**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2013-404-4866**
**[2016] NZHC 2585**

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| UNDER | the Companies Act 1993 |
| IN THE MATTER | of the liquidation of NZ Natural Therapy Ltd (In Liquidation) |
| BETWEEN | NZ NATURAL THERAPY LTD (IN LIQUIDATION)<br>First Plaintiff |
| | VIVIEN JUDITH MADSEN-RIES AND HENRY DAVID LEVIN as liquidators of NZ NATURAL THERAPY LTD (IN LIQUIDATION)<br>Second Plaintiffs |
| AND | JOHN LAWSON LITTLE<br>Defendant |

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| Hearing: | 29, 30, 31 August and 1 September 2016 |
| Counsel: | K H Morrison and G A Campbell for Plaintiffs<br>P J Dale and S Moore for Defendant |
| Judgment: | 1 September 2016 |
| Reasons: | 28 October 2016 |

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**JUDGMENT OF BREWER J**

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*This judgment was delivered by me on 28 October 2016 at 3:00 pm pursuant to Rule 11.5 High Court Rules.*

*Registrar/Deputy Registrar*

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| Solicitors: | Meredith Connell (Auckland) for Plaintiffs<br>Saunders Robinson Brown (Christchurch) for Defendant |

## Introduction

[1] On 1 September 2016, I ruled that the plaintiffs do not succeed on their first cause of action. This Judgment gives my reasons.

## The first cause of action

[2] The plaintiffs sue the defendant to recover monies they plead are owing to the first plaintiff because:

(a) They are loans by the first plaintiff to the defendant; or

(b) If the first plaintiff held the monies on trust, then the first plaintiff has a beneficial interest in them pursuant to its trustees' indemnity and the advances of the monies were loans to the defendant and thus payable by him.

[3] The sum of the monies is $1,059,590.49.

## Issue

[4] The issue is whether the first plaintiff traded on its own account, or whether it traded as a corporate trustee.

[5] If it is the former, then the payments comprising the monies are advances to the defendant as the sole director or the sole shareholder of the first plaintiff. As the plaintiffs observe, it is a well settled principle that advances made by a company to its shareholders or directors are debts owed to the company. Such advances are repayable on demand.

[6] If it is the latter, then the payments comprising the monies are distributions pursuant to a trust. They are not recoverable by the plaintiffs since they were never assets of the first plaintiff.

**Background**

[7] NZ Natural Therapy Ltd (the company) was incorporated on 5 October 1984 with the name Acacia Sales Ltd. On 23 March 1993, it changed its name to New Zealand Natural Therapy Ltd and on 16 February 2007 changed its name again, this time to NZ Natural Therapy Ltd.

[8] On 31 October 2001, the defendant became the sole director of the company. On 16 June 2004, he became the sole shareholder.

[9] Two trusts have been associated with the company. The first, settled on 21 October 1997, is Niagara Therapy (NZ) Trust. The defendant and another were the named trustees. On 28 February 2007, Niagara Therapy (NZ) Trust changed its name to NZ Natural Therapy Trust.

[10] The second trust was settled on 28 November 2006. It also has the name NZ Natural Therapy Trust. The company was the named trustee. There is no evidence that it ever operated. I find that its settlement has no bearing on the issue under the first cause of action.

[11] The second plaintiff is handicapped by a lack of documentation as to the operation of the company and the trust. The company never filed tax returns, nor did it ever produce accounts. Accounts were produced in the name of the trust.

**The onus of proof**

[12] It is common ground that the impugned payments were made. As a result, the plaintiffs submit that they have discharged their initial onus as plaintiffs and it is for Mr Little to prove as a defence that the company was a corporate trustee. In submitting that the onus lies with Mr Little, the plaintiffs rely on *Mawson v Public Trustee*.[1] In that case the Court was concerned with a claim for payment due under a contract. The liable party claimed he had paid the whole of the amount payable under the contract. Justice Turner held that the plaintiff, by proving the contract,

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1 *Mawson v Public Trustee* [1956] NZLR 247 (SC).

discharged the onus of proof initially lying upon him, and it was thereafter for the defendant to prove payment.[2]

[13] The difficulty with the plaintiffs' submission is that the issue of fact I have to decide is determinative of whether there is a debt in the first place. That is because, as I have said, if the company was the trustee then the payments are not recoverable by the plaintiffs since they were never assets of the first plaintiff. *Mawson v Public Trustee* is authority for the proposition that proof of the debt itself discharges the onus originally resting with the plaintiff. But it cannot assist the plaintiffs in the present case where the defendant does not accept that there is a debt. Mr Little's claim that the company is a trustee is not a "defence" like the defence of payment. Rather, it gives rise to an issue of fact which is relevant to the plaintiffs' claim and I must decide it on the balance of probabilities.

[14] However, the point is moot. This is not a case of finely balanced arguments where who has the onus will decide the outcome.

