

**The New Zealand Guardian Trust
Company Limited**

Appellants

v.

- (1) **Kenneth Stewart Brooks**
- (2) **Norman Geary**
- (3) **Keith Norman Goodall**
- (4) **Ronald William Jones**
- (5) **Duncan Macalister Leitch and**
- (6) **David James Steel**

Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
17TH NOVEMBER 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD OLIVER OF AYLMEYTON
LORD MUSTILL
LORD LLOYD OF BERWICK
LORD NICHOLLS OF BIRKENHEAD

[Delivered by Lord Keith of Kinkel]

This is an appeal from the Court of Appeal of New Zealand. The question at issue is whether or not the directors of a company which under the terms of a debenture trust deed was obliged to furnish to the trustee of the deed regular certificates as to certain aspects of the company's affairs, signed by two of the directors on behalf of all of them, are or are not joint tortfeasors with the company in respect of alleged negligence in the preparation of the certificates.

The company, Budget Rent A Car Limited ("Budget") borrowed money from a consortium of financiers and bankers. The advance was secured by a debenture trust deed dated 5th May 1987 entered into between Budget, Budget Lease Management (Car Sales) Limited and the present appellants ("NZGT"), the holders of the debentures being the lenders mentioned above. The total moneys advanced amounted to \$17.25 million. Budget fell into financial difficulties and was unable to repay the

advances made by the debenture holders. Two of these, Westpac Securities Limited ("Westpac") and DFC Financial Services Limited ("DFC") entered into a deed of compromise with Budget dated 30th July 1990 by which they agreed to accept \$10.537 million in full and final settlement of their claims. This sum was in fact advanced to Budget under new financing arrangements. There was a shortfall of \$2.712 million in respect of the claims in question, and Westpac and DFC are suing NZGT to recover this sum alleging breaches of the duties owed to them under the trust deed. NZGT have joined as third parties the directors of Budget at the material time, claiming indemnity or contribution in respect of the claims against it by Westpac and DFC. By deed dated 7th August 1990 NZGT released Budget from all liabilities towards it. The release did not cover the directors of Budget.

The directors of Budget, in answer to the claim against them, pleaded the release of 7th August 1990. The effect of this was tried, as a preliminary issue under Rule 418 of the High Court Rules, before Barker J. By judgment delivered on 2nd August 1993 he decided the issue in favour of NZGT. The directors appealed, and on 17th December 1993 the Court of Appeal (Sir Robin Cooke P., Richardson and Casey JJ.) reversed the judgment of Barker J. and dismissed NZGT's claim against the directors.

Under Clause 6.01 of the trust deed Budget covenanted with NZGT that it would from time to time during the currency of the deed do various things, including:-

"Furnish Directors' Quarterly Reporting Certificates

- (h) on or before the last day of the month (or such later date as the Trustee shall in writing agree) after the end of each financial quarterly period of the Company in each year and at any other dates the Company may elect and if so required by the Trustee, on or before the last day of the month following any month during which the Trustee shall request the same (which request shall only be made if the Trustee considers that special circumstances warrant such request and so certifies in writing to the Company specifying such special circumstances), furnish to the Trustee a certificate signed by not less than two Directors on behalf of the Directors, in such form and with such qualifications (if any) as the Trustee in its discretion may approve:
 - A. Stating to the best of the Directors' knowledge and belief after having made all due enquiry, whether or not since the date as at which the last such certificate was given, or in the case of the first such certificate, since the date of this Deed (each such date being referred to in this paragraph (h) as a 'certification date'):

- (i) any matters have in their opinion occurred to affect adversely the interests of the Stockholders, and if so giving particulars thereof;"

There followed a great many other matters which it is unnecessary to set out.

Counsel for the appellants before the Board did not dispute the existence and continued validity in New Zealand of the rule that the release of one joint tortfeasor from liability operates to release also all the others. The argument was that the effect of Clause 6.01(h) of the trust deed was to impose upon the directors of Budget a personal duty owed to NZGT, quite independent of any duty which might be incumbent on Budget, to exercise reasonable care and skill in the preparation of the requisite certificates. Therefore the directors were not joint tortfeasors with Budget.

The respondents' case is that Budget is vicariously liable for the negligence of the directors in the preparation of the certificates and is accordingly a joint tortfeasor with them on that basis.

In *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716, 737 Lord Macnaghten quoted with the approval the following passage from the judgment of Blackburn J. in *McGowan & Co. v. Dyer* (1873) L.R. 8 Q.B. 141, 145:-

"In *Story on Agency*, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them'. He then proceeds, in s. 456: 'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit'."

