IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-7427
[2013] NZHC 2992

IN THE MATTER OF	the Estate of the late PATRICIA AMSTEAD LEARY
BETWEEN	SHARON LOUISE REYNOLDS ROBERT NEWCOMB LEARY and LYNETTE MAREE DUNCAN Plaintiffs/Judgment Creditors
AND	SHARYN DAWN BARRATT DOUGLAS JOHN BARTLETT (aka DOUGLAS JAMES BARTLETT) TIMOTHY HARRISON as trustees of the BARRATT FAMILY TRUST Defendants/Judgment Debtors

Hearing: 8 November 2013

Appearances: G D Wiles for Plaintiffs
A M Swan for Defendants

Judgment: 8 November 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors:
Duncan Horrocks Law, Epsom Auckland, for Plaintiffs
Whitlock & Co, Auckland, for Defendants

Counsel:
G D Wiles, Auckland, for Plaintiffs
Andrew M Swan, Auckland, for Defendants

[1] Today has been set down for the judgment debtors to appear to be examined as to their means under Part 17 of the High Court Rules.

Service

[2] A question has arisen as to service. Mr Bartlett has appeared in person – his examination has not yet started. Sharyn Barratt and Timothy Harrison have not appeared. Mr Swan, on their behalf, submits that they have not been validly served. He says that Mrs Barratt is out of town because of a bereavement and is unable to attend. He says that Mr Harrison has resigned as a trustee of the Barratt Family Trust and is now apparently living in Hong Kong.

[3] For service, the judgment creditors rely on an affidavit of Annette Marie Duncan, which deposes that on 13 September 2013 she served each of the judgment debtors with the sealed order for summary judgment and the orders for examination by sending them under cover of a letter dated 13 September 2013 to Gaze Burt, solicitors of Albany, to their PO Box 301251 Albany.

[4] Gaze Burt were the solicitors for the defendants in the original summary judgment application. However, on 16 September 2013 the judgment debtors filed a notice of change of representation and address for service. The judgment debtors' new solicitor is Malcolm Whitlock, of Whitlock & Co, and his address for service is at Unit N, 44 Constellation Drive, Mairangi Bay, Auckland. In my judgment, the letter posted on 13 September 2013 would have reached Gaze Burt before the notice of change of representation was filed in this court.

[5] Mr Swan says that serving an order for examination on the judgment debtors' address for service is not valid service. For that, he refers to r 17.13(1):

> Unless the court otherwise orders, an order to attend court for examination must be served on the examinee not less than 10 working days before the examination.

[6] It is Mr Swan's submission that the order for examination must be served on the judgment debtor in person. It cannot be served on the judgment debtor's address for service. I do not read r 17.13 that way. That rule is directed at fixing the time before the examination, when the judgment debtor must be served – not with directing how the judgment director is to be served. Instead, the provisions of Part 6 deal with methods of service. Rule 6.1 says:

> Any of the following methods may be used for serving a document that is required by these rules to be served.

And four modes of service are there set out. One of those is by posting the documents to a post office box address, where the party has specified that post office box address as a place to which documents can be sent. The judgment creditors have used a recognised method of service under r 6.1(1)(d). They are not required to serve the judgment debtors in person although that was another option available to them under r 6.1.

[7] Accordingly, I rule that all three of the judgment debtors have been validly served with the order for examination and there has been compliance with r 17.13. There is one minor caveat to that. While Mr Harrison is allegedly overseas, leave to serve abroad was not required. Leave to serve abroad does not require leave because this matter concerns enforcement of a judgment. That is available without leave under r 6.27(2)(m). The judgment creditors did not know that Mr Harrison was overseas. Technically, he ought to have been served with a notice under r 6.31. That was not done. That is a minor irregularity and does not invalidate the service. I note that Mr Harrison does have legal representation. I will not make any orders against Mr Harrison today by reason of his non-attendance. That will therefore give him the opportunity to protest the jurisdiction if he does want to take that point.

Defendants' application to re-call the judgment of Cooper J

[8] In a notice of application dated 16 October 2013, the defendants applied for two orders:

(a) Recalling the judgment of 27 August 2013 to include a determination that the defendants are liable in their capacities as trustees of the Barratt Family Trust; and alternatively,

(b) to correct the order that the defendants are liable only in their capacities as trustees of the Barratt Family Trust.

