Privy Council Appeal No. 59 of 1994

Peter Amarat Rama *Appellant*

v.

Christopher Alexander Millar *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 30th November 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Griffiths
Lord Nolan
Lord Nicholls of Birkenhead
Lord Steyn

*[Delivered by **Lord Nicholls of Birkenhead**]*

This appeal concerns a claim by one partner against another for compensation for breach of fiduciary duty. The major issue is the amount of the compensation.

The events took place in the New Zealand winter of 1987. The plaintiff, Mr. Christopher Millar, and Mr. Michael Hounsell had a banking background. The judge described Mr. Millar as an alert, inventive financier. In May 1987 Mr. Millar and Mr. Hounsell negotiated a scheme which involved taking advantage of the different rates of interest payable for loans of New Zealand dollars in different parts of the world. It was possible, or so it was thought, to borrow New Zealand dollars more cheaply overseas than in New Zealand.

Mr. Millar had previously dealt with a Luxembourg-based finance house, IHD International S.A.R.L.("IHD"). The proposed scheme was that Mr. Millar and Mr. Hounsell, or a company of theirs, should borrow from IHD, say, NZ$2 million for a fixed term of 3 years at a fixed rate of interest, say, 8.5% payable yearly

in arrears. The security, and the source for payment of the interest and repayment of the loan, would be a tranche of three Transferable Certificates of Deposit ("TCDs") issued by the Bank of New Zealand ("the BNZ"), one for $170,000 payable in one year's time, being the interest for the first year, a like TCD in respect of the second year, and a third TCD for $2,170,000 payable at the end of the third year, being the third year's interest and the loan principal. These TCDs could be bought from the BNZ at a yield of about 17%, that is, for a total immediate outlay of about $1.57 million. After deducting commission payable to IHD, estimated at about 6%, or $120,000, there would be a profit margin of $310,000, representing the difference between the amount of $1.88 million received from IHD and the cost of $1.57 million payable to the BNZ for the TCDs. The purchase of the TCDs would be financed by a short term bank loan, repayable as soon as the $1.88 million was received from IHD. The interest payable on this loan and other fees could be met out of the margin of $310,000, and still leave a worthwhile profit. The scheme, in like amounts, could be repeated again and again.

Mr. Millar paid IHD an initial commitment fee of $70,000, but neither he nor Mr. Hounsell had the money or the borrowing capacity to take the matter further. In May 1987 they approached the defendant, Mr. Peter Rama, and suggested he should join them in the scheme. They would provide the expertise and the overseas contact, and he would provide the capital. He and his family had substantial means, and he was an established customer of the BNZ. Mr. Hounsell then went to Australia and dropped out of the picture, for all practical purposes and for all legal purposes relevant to liability. Suffice to say, thereafter Mr. Millar and Mr. Rama proceeded with the scheme as partners, owing to each other corresponding fiduciary duties.

On 26th May Mr. Rama obtained a commercial bank facility from the BNZ and bought the first set of TCDs, in the amounts mentioned above. There was then a hiccup. It transpired that IHD was obtaining the required NZ dollars by borrowing US dollars of corresponding value from P-B Finance Ltd ("PB Finance") on the security of the TCDs. PB Finance was a Cayman Islands company with its main office in New York. It formed part of the Prudential Assurance group. PB Finance insisted on having TCDs issued in its name before it would make funds available and, further, it was unwilling to lend the full amounts envisaged by the scheme. The first difficulty was overcome by the BNZ issuing in the name of PB Finance a duplicate set of TCDs in respect of the same loan. The second difficulty was not overcome. The amount received by Mr. Rama in his account with the BNZ on 18th June was just under $1.6 million. This was some $280,000 less than the amount of $1.88

million arranged by the partners with IHD, and produced a much reduced surplus, of approximately $27,000.

Despite this a second transaction went ahead, on similar terms. On this occasion the amount received, in round figures, was $1.667 million. The surplus, being the difference between that amount and the cost of buying the TCDs, was $92,324. A third transaction followed: the TCDs cost approximately $1.57 million, the amount received by Mr. Rama on 13th July was $1.64 million, producing a surplus of about $70,000.

On the following day, 14th July, Mr. Rama bought a fourth set of TCDs, at a cost of $1.605 million. The duplicates were sent by the BNZ to PB Finance, with a request to remit funds direct to Mr. Rama's account with the BNZ in Wellington, in accordance with IHD's instructions. This did not happen. A major difficulty arose between PB Finance and IHD. PB Finance claimed that IHD was in default under its loan agreement with PB Finance, because the value of the TCDs already provided fell short of the agreed collateral margin. PB Finance required IHD to make good the security deficiency, failing which it was unwilling to lend more than $1.1 million on the fourth set of TCDs. A loan of this amount would have left the partners with a substantial loss in respect of the fourth tranche of TCDs. Mr. Rama sought the return of these TCDs from PB Finance, but he was unsuccessful. As to IHD, Mr. Rama demanded payment of the shortfall in the amount of the loans in respect of the earlier transactions. Lawyers became involved.

