Privy Council Office
Judicial Committee

Privy Council Appeal No. 17 of 1999

(1) Arklow Investments Ltd. and

(2) Christopher Mark Wingate

Appellants

v.

I.D. Maclean and Others *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

_____

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 14th October 1999, Delivered the

1st December 1999

_____

Present at the hearing:-

Lord Steyn

Lord Lloyd of Berwick

Lord Hobhouse of Woodborough

Sir Andrew Leggatt

Mr. Justice Henry

*[Delivered by **Mr. Justice Henry**]*

–––––––––––––––––

-

On 14th October 1999 at the conclusion of the hearing their Lordships agreed humbly to advise Her Majesty that the appeal should be dismissed and that they would give their reasons later. This they now do.

The appeal is from a judgment of the Court of Appeal of New Zealand delivered on 16th July 1998 (*Maclean v. Arklow Investments Ltd.* [1998] 3 N.Z.L.R. 680). It raises issues relating to the concept of fiduciary duty, and results from the sale of Matakana Island, which lies across the entrance to Tauranga Harbour on the eastern coast of the North Island of New Zealand. A forest, consisting mainly of radiata pine, extends over much of the area of the island, which approximates 4,300 hectares. The vendor of the sale in question was Matakana Forest Ltd., which had been placed in receivership in October 1990. The receivers put the island up for sale in February 1991, and it remained on the market until the sale was negotiated in late 1992. During that year milling of the mature trees was in operation.

The relevant facts are fully set out in the majority judgment of Richardson P., Gault and Keith JJ. delivered by Gault J., and need not be repeated in detail. They are also reviewed comprehensively by Thomas J. in his dissenting judgment. The background to the proceedings can be stated quite briefly. The appellant Mr. Wingate had become interested in the purchase of Matakana Island in July 1991, his intention being to develop the land for residential, recreational and resort uses. Arklow Investments Limited was to be the vehicle for this venture. On 15th June 1992, the FAR group of companies, which operated a merchant banking business, were approached on behalf of Mr. Wingate with a view to obtaining the group's assistance in raising finance to enable the proposal to proceed. Mr. Wingate had previously employed another merchant banker, Fay Richwhite & Co. Ltd., for that purpose but their relationship had been terminated. On 16th June 1992, in response to that approach FAR made a written proposal setting out the terms on which it would accept appointment. Those terms were not acceptable to Mr. Wingate, and on 15th July 1992 FAR gave written notice of withdrawal of its mandate offer. FAR proceeded to broker arrangements with other parties for the purchase of the island, which ultimately led to the February 1993 sale now in question. The transaction initially comprised a composite arrangement, under which ITT Rayonier Ltd. had acquired the forestry right to the mature standing timber, Ernslaw One Ltd. acquired the land, the remaining timber and some associated assets, and a FAR group member company acquired the balance of the assets, particularly the mill and the mill land. The total purchase price was $20.7 million, of which $50,000 was paid by the FAR interests. This transaction, originally negotiated in November 1992, was restructured to overcome statutory requirements governing acquisition by overseas interests. There has also been a subsequent re−arrangement of interests which are not relevant to matters now in issue. In broad terms the appellants, for convenience referred to as Arklow, contend that in taking the actions it did leading to the November 1992 transaction, FAR breached its fiduciary duties to Arklow. Two separate causes of action were pleaded in that respect.

In an interim judgment delivered in the High Court on 5th May 1997, Temm J. answered a series of specific questions governing the issue of liability. They were framed as follows:−

> "1. In relation to the cause of action of breach of fiduciary duty owed by FAR to Arklow/Wingate:
>
> (a) whether the FAR interests owed a fiduciary duty to the plaintiffs and
>
> (b) if there was a fiduciary duty, did FAR breach any fiduciary duties.
>
> 2. In relation to the cause of action of misuse of confidential information:
>
> (a) as to whether FAR Financial and/or other of the FAR interests received confidential information:
>
> (i) whether those defendants received the information which the plaintiffs claim to have conveyed;
>
> (ii) whether such information as they did receive was confidential;
>
> (b) whether the FAR interests were under an obligation not to use the information received by them other than for the purposes for which it was conveyed;
>
> (c) if the FAR interests received confidential information, and were under an obligation not to use it other than for the purposes for which it was conveyed, whether they did use it other than for the purposes for which it was conveyed;
>
> (d) if detriment to the plaintiff is a relevant ingredient of a cause of action founded in breach of confidence – whether or not Arklow/Wingate suffered any loss or damage, and hence any detriment, as a result of the FAR actions."

