

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2013-404-3206  
[2015] NZHC 694**

BETWEEN

MARQUIS PROPERTY  
DEVELOPMENTS LIMITED  
Plaintiff

AND

RAYMOND WALTER LORENZEN  
First Defendant

RAY'S CONSTRUCTION LIMITED  
Second Defendant

ANTHONY MARQUISS KEMP  
Third Defendant

LEE KEMP  
Fourth Defendant

Hearing: 14 April 2015

Appearances: P Rice for plaintiff  
S Hamilton for defendants

Judgment: 14 April 2015

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**(ORAL) JUDGMENT OF LANG J  
[on applications for summary judgment]**

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[1] This proceeding arises out of a dispute between Mr and Mrs Kemp and their son-in-law, Mr Lorenzen.

## **Background**

[2] The dispute arises for the most part as a result of a property development project that Mr and Mrs Kemp entered into with Mr Lorenzen. This involved Mr and Mrs Kemp transferring a block of land that they owned to Marquis Property Developments Limited (Marquis), a company that they formed specifically to undertake the development. They then engaged Mr Lorenzen's company, Ray's Construction Limited (Ray's Construction), to subdivide the section into four lots and to build homes on them that they intended to sell at a profit.

[3] The project was not a success, and the present litigation follows as a result. As currently framed, it contains three broad aspects. First, Marquis alleges that it had overpaid Ray's Construction for the building work that it had carried out. Secondly, Marquis alleges that Mr Lorenzen breached his fiduciary duties to it by allowing loan monies drawn down by Marquis to be paid to Ray's Construction. Thirdly, Mr Lorenzen sought to recover monies that he had earlier advanced to Mr and Mrs Kemp.

[4] In March 2014, the parties entered into a written agreement in which they agreed to have all aspects of their dispute determined by a building expert, Mr Anthony Dean.<sup>1</sup> Although the agreement specifically provided that Mr Dean was not undertaking an arbitration, the process that he followed was very similar to a conventional arbitration. Mr Dean received submissions from both parties in person because, in order to reduce costs, they agreed that they would not be represented by counsel.

[5] Mr Dean issued substantive determinations on 4 September and 15 October 2014. The first dealt with liability and the second dealt with interest and costs.

[6] The principal features of the determinations were:

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<sup>1</sup> This proceeding was stayed whilst that occurred.

- i. Mr Dean held that Marquis had overpaid Ray's Construction in the sum of \$76,062.92, and that Ray's Construction was required to repay that amount together with interest totalling \$4,605.45.
- ii. He held that Mr and Mrs Kemp were required to repay Mr Lorenzen the sum of \$31,561.09, together with interest totalling \$1,785.58.

[7] Unfortunately, Mr Dean's determinations did not finally resolve the dispute. The amounts he awarded remain unpaid. Both parties also sought to have him review aspects of his decision. Mr Lorenzen asked him to review his decision to the extent that it allegedly contained a number of factual errors. Mr and Mrs Kemp asked him to review his decision because it did not deal with the claim that Mr Lorenzen had breached his fiduciary duties to Marquis. Mr Dean declined to alter or disturb his decision. He took the view that he was *functus officio*, and therefore unable to revisit any aspect of his decision.

[8] Marquis then sought to revive the present proceeding in order to have its claims against both Ray's Construction and Mr Lorenzen dealt with by way of summary judgment. Mr Lorenzen opposed that application.

[9] Ray's Construction also now seeks summary judgment against Mr and Mrs Kemp in respect of the amounts for which Mr Dean found them to be liable to it. They have never opposed judgment being entered against them in respect of those amounts. Ray's Construction has similarly never opposed the application by Marquis for summary judgment against it.

[10] The only issue to be determined today was therefore whether Marquis ought to be permitted to use this proceeding in order to pursue the outstanding issue relating to alleged breaches by Mr Lorenzen of his fiduciary duties to Marquis.

### **Decision**

[11] I consider that the attempt by Marquis to revive this proceeding cannot succeed for the simple reason that the parties expressly agreed that Mr Dean was to determine all aspects of their dispute. In this context the written agreement said:

6. **Authority of Expert** The Expert [Mr Dean] has the authority to impose a decision on the parties, and any decision made by the Expert will be fully & finally binding on the parties.

...

9. **Stay of Other Proceedings** The parties shall refrain from commencing or continuing with any action to take the disputes and differences to arbitration or before the Courts of law prior to the proper termination of the Agreement. \*

\* Upon the formal written decision of the Expert being issued, no further legal action will be commenced or continued in respect of the disputed matters [e]xcept in relation to the enforcement of the Expert's decision.

[12] Marquis argues that a subsequent memorandum filed by its counsel in this proceeding, in which counsel sought to reserve Marquis's right to return to the courts should the need arise, permitted it to return to this forum in the event that Mr Dean did not determine all matters that had been referred to him. I do not consider this argument to be sound. Memoranda filed by counsel cannot override the express provisions of a written agreement signed by both parties.