[9] The application was made in reliance of r 11.10 of the High Court Rules. That rule allows for the correction of accidental slips or omissions. For his submissions, Mr Swan also submitted that the court had power to recall the judgment. The rule allowing recall is r 11.9. Mr Swan also invoked the court's inherent jurisdiction to recall judgments. Accordingly, for completeness, I will consider the application as both a recall application either under the court's inherent jurisdiction or under r 11.9, and I will also consider the court's power to correct the sealed judgment.

Background

[10] On 27 August 2013 Cooper J gave judgment for the plaintiffs against the defendants on a summary judgment application. That judgment has been sealed. The judgment, as sealed, gives judgment for the plaintiffs against the defendants in the sum of $246,793.44 plus cost and disbursements in the sum of $15,100.50 making a total of $261,893.94.

[11] Cooper J found that the defendants were liable in damages for losses and expenses caused on the re-sale of the plaintiffs' property at 80 Cliff Road, Torbay, after the defendants had purported to cancel an agreement to buy the property from the plaintiffs. The plaintiffs had agreed to sell the property at 80 Cliff Road, Torbay, to the defendants on 3 May 2012. The agreement uses the Barfoot and Thompson Particulars and Conditions of Sale of Real Estate by Tender. The purchasers are identified in the agreement for sale and purchase as the Barratt Family Trust. Each of the defendants is identified by name and each has signed as purchaser.

[12] Of relevance for this application is a limitation of liability provision in clause 18:

> **18.0 Limitation of Liability**
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> 18.1 If any person enters into this agreement as trustee of a trust, then:
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> (1) That person warrants that:
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> (a) that person has power to enter into this agreement under the terms of the trust;
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> (b) that person has properly signed this agreement in accordance with the terms of the trust;
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> (c) that person has the right to be indemnified from the assets of the trust and that right has not been lost or impaired by any action of that person including entry into this agreement; and
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> (d) all of the persons who are trustees of the trust have approved entry into this agreement.
>
> (2) If that person has no right to or interest in any assets of the trust except in that person's capacity as a trustee of the trust, that person's liability under this agreement will not be personal and unlimited but will be limited to the actual amount recoverable from the assets of the trust from time to time ("the limited amount"). If the right of that person to be indemnified from the trust assets has been lost, that person's liability will become personal but limited to the extent of that part of the limited amount which cannot be recovered from any other person.

[13] In the original summary judgment application the defendants opposed, but they relied on other matters in opposition to the application for summary judgment. They did not rely on the provisions of clause 18 of the agreement for sale and purchase. Cooper J considered the other defences raised by the defendants and found that none of them amounted to an arguable defence. He gave summary judgment as a result. He said:[1]

> **[67]** I conclude that the defendants have no defence to the claim.
> ...
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> **[72]** These conclusions mean that the plaintiffs are entitled to succeed on their application for summary judgment and there will be judgment accordingly for the sums set out in paragraph [6] above.

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[1] *Reynolds v Barratt* [2013] NZHC 2185.

[14] In the sealed judgment the defendants are identified in the entituling as trustees of the Barratt Family Trust. The judgment itself indicates that judgment is given against the defendants for the judgment sums ordered, without stating further what the precise effect of them being trustees is.

[15] It is necessary to come back to some well-established principles as to the liability of trustees when they contract in their capacity as trustees. Both sides helpfully cited from McMorland *Sale of Land*:[2]

> Where the sale is to two or more persons as trustees, each person is prima facie personally liable unless there is an exclusion of liability in the contract. This is a consequence of the trust not being a separate legal entity from the trustees. However, it is usual to limit the liability of independent trustees to the trust assets, though it requires a clearly worded express provision in the contract to do this. The mere description of a purchaser as a trustee is not sufficient.

[16] The normal consequence of a trustee contracting and being liable for a debt incurred in his capacity as trustee is two-fold. First, the trustee is personally liable. Second, the creditor of the trustee has an additional remedy. Because the trustee has a right to be indemnified out of trust assets, equity has also provided the trust creditor with the right to be subrogated to the trustee's right of indemnification out of trust assets. Ordinarily, if there are no contractual provisions adjusting this, the creditor has a two-fold remedy – a personal right against the trustee and, secondly, against trust assets. As Dr McMorland has indicated, it is open to the parties to make alternative provisions so long as they use words that clearly express that intention.