The directors of Budget were its agents, and the question is whether or not they were acting in the course of their agency when they prepared the certificates. There can be no doubt that they were acting in their capacity as directors when they did so, and indeed this was conceded by counsel for the appellants. Further, they were acting within the scope of their agency. They

could not have prepared the certificates if they had not been authorised by Budget to do so, and their doing so was for the benefit of Budget because the rendering of the certificates was necessary to the maintenance of the loans to it. It is to be accepted that the directors assumed a personal responsibility towards NZGT to see that the certificates complied with the requirements of the trust deed and to exercise reasonable care in their preparation, but in most if not all cases where the acts of an employee or agent render the employer or principal vicariously liable it is because the employee or agent was in breach of a duty which he personally owed to the injured party.

There are, of course, cases where the principal or employer himself owes a duty of care to the person who has been injured by the act of the agent or employee. That was the basis of the decision in *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, where it was held that a hospital authority which had undertaken the treatment of a patient owed the patient a duty of care in relation to the treatment, and could not escape liability on the ground that the injury had resulted from negligence on the part of the medical staff who had actually administered the treatment. But vicarious liability can and very frequently does arise in the absence of any duty directly owed by the principal or employer. A familiar instance is that of negligence on the part of the driver of a vehicle. The employer of the driver does not himself owe any duty to users of the highway in relation to the manner of driving of the vehicle, yet is liable for the negligence of his employee. So in the present case the fact that Budget may not itself have owed any duty of care to NZGT in relation to the preparation of the certificates does not necessarily mean that it cannot be liable for the negligence of its directors acting within the scope of their authority. It is no doubt possible that the terms of a contract such as that which is here involved may be such as to make it plain that any liability for the negligent preparation of certificates is to rest on the directors alone, to the exclusion of the company. But their Lordships can find nothing in the general structure of this trust deed or the particular language of Clause 6.01 capable of evincing an intention that such should be the position in the present case. Their Lordships were not referred to any authority or statement of principle indicating a possible basis of distinction between cases where the negligence of directors acting within the scope of their authority might engage the liability of the company and cases where it does not. In the circumstances they cannot perceive any valid grounds upon which vicarious liability of the company might be negated in the instant case.

Counsel for the appellants sought to derive support for their argument from certain *dicta* of Lord Lowry in *Kuwait Asia Bank E.C. v. National Mutual Life Nominees Ltd.* [1991] 1 A.C. 187. That case was similar to the present in that it involved a claim arising out of alleged negligence on the part of directors of a company ("A.I.C.S.") in preparing certificates to be furnished by the company to

the trustee for deposit holders. Two of the directors in question (House and August) were employees of the Kuwait Bank, which had nominated these employees as directors. The trustee sought to make the Kuwait Bank liable for their negligence, but although succeeding before the Court of Appeal of New Zealand failed before the Judicial Committee.

Lord Lowry, delivering the advice of the Board, said at pages 221, 222:-

"House and August owed three separate duties. They owed in the first place to A.I.C.S. the duty to perform their duties as directors without gross negligence; the liability of a director to his company is set forth in the judgment of Romer J. in *In re City Equitable Fire Insurance Co. Ltd.* [1925] Ch. 407. They owed a duty to the plaintiff to use reasonable care to see that the certificates complied with the requirements of the trust deed. Finally, they owed a duty to their employer, the bank, to exercise reasonable diligence and skill in the performance of their duties as directors of A.I.C.S.

If House and August did not exercise reasonable care to see that the quarterly certificates were accurate, they committed a breach of the duty they owed to the plaintiff and may have committed a breach of the duty they owed to A.I.C.S. and a breach of the duty they owed to the bank to exercise reasonable diligence and skill. But these duties were separate and distinct and different in scope and nature. The bank was not responsible for a breach of the duties owed by House and August to A.I.C.S. or to the plaintiff any more than A.I.C.S. or the plaintiff were responsible for a breach of duty by House and August."

Later at page 223, he said:-

"The only rights and remedies of the plaintiff were against A.I.C.S. for breach of contract and against the directors of A.I.C.S. who owed a duty to the plaintiff. By the trust deed, the quarterly certificates were rendered on behalf of the directors and nobody else."

The issue before the Board was whether the Kuwait Bank was liable to the plaintiff trustee for breaches of the duty owed to it by House and August. That issue was answered in the negative. No question arose as to whether A.I.C.S. was liable for these breaches of duty. There was no argument about that. It was clearly not in the forefront of Lord Lowry's mind. It is difficult to understand what may have been in his mind when he referred, in the last two lines of the passage first quoted above, to the possibility of the plaintiff being liable for a breach of duty by House and August. In the result the passages in question, which are purely obiter, cannot be

regarded as expressing a considered view upon the sort of question which arises in the present appeal. In their Lordships' opinion Budget was vicariously liable for the negligence of its directors in the preparation of the certificates and was accordingly a joint tortfeasor with them. The release of Budget therefore had the effect of releasing also the directors.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before their Lordships' Board.