[13] As I have indicated, I consider that the parties expressly agreed that Mr Dean would determine all outstanding issues in dispute. They also agreed that they would not return to the Court in respect of any issue other than the enforcement of any decision that Mr Dean might make. For that reason I consider that Marquis is now contractually precluded from returning to this Court to have any aspect of its claim resolved. The application for summary judgment therefore cannot succeed.

[14] Although it is not strictly necessary for me to express a view on the matter, I disagree with Mr Dean's assessment that he is now *functus officio* and therefore unable to deal with the issue of the alleged breach by Mr Lorenzen of his fiduciary duties to Marquis. That issue was expressly pleaded in the current version of the statement of claim. It was therefore before Mr Dean for decision. The fact that he has issued a determination that did not deal with the issue does not mean that he is *functus officio* in respect of it. He will not be *functus officio* until such time as he has determined all aspects of both parties' claims. Moreover, it is not open to Mr Dean to determine that he is *functus officio*. Whether or not he has that status is a matter

of fact and law. A tribunal in Mr Deans' position will not be *functus officio* until such time as it has determined all of the matters that are properly before it.

[15] Mr Deans makes it clear in a memorandum issued on 18 November 2014 that his failure to deal with the claim that Mr Lorenzen had breached his fiduciary duties to Marquis occurred by oversight. This Court has the power to recall its judgments where by oversight it fails to deal with an issue squarely raised by a party to the proceeding.<sup>2</sup> It will do so where for a very special reason the interests of justice require that to be done.<sup>3</sup> By way of analogy, Mr Dean must also have the power to recall his original determinations so that he can deal with the issue that he failed to determine by oversight. If he did not, this aspect of Marquis's claim could never be determined.

[16] After I had discussed these issues with counsel, all parties agreed that the appropriate course of action was for the matter to be referred back to Mr Dean so that he can reach a final determination regarding the outstanding issue. I make no formal order that this must occur, and indeed I do not consider I have any power to do so. It will be for the parties jointly to ask Mr Dean to determine this final aspect of their dispute.

[17] The issue may raise some complex legal concepts. Essentially Marquis contends that Mr Lorenzen failed to account to them for monies that belonged to them, and that this amounted to a breach of the fiduciary duty that Mr Lorenzen owed to it. Both parties would obviously benefit from legal input into the submissions that they make to Mr Dean regarding this issue because, as I understand the position, he does not have legal qualifications that would provide him with expertise in this area.

## **Result**

[18] I grant Mr Lorenzen's application for summary judgment against Mr and Mrs Kemp in the amounts sought. I also grant Marquis's application for summary

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<sup>2</sup> See eg *Brake v Boote* (1991) 4 PRNZ 86 (HC).

<sup>3</sup> *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.

judgment against Ray's Construction in the amount sought. I dismiss Marquis's application for summary judgment against Mr Lorenzen.

[19] Both successful parties are also entitled to interest on those amounts, from 4 September 2014 at the rate of five per cent per annum to the date of this judgment.

### **Costs**

[20] Both parties seek orders for costs in their favour. Marquis points out that it suggested at an early stage to Mr Lorenzen's counsel that the issue relating to the alleged breach of fiduciary duties should be referred back to Mr Dean. That proposal was steadfastly rejected. Mr Rice points out that Marquis therefore had no option but to apply for summary judgment against the defendants because that was the only remaining alternative given the fact that Mr Dean had advised both parties that he was not prepared to revisit the issue.

[21] I understand this submission as far as it goes, but in this jurisdiction costs usually follow the event. An unsuccessful party is generally required to contribute to the costs of the successful party.<sup>4</sup> For that reason, I am not prepared to make an award of costs in favour of Marquis. However, I have some sympathy with Marquis because it was placed in a difficult position once Mr Dean elected not to determine the issue that he acknowledged he had omitted to deal with. Probably the only practical alternative open to Marquis at that point was to seek to have Mr Dean revisit that decision. I am not sure that Marquis could have had resort to the Court to require him to do so, however, because he was not a party to the agreement to refer the dispute to him.

[22] I therefore consider that justice will be done if the defendants are jointly ordered to pay the disbursements incurred by Marquis in relation to the present application for summary judgment.

[23] Costs should also, however, follow the event in relation to the remaining applications before the Court. Mr Lorenzen is therefore entitled to costs against Mr

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<sup>4</sup> High Court Rules, r 14.2(a).

and Mrs Kemp on an undefended category 2B basis together with disbursements as fixed by the Registrar. Marquis is entitled to costs against Ray's Construction on an undefended category 2B basis together with disbursements as fixed by the Registrar.

**Stay of proceeding**

[24] This proceeding, to the extent that it now remains undetermined, is now stayed again pending determination by Mr Dean of the outstanding claim by Marquis against Mr Lorenzen.

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Lang J

Solicitors:

Haigh Lyon, Auckland

Davenports West, Henderson

Counsel:

P Rice, Auckland

C T Patterson / S R J Hamilton