Temm J. answered all questions in the affirmative. In the Court of Appeal, the majority judgment delivered by Gault J. considered the separate issues of breach of fiduciary duty not to promote or become involved in a competitive acquisition of Matakana Island, and of breach of the duty not to misuse confidential information. They held that the evidence did not establish that there was an actionable breach of either duty. Blanchard J. held that there were breaches of those or similar duties, but that they were relatively minor and not causative of any loss to Arklow. In his dissenting judgment, Thomas J. took the view that FAR owed Arklow a duty not to act contrary to Arklow's interests, that it had done so in breach of that duty, and further that FAR had misused information which was confidential to Arklow.

Although their Lordships heard extensive argument on both the nature and extent of fiduciary duties and the facts of the case, they have reached the conclusion that the real issues on appeal fall within a rather narrow compass which can be resolved without the need for either a comprehensive or detailed consideration of the law or a close review of the

evidence. In the course of his argument, Mr. Underhill Q.C. for Arklow stressed that in this case there was a considerable overlap between the duty "not to be disloyal" and the duty to respect confidence. It was clear however, that as in the Court of Appeal and in the High Court, a major plank in Arklow's case was that FAR did have a fiduciary duty which was wider than the duty not to misuse confidential information, and extended in the circumstances to that described by Gault J. as one not to promote or become involved in a competitive acquisition of Matakana Island whether or not confidential information had been used. It is immediately apparent that protection of confidential information may be involved in or form an integral part of such a duty, and misuse may be evidence of a breach of that duty. But as the case was pleaded and argued on the basis that there was a duty which was actionable for breach in the absence of any misuse of confidential information, it is necessary to consider that contention. The first issue therefore is whether FAR owed a fiduciary duty of that nature to Arklow.

Duty of loyalty

The description of the duty under consideration as being one of loyalty was not seen by Mr. Underhill as being the most appropriate one, but for present purposes it is convenient to label it in that way. In the present context, the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal. An example of the obligation relevant to the present case is not to exploit or take advantage of the position of fiduciary at the expense of the principal. The existence and the extent of the duty will be governed by the particular circumstances. It is therefore essential at the outset to turn to the circumstances which it is said gave rise to FAR's duty of loyalty. The basic facts are not in dispute. They do not require any critical consideration of Temm J.'s findings on any of the primary facts, and can be summarised quite briefly.

The first communication between FAR and Arklow was at a meeting held in Wellington on 15th June 1992. A Mr. Bailey was chief executive of the Economic Development Office for the Western Bay of Plenty, an entity established by local authorities in the region which includes Matakana Island. By that time he had become closely associated with Mr. Wingate and his plans to purchase and develop the island. Mr. Bailey had previously had dealings with Mr. Graham, one of the FAR directors. At the meeting Mr. Bailey told Mr. Graham he wished to discuss a confidential project in which he, Mr. Bailey, was involved. The proposal which by then Mr. Wingate had drawn up was outlined. Two other FAR directors joined the meeting, which lasted at the most one and a half hours, probably less. Mr. Wingate's (Arklow's) proposal was to purchase the island for $20 to $20.5 million, being the price believed to be acceptable to the receivers, by pre−selling the rights to the mature forest to a Japanese corporation (Kanematsu) which would provide most of the purchase money, with a balance of $4−$5 million being required by way of funding. Assets included in the purchase would be the mill, the immature pine forest, and the eucalyptus trees which if disposed of at their estimated value would result in Arklow being left owning the land, at no cost to it and available for development. At the meeting a copy of the investment document prepared by Fay Richwhite was made available to and left with the FAR directors.

