TRUST LAW

Trusts and Equity: some recent developments

By Anthony Grant

This week's article gives a snapshot of some recent developments in the law of trusts and equity.

Dishonest assistance

Dishonest assistance is a cause of action that is being used against lawyers with some frequency. It is therefore important that lawyers know the extent of their potential vulnerabilities.

In *Group Seven v Notable Services Limited* [2019] WTLR 803 the English Court of Appeal was concerned with the extent to which a person can be liable for dishonest assistance when they have "Nelsonian blindness".

The courts regard blind-eye knowledge as equivalent to actual knowledge for the purpose of determining the existence of dishonest assistance. It was held that "the imputation of blind-eye knowledge requires... the existence of a suspicion that certain facts may exist and... a conscious decision to refrain from taking any step to confirm their existence."

The test is a little more elaborate than that: there is a need to show a refraining from making full inquiries when there is real cause for suspicion.

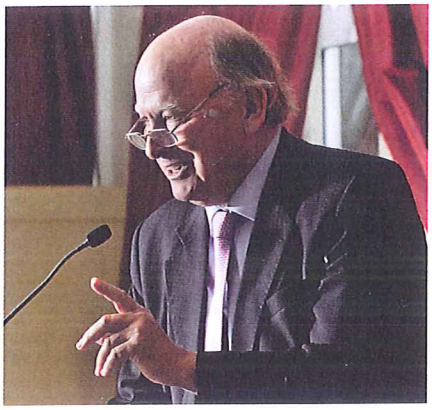
The Supreme Court also considered the tort of dishonest assistance recently – see *Sandman v McKay & Others* [2019] NZSC 41.

So far as wilful blindness is concerned, it said: "This arises where a defendant strongly suspects a breach of trust but makes a deliberate decision not to enquire in case the enquiry results in actual knowledge. It is necessary that the strength of the suspicion... makes it dishonest to decide not to make enquiry." [78]

The allegation of dishonest assistance in that case was made against a law firm.

Unjust enrichment

In 2018 Justice Susan Glazebrook delivered an academic paper with an unusual title, *Unjust enrichment: the platypus of private law.* She referred to the problems with the notion of unjust enrichment as a cause of action, saying the uncertainties of the cause of action make it "somewhat difficult for judges at the coalface" and "no doubt lawyers are in an even worse position when they are advising clients".



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In *Young v Hunt* [2019] NZHC 2822, the High Court recognised the existence of a cause of action for unjust enrichment. It said the cause of action had three ingredients:

- proof of a defendant's enrichment by receipt of a benefit;
- a corresponding deprivation by the plaintiff; and
- the absence of any juristic reason for the enrichment.

In *Enright & Another v Enright* [2019] NZHC 1124, Justice Matthew Palmer also confirmed the existence of unjust enrichment as a cause of action: "I do not accept the submission that unjust enrichment cannot be a separate cause of action in New Zealand law."

In the same case, Justice Palmer also spoke about the allied concept of "unconscionable receipt" – a term I suspect many lawyers will not have heard before.

Anti-Bartlett clauses

It is common for trust deeds to contain an anti-Bartlett clause – ie, a clause saying the trustees do not have an overriding duty to supervise the management of an underlying company.

The Hong Kong Court of Final Appeal has upheld the operation of such a clause in *Zhang Hong Li v DBS Bank (HK Limited)* [2019] HKCFA 45.

Readers who would like more details on this case and on other recent cases which consider the extent to which trustees may be under a duty to monitor the investments made by a company owned by a trust, and to disclose information relating to such a company, notwithstanding the presence of an anti-Bartlett clause, are referred to an article at [2019] Trusts & Trustees page 296.

Trustee exoneration clauses

One of the clauses that will be uppermost in most trustees' minds is a "trustee exoneration clause".

These clauses do not come up for consideration very often but when they do, trustees hold their breath. A trustee who paid US$90 million to a beneficiary at his request when it was said there was no right to make the payment relied on such a clause in *Sofer v Swiss Independent Trustees SA* [2019] EWHC 2071 (Ch) 2.8.19. HHJ Paul Matthews upheld the clause and dismissed the claim.

I have written several articles in favour of the appointment of specialist judges. Judge Matthews is the epitome of such a person. He has outstanding academic credentials, having been a co-author of *Underhill & Hayton on Trusts* and several other practitioners' texts and having held teaching appointments at Oxford University and five other universities in England and Europe. He was appointed a specialist circuit judge in England in 2017 and appears to sit wherever his expertise is most needed.

Unconscionable bargains

I pleaded a claim for an unconscionable bargain in *Archer v Cutler* [1980] 1 NZLR 386, at a time when the cause of action was not well-known in this country and I thought I was rescuing it from obscurity.

It has been invoked quite a lot since then. In

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Putt v Putt & Lattell [2018] NZHC 1849, Andrew AJ has added to its usefulness by holding that an allegation of an unconscionable bargain can sustain a caveatable interest in land.

Wills: knowledge and approval

Wills can be set aside if it can be shown a will-maker lacked "knowledge and approval" of the contents of the document.

In *Gupta v Gupta* [2019] WTLR 575 it was held to be sufficient if a solicitor had explained the meaning of a will to the will-maker, even if the solicitor was mistaken.

The *Gupta* case had some unusual facts. The solicitor advising the will-maker had made "individual accusations of corruption and dishonesty against most of the senior judiciary" in England. She had been struck-off as a solicitor in 2009 and charges of dishonesty, forgery and impropriety had been proven against her. She even refused to acknowledge that a High Court judge who presided over a case was actually a judge!

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