[17] Here, the defendants are saying in their application that regard ought to be had to clause 18, and that they cannot be liable except to the extent provided in clause 18. However, clause 18 was not raised as an issue before Cooper J. Mr Swan submitted that it was for the plaintiff to address clause 18 in the summary judgment application and that the matter was something on which the plaintiff bore the onus of proof. It is true that in a summary judgment application the plaintiff does have the onus of persuading the court that the defendant has no defence to an application. But it is also necessary to add that a plaintiff in a summary judgment application will typically set out all the matters which need to be proved by a plaintiff to show that

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2 D W McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [3.02].

there is no defence. The court will then grant judgment unless the defendant puts other matters in issue.

[18] There is an initial onus on the defendant to raise an affirmative defence if the defendant contends that there is an arguable alternative defence that stands in the way of judgment going against the defendant. Limitation is a typical affirmative defence. There can be limitations of time. After certain periods of time the plaintiff is unable to make a claim in court. There can also be limitations as to extent of liability. Some contracts provide that the amounts of a defendant's liability will be limited to a set sum. For example, limited guarantees. Clause 18 in this case is another limitation provision. It limits the extent of liability of trustees. But as a limitation provision, it is something that needs to be raised and put in issue by the defendant in the summary judgment application. If it has not been raised, the court will not be required to give consideration to it and the plaintiff will be able to proceed on the basis that that matter is not in issue. Our system requires that defendants signal all their defences at the outset. Our system does not allow defences to be "drip fed" over time - that is, so there is one hearing where a defendant puts up some defences and then after judgment has been given, the defendant is given a fresh opportunity to put up new defences that have not been put up the first time. That is why there is a strong policy in our law as to finality of judgments: so that all matters in issue can be determined at one and the same time, and so that it is not necessary to re-visit matters time and time again.

[19] I have spelt those matters out because they are relevant to considering the particular applications by the defendants in this case.

Recall

[20] Mr Swan referred to the court's power to recall. It is well established that there cannot be a recall of a judgment after judgment has been sealed. He contended that there was authority to the contrary. He relied on the decision of Salmond J in *Crewe v Crewe*.[3] In response to a claim that Stout CJ had entered judgment on an erroneous supposition, Salmond J said this:

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3 *Crewe v Crewe* [1921] NZLR 769.

> I am of opinion that whether any such error has taken place or not this court has no jurisdiction to set aside or vary the judgment on such a ground. So long as a judgment has not been effected by sealing and entry, the Judge before whom it was given may have power to re-consider the matter and correct an error into which he has fallen. ...
>
> Even after a judgment has been perfected, there is power to amend it so as to make it conform with the true intent of the judgment as actually delivered. And where a judgment has been perfected and accurately expresses the true intention of the court, it cannot be set aside or varied on the ground that it is erroneous. The only remedy in such a case is appeal.

[21] In stating the law in that fashion, Salmond J was setting out matters that are now encompassed by rr 11.9 and 11.10. The recall path in 11.9 is available only up until the time when judgment is sealed. That was reinforced by Randerson J in *Lopdell v Deli Holdings Ltd*.[4] Randerson J recognised that aside from the rules of court there may be an inherent jurisdiction to recall judgments, but he went on to re-emphasise the established law that the recall path could not be used when the judgment had already been sealed. He said:[5]

> However it has been constantly emphasised that the jurisdiction to recall should not be exercised when a judgment has been perfected. In my view the court's decision is perfected when a judgment or order is sealed or where, in a case on appeal, a formal certificate or notification is issued pursuant to r 718C.

[22] Mr Swan drew my attention to Randerson J's reference to the decision of Neazor J in *Walsh-Wrightson v Walsh-Wrightson*,[6] but I do not regard those matters as relevant to what I have to consider here. The fact that judgment has been sealed means that the court is unable to exercise its recall power under r 11.9.