IHD did not provide any further security. On 7th August PB Finance set about realising its securities. It entered into a contract with the BNZ to sell all four sets of TCDs, with settlement due on 10th August. The BNZ completed the transaction regarding the first two sets, but not the third or fourth sets. Particularly in respect of the fourth set, the BNZ was in an embarrassing position, because on 14th July Mr. Rama had instructed the bank not to register transfers of the original TCDs to PB Finance without his consent. PB Finance started proceedings in New York against the BNZ for breach of contract, and then against IHD for US$1.2 million. For his part, on 28th August Mr. Rama was due to repay or else roll over the BNZ loan facility for the purchase of the fourth set of TCDs, but the expected funds to cover the repayment had not come from IHD. It might be a long and expensive matter to take action against IHD in Luxembourg or New York to try and enforce payment.

On 8th September Mr. Rama entered into a deed of settlement with the BNZ by which he gave up all claim or title to the third

and fourth sets of TCDs in exchange for payment of $1.5 million. This was $105,392 less than the cost of buying the fourth set of TCDs and meant that, overall, the four transactions were unprofitable for the partners. To break even Mr. Rama needed to receive about $1.61 million. Mr. Rama was left carrying a loss of about $89,000, and Mr. Millar was out of pocket by $50,000, being the initial commitment fee of $70,000 less $20,000 Mr. Rama had paid him on 28th July.

Mr. Rama entered into this settlement without Mr. Millar's approval and against his known wishes. At the time Mr. Rama took steps to conceal from Mr. Millar what he had done. Before their Lordships' Board it was accepted that in so conducting himself Mr. Rama acted in breach of a fiduciary duty owed by him to Mr. Millar.

At the trial Mr. Millar's claim for damages was calculated on the basis of the completion of the first four transactions in the amounts originally contemplated. Greig J. held this claim was untenable because, as the transaction proceeded, and in the hope of further transactions, the parties had accepted the amounts paid. Thus they were never likely to succeed in their claim for any further money in respect of the first three transactions. On that footing, and assuming payment by IHD for the fourth set of TCDs in the same amount as the third, the four transactions if completed would have yielded for Mr. Millar a one half share in a modest partnership profit of $40,000, and repayment of one half of the initial commitment fee of $70,000 paid by him. Against these items was to be offset the payment of $20,000 made by Mr. Rama to Mr. Millar on 28th July. So the balance payable to Mr. Millar would have been $35,000.

The judge observed that at the time of the negotiations the partners were in a strong position against the BNZ which had put itself into an apparent breach of contract on an international monetary transaction in New York upon which proceedings had already been instituted, and at the same time had apparently breached or failed to take any action to comply with its customer's request not to register the fourth set of TCDs. Regarding the compromise the judge said:-

> "In fact as a matter of reality there was no possibility of the parties in New Zealand, namely the plaintiff and the defendant, coming to terms on any basis with PB Finance in New York or IHD International in Luxembourg. There was no leverage over them. PB Finance had the documents in their hands, in their name, and to extract monies from them required proceedings and perhaps judgment in a Court of appropriate jurisdiction. It was only through the BNZ that this matter could be brought to a conclusion and so there is a question how much realistically the bank would pay."

The judge noted that the bank might have had sufficient motive to increase its payment, but any further delay would have meant that the value of any increased payment to the partners would be diminished by accruing interest. The judge concluded that Mr. Millar was entitled to be paid $35,000, and gave judgment in his favour accordingly. This assumes a payment of $1.64 million for the fourth set of TCDs. Before the Court of Appeal and their Lordships' Board it was common ground that in his calculation the judge erred in not crediting Mr. Millar with repayment of the whole commitment fee. The correct amount payable to Mr. Millar, on the basis of this calculation, was $70,000.

Both parties appealed. The Court of Appeal, comprising Casey, McKay, and Fisher JJ., dismissed Mr. Rama's cross-appeal on liability, and allowed Mr. Millar's appeal on quantum. McKay J. delivered the judgment of the Court. The court held that the evidence did not support the judge's finding that there was an agreed variation of the agreement with IHD. The court considered that a realistic basis for a settlement was one proposed by Mr. Rama and agreed by IHD's lawyers in a letter dated 17th August. The financial effect of this proposal, at any rate as understood by Mr. Rama, was that he would abandon his claim to the third and fourth sets of TCDs in exchange for about $2.1 million. A settlement on these terms would have yielded a balance for Mr. Millar of $262,826. The court held this was the sum Mr. Millar would have received if Mr. Rama had not settled the matter on his own terms in breach of his fiduciary duty as a partner. From that decision Mr. Rama appealed to their Lordships' Board.