On 16th June FAR wrote to Mr. Bailey enclosing its "Letter of Mandate" setting out the terms of an agreement for services to be provided by FAR to Arklow for the purposes of implementing the proposed purchase. The terms included an immediate payment by Arklow of a commitment fee of $5,000 plus GST (Goods and Services Tax). Although as Mr. Wingate made clear in his evidence the proposal was not acceptable to Arklow, with one exception there was no further communication of substance between FAR and Arklow until 15th July 1992 when FAR wrote to Mr. Bailey formally withdrawing its mandate offer. The exception concerns an investment brochure compiled by Arklow, based in part on the Fay Richwhite document, which was distributed by Arklow over a short period commencing at the end of June to some 24 parties, including FAR. This brochure sought participation in the scheme by way of investment. It is clear that between 16th June and 15th July 1992 Arklow was taking steps to pursue avenues of possible financial assistance or involvement from sources other than FAR.

In these circumstances did FAR owe a duty of loyalty to Arklow? The dictum of Millett L.J. in *Bristol and West Building Society v. Mothew* [1998] Ch. 1, 18 is apposite:−

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single−minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

Their Lordships are unable to see an evidential basis for finding that a relationship of trust and confidence, in this sense of undertaking an obligation of loyalty, arose in these circumstances. In considering this question it is essential not to confuse the claimed duty with the separate duty to respect confidential information. This distinction does not appear to have been made sufficiently clear in the High Court, and has probably led to what was described as Temm J.'s conflation of the two issues. Here FAR did not undertake any obligation, either expressly or impliedly, to act on behalf of Arklow. It had made an offer to do so, which from its receipt was effectively treated by Arklow as unacceptable. FAR had no authority, actual or ostensible, to act on behalf of Arklow. Arklow never accepted the existence of a relationship, the benefits of which it now claims for itself. Neither had the stage been reached whereby it could be said that either an informal arrangement had come into existence or a continuing course of conduct between the parties had been undertaken which could give rise to the fiduciary relationship. Put shortly, there was no mutuality giving rise to the undertaking or imposition of a duty of loyalty. The relationship of these parties never extended beyond one created by and limited to the giving and receipt of confidential information.

In reaching this conclusion, their Lordships have not overlooked the evidence of Mr. Pryke, an experienced economist and financial adviser, whose opinion as to standard practice in this field supported the duty of loyalty claim. Evidence of practice and accepted standards of professional conduct may be of assistance in determining what is essentially a question of law, but it cannot be determinative. It must be said however that the obligations defined by Mr. Pryke as applying in this case were expressed in surprisingly wide terms and do not in their Lordships' respectful view equate to the law.

Whether or not the obligation not to misuse confidential information is properly classed as a fiduciary duty (*Attorney−General v. Blake* [1998] Ch. 439, 454; *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14) does not require consideration. Recognition by equity of the existence of a particular obligation, such as the obligation of loyalty which Arklow relies upon in the present case, will depend upon the particular facts. To repeat the words of Millett L.J. in *Bristol and West Building Society*, it is the obligation and duty which makes the obligor a fiduciary. Characterising the duty to respect confidential information as fiduciary does not create particular duties of loyalty, which are imposed as a result of the nature of the particular relationship and the circumstances giving rise to it. It is not the label which defines the duty.

Misuse of confidential information

The second issue is whether FAR breached its obligation of confidentiality.

It is common ground that the obligation not to use confidential information attaches only to information which has the necessary element of confidentiality and continues only so long as the information remains confidential (*Saltman Engineering Co. Ltd. v. Campbell Engineering Co Ltd.* (1948) R.P.C. 203; *Coco v. A.N. Clark (Engineers) Ltd. [No. 2]* [1969] R.P.C. 41). In the High Court Temm J. identified six items of information which he held were confidential and had wrongly been used by FAR. They were:−

> "(a) That all the assets available for sale by the receivers could be bought for $20 million.
>
> (b) That the mature forest (aged 17 years and over) could be sold for $13 million (and maybe more if [an] estimate of value at $15.75 million could be sustained).
>
> (c) That the immature forest could be sold for $3 million to $4 million for the radiata trees, and the eucalyptus trees could fetch up to $3 million in addition depending on market forces.
>
> (d) That the mill had a break up value of $1 million to $1.5 million.
>
> (e) That [Arklow] had a buyer for the mature forest which was willing to provide $15.75 million in cash.
>
> (f) That [Arklow's] scheme was practicable and feasible if suitable financial arrangements could be made."