[23] I go further also and refer to the recall power. The judgment of Wild CJ in *Horowhenua County Council v Nash (No.2)*[7] remains the classic authority on the exercise of the power:

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise, there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a

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4 *Lopdell v Deli Holdings Ltd* (2002) 16 PRNZ 551.
5 At [10].
6 *Walsh-Wrightson v Walsh-Wrightson* (1998) 12 PRNZ 204.
7 *Horowhenua County Council v Nash (No.2)* [1968] NZLR 632 at 633.

> new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[24] What I emphasise here is the importance given to the finality of a judgment and the need to avoid inconvenience and uncertainty.

[25] The matters that the defendants are now trying to raise are matters that ought properly to have been raised in the summary judgment application. None of the matters raised by the defendants in my view come properly within the matters which Wild CJ had in mind in *Horowhenua County Council*. In particular, I do not see any basis for any finding under the third category that there is some other very special reason for requiring the judgment to be recalled. This seems to be a case where there was available, arguably, a possible defence that could have been run but for whatever reasons – reasons on which I ought not to speculate – an issue has not been raised. The importance of the finality of the judgment must prevail over any wish that the defendants might have to ask the court to look at matters afresh.

Correction of accidental slip

[26] Rule 11.10 says:

> **11.10 Correction of accidental slip or omission**
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> (1) A judgment or order may be corrected by the court or the Registrar who made it, if it—
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> (a) contains a clerical mistake or an error arising from an accidental slip or omission, whether or not made by an officer of the court; or
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> (b) is drawn up so that it does not express what was decided and intended.
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> (2) The correction may be made by the court or the Registrar, as the case may be,—
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> (a) on its or his or her own initiative; or
> (b) on an interlocutory application.

[27] The essential purpose of r 11.10 is to allow the court to make corrections to a sealed judgment if that sealed judgment does not correctly reflect the intent of the

decision as given by the Judge after the hearing. The power to correct errors under r 11.10 is less extensive than the powers of the court on a recall application. In particular, the power under r 11.10 does not extend to changing the substance of what was decided. *McGechan* cites two authorities to that intent: *Bank of New Zealand v Mulholland*[8] and *Allan Scott Wines & Estates Holdings Ltd v Lloyd*.[9] In *Bank of New Zealand v Mulholland*, McGechan J made it clear that the power is exercised sparingly, and the general rule is that the finality of a judgment is not to be lightly weakened.

[28] The order as drawn up does not limit the defendants' liability as provided in clause 18(2) of the agreement for sale and purchase. If I were now to accede to the defendants' request, I would be making a substantive change to the decision of Cooper J. I would be introducing a limitation to the defendants' liability under the judgment which was not given by Cooper J in his substantive decision. In other words the judgment as drawn up does, in my view, properly record the intent of Cooper J that the defendants were to be liable as such. The limitation issue had not been raised before him. He was not required to consider it in his decision. In giving judgment against the defendants as trustees, he can be considered to have intended the normal consequence of judgment against trustees to apply. That is, that the judgment creditors would have recourse to the defendants personally and also be able to invoke the right to be subrogated to the trustees' right of indemnification from trust assets.

[29] Accordingly, I dismiss the defendants' application for recall and correction of the judgment. The judgment, as sealed, should stand and should not be adjusted under either rr 11.9 or 11.10.

[30] There was one final matter raised by Mr Swan. That was the terms of the order for examination. He contended that the order for examination was directed solely at the defendants' liability as trustees in terms of their ability to have recourse to trust assets to meet their liability under the judgment. The order as drawn up refers to receipts and payments of the Barratt Family Trust, assets and liabilities of

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8 *Bank of New Zealand v Mulholland* [(1991) 4 PRNZ 299.
9 *Allan Scott Wines & Estates Holdings Ltd v Lloyd* (2006) 18 PRNZ 199.

the Barratt Family Trust, income and expenditure of the Barratt Family Trust, and business accounts and affairs of the Barratt Family Trust. However, there is also a reference to: any additional issues suggested by the plaintiffs that the court considers necessary; and their means of satisfying the judgment.

[31] I do not regard those orders as being confined to examining the defendants solely to see whether there are trust assets available to meet the judgment liability. I direct that the examination may extend more widely, and may cover the defendants' own ability to meet their liabilities under the judgment.

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Associate Judge R M Bell