This is not a case of a claim that a fiduciary should account for an unauthorised profit. The claim is for the amount of loss Mr. Millar is said to have sustained by Mr. Rama's breach of fiduciary duty. This calls for consideration of what would have happened if Mr. Rama had fulfilled his fiduciary duties and kept Mr. Millar informed of the further negotiations he was having with the BNZ and told Mr. Millar in advance of his wish to do a deal with the bank in return for $1.5 million.

The problem in this case is that in two respects the interests of the partners were not the same. Both were interested in maximising the profits. But Mr. Rama was financially exposed in a way Mr. Millar was not. Bank interest, for which Mr. Rama was liable to the BNZ, was continuing to accrue at a high rate on the $1.6 million borrowed to pay for the fourth set of TCDs. And Mr. Rama would have to provide the money, and face the financial hazards, if court proceedings were instituted by or against any of the parties. Mr. Millar was not in a financial

position to assist. So Mr. Rama had a greater financial interest than Mr. Millar in bringing the dispute to a speedy end.

Secondly, Mr. Rama had an interest in maintaining a good relationship with the BNZ. In his family and other dealings with the bank he received concessions and the like offered to a valuable customer. He stood to lose these if he pushed the BNZ too hard. Mr. Rama made no secret of this at the time.

In these circumstances it seems clear that if Mr. Rama had kept Mr. Millar properly informed there would inevitably have been an impasse, with Mr. Rama wanting to accept $1.5 million, and Mr. Millar preferring to sit the matter out and see if the continuing pressure on the BNZ would result in an improved offer. If necessary, Mr. Rama should sue the BNZ. That, indeed, was Mr. Millar's attitude at the end of August when told by Mr. Rama that he wished to settle in return for $1.6 million, if this could be arranged.

Whatever be the ordinary position when there is a deadlock, in this case their Lordships consider that Mr. Rama, as the financially exposed partner, would have been entitled to proceed to settle the matter without further delay unless Mr. Millar was able and willing to provide a financial indemnity to Mr. Rama. Mr. Millar could not have done that. The Court of Appeal held that Mr. Rama was not free to settle with the BNZ without the agreement of Mr. Millar. Their Lordships are unable to agree. Partners must act honestly and fairly towards each other, but this does not mean that one partner can require another to undertake a financial risk to which he has not agreed.

Of course, when proceeding to settle the dispute unilaterally, Mr. Rama remained under an obligation to act honestly and fairly. He was not entitled to prefer his other interests, although he was entitled to give weight to his reluctance to expose himself to further financial risks in a venture which had foundered.

So the question which arises is whether, in settling on the terms he did, Mr. Rama preferred his wish to maintain his standing as a good customer of the bank over the interests of the partnership on whose behalf he was negotiating. This is a question of fact. Neither the judge nor the Court of Appeal made any such finding. Indeed, if anything, the Court of Appeal seems to have taken the opposite view, observing that Mr. Rama may have thought that the settlement was a reasonable one.

There is another difficulty with the conclusion of the Court of Appeal. The partners were in a strong bargaining position against the BNZ, but in a weak position against IHD and PB Finance. The

terms of settlement which the Court of Appeal regarded as realistic involved no contribution from the BNZ but a significant contribution from IHD or PB Finance, or both of them. Despite the terms of the letter of 17 August, and with all respect to the Court of Appeal, it must be highly questionable whether in practice a speedy settlement could have been effected on these terms.

Their Lordships consider that the conclusion of the Court of Appeal cannot stand. The court misdirected itself in holding that Mr. Rama could not settle without Mr. Millar's agreement, and in failing to take into account that Mr. Millar could not require Mr. Rama to hold on and be exposed to further financial risk. Before their Lordships' Board Mr. Millar advanced no alternative basis of claim. For his part Mr. Rama disclaimed any attempt to challenge the judge's award in the (corrected) principal amount of $70,000.

This leaves only one further point, concerning the rate and period of interest. Mr. Millar's claim is that, in breach of a fiduciary obligation, Mr. Rama misapplied a partnership asset, namely, the claim against the BNZ. Mr. Rama chose not to challenge the trial judge's award. It must follow that, so far as that award is concerned, the case falls within the circumstances in which a court of equity has a jurisdiction of its own to award interest. That jurisdiction is outside and additional to the statutory power contained in section 87(1) of the Judicature Act 1908: see *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373 and *General Communications Ltd. v. Development Finance Corporation of New Zealand Ltd.* (1990) 3 N.Z.L.R. 406, 436. Their Lordships see no reason for interfering with the Court of Appeal's award of simple interest from 10th September 1987, the date of completion of the settlement, at the rate of 14.9%.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed. The respondent must pay the appellant's costs. There will be no order regarding the parties' costs in the Court of Appeal.