The sources of the information were the discussion Mr. Bailey had with the FAR directors on 15th June, the Fay Richwhite document, and the Arklow brochure distributed as from the end of June. The scheme referred to was described by Temm J. as one by which Arklow could acquire the whole of the assets without putting up cash of its own, providing approximately $5 million could be raised on the security of assets other than the mature forest. Some observations as to the confidential nature of this information can be made.

First, the price of $20 million. This was the figure set by the receivers in March 1992 as the minimum acceptable, and as such originally would have been confidential to them. Whether this information was received by Arklow in confidence is unclear, but what the evidence did show was: the receivers were prepared to disclose it to parties believed to be in serious negotiation to purchase (it was in fact disclosed by them to FAR by August 1992); $21 million was seen by Mr. Olsen, a forestry consultant, as a price likely to be acceptable to the receivers, and he had told FAR shortly before the meeting of 15th June that the value of all assets was in the range of $21 million to $27 million; and Arklow's own brochure of June 1992 disclosed to all recipients the contemplated purchase price of approximately $20 million. Secondly, the forest valuation. As Temm J. expressly recognised, the value of the forest (and the mill) may well have been known to other experts if appraisals had been undertaken by them. That must be so. As an example Mr. Olsen, with whom FAR had had previous dealings, had been involved with Matakana Island since 1971. In 1991 his company had been consulted concerning the establishment of a joint venture between a real estate developer and a forestry partner, and his then estimate of $21 million as a likely acceptable price for land and trees obviously required an assessment of the value of the forest. Nothing unique or unusual in the valuations made available by Arklow was identified. Thirdly, the scheme. Mr. Wingate's interest in Matakana Island and its development was public knowledge. Development of this nature obviously involved disposal of the mature forest, which in 1992 was in the process of being milled. The perceived value placed on the assets by the receivers, and the availability of a purchaser (Kanematsu) for the mature forest would seem to be the only possibly significant features of the scheme.

Accepting there was a receipt by FAR of confidential information, the crucial issue is whether Temm J.'s conclusion that FAR misused it is supported by the evidence. That conclusion was expressed very shortly in general terms, but without any specific findings as to how or when the use occurred. The relevant evidence possibly going to use has been comprehensively analysed in the judgment delivered by Gault J. The analysis revealed that there was neither evidence of actual use of the identified items of information, whether individually or in combination, nor that there was any basis for the inference that there had been use. It was not suggested that the two participants in the FAR transaction (ITT Rayonier and Ernslaw) had been given or used information received by FAR. Both these parties had had previous dealings with FAR, the former had already undertaken its own research into Matakana Island in 1991. In essence the evidence showed that the transaction which FAR had put together resulting in the purchase did not utilise the Arklow forest valuation, did not involve Kanematsu, did not involve any resort development of the island, and did not result in FAR obtaining ownership of the land without expenditure of its own. Even if FAR was "galvanised" into other action by reason of its knowledge that Arklow was in a relatively advanced stage of implementing its scheme, it is not possible to translate that into actionable misuse, particularly when regard is had to the considerable time lapse down to November 1992 when the FAR transaction was finally negotiated. As the majority of the Court of Appeal held, supported by Blanchard J., there is no basis upon which Arklow could be entitled to relief. Its prospects of successfully concluding an agreement with the receivers was not shown to have been adversely affected by FAR's use of that knowledge. Any possible advantage it may have obtained had dissipated by November 1992. Without further elaboration or unnecessary repetition, their Lordships would respectfully adopt the reasoning of the majority in concluding that no actionable misuse of confidential information was established. On this head too, the claim must therefore fail.

Back the top of the page

Judicial Committee | Judgments 1999 | Judgments 2000 | Key Judgments