**Discussion**

[15] The plaintiffs' position is that the company was never appointed as trustee of the trust. They say there is no clear, uncontradicted evidence of the company's appointment and that the primary evidence of the company's appointment is Mr Little's assertion of it. The plaintiffs submit that Mr Little's actions indicate that he may have simply continued to be the trustee and used the company to run the business.

[16] In support of this submission, the plaintiffs refer to contradictory aspects of Mr Little's evidence. For example, in answers to interrogatories, Mr Little stated that the company was appointed as trustee of the trust some time on or after November 2006.[3] However, Mr Little said in evidence that the company was most likely to have been appointed as trustee within two years of 21 October 1999.[4]

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2 At 251.
3 Affidavit of John Little sworn 29 May 2015 at [2(a)].
4 Notes of Evidence at 114.

Further, in cross-examination Mr Little appeared to suggest that he did not know whether there was any document recording the company's appointment as trustee.[5]

[17] The plaintiffs also place weight on email correspondence from a representative of the IRD sent to the liquidators:[6]

> First, there is no evidence of any audit of the Company.
>
> There were two or 3 audits of NZ Natural Therapy Trust and the last was concluded in May 2012. Without being specific, that audit will not assist your claims. Both this audit and the two prior related to accounting errors committed both in house and by their tax agent.
>
> The Company is not named as the Trustee of the Trust, although at one point it was surmised that it may have been.

[18] In cross-examination the liquidator, Mr Levin, expressed his view that this correspondence was consistent with the company never having been appointed as a trustee:[7]

> Q You learn, don't you, around this time that the trust has been audited by the IRD?
> A Yes.
>
> Q Did that give you any comfort about the way it had been conducted?
> A No.
>
> Q Even though there had been no findings of any irregularities by the IRD?
> A The IRD correspondence was fascinating because it suggested to me that the IRD thought it was still dealing with the Niagara Therapy trustees and again, that was consistent to me with the company never having been appointed a trustee.

[19] The thrust of Mr Levin's evidence was that Mr Little and the accountants were clearly acting as if they thought the company had taken over as trustee of the trust but he did not think the company had ever actually been appointed as a trustee.

[20] The plaintiffs also observe that Mr Little continued to instruct Ms Page in relation to the affairs of the trust after the company had been put into liquidation and Mr Little no longer had control of it. For example, Mr Little instructed Ms Page to

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5 Notes of Evidence at 87.
6 Agreed Bundle of Documents Volume 2 at page 583.
7 Notes of Evidence at 62.

file tax returns for the trust and asked her to change its mailing address at the IRD.[8] The plaintiffs submit that Mr Little's actions in continuing to instruct Ms Page are consistent with the company not being the trustee.

[21] Mr Little's evidence, on the other hand, was that the company had been appointed as trustee of the company:[9]

> Q How long after the 21st of October 1999 did the company become the corporate trustee?
> A Within – on my knowledge and understanding I believe it was within possibly less than two years.
>
> Q And how was that done?
> A It was done—
>
> Q Because you don't just – what I'm saying is you don't just suddenly step out of a telephone booth and say, "Now the corporate trustee exists".
> A Yes.
>
> Q There's a process that you go through so tell me about the process.
> A Yes. So what happened was Ascent Business Directions who had been our accountants for all time prior even from the early nineties, they then – we used a company which was a shelf company that was already there and they did all that process.

[22] Mr Little also gave evidence that appropriate documents were prepared:[10]

> Q So documents were prepared?
> A Yes.
>
> Q You and Mr Bell-Booth would have had to have resigned as trustees wouldn't you?
> A Yes.
>
> Q The Company would have had to have accepted that it was going to be the corporate trustee?
> A Yes.
>
> Q Where are those documents?
> A I'm sorry Your Honour I – they were in, in Ascent's hands. My, my belief I went back, we back to Mr Bell-Booth to ask if he could go back into his archives and find – he's fully aware of when – and so he went back and unfortunately he didn't have them but he thought that he'd kept them for at least 10 years so we asked him if he could go back and find them and Ascent Business Directions say they

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8 Notes of Evidence at 90-91.
9 Notes of Evidence at 114.
10 Notes of Evidence at 114-115.

> don't hold them but we've gone through all our hard drives and everything else to try and find those.

[23] Mr Little's last answer is consistent with an email sent from the trust's former accountant, Mr Mark Salmon to Meredith Connell:[11]

> I do not hold any records for the above named company. It was our company policy that all records were returned to the client upon completion of each year's accounts. Any additional records we held when a client became a no longer client were also returned to the client, John Little and his associated entities were not clients of Ascent Business Direction Ltd prior to its liquidation.

[24] Mr Little was questioned as to why he continued to instruct Ms Page in relation to the company after its liquidation.[12]

> Q …At the time that you were giving the instructions to Ms Page which you've just been referred to who was the trustee of the trust?
> A The company was still the trustee of the trust.
>
> Q Sorry?
> A The company, NZ Natural Therapy Limited was still the trustee of the trust.
>
> Q All right so that being the case why were you acting on behalf of the company?
> A I don't know. I didn't know any different.
>
> Q Because your evidence is that you weren't the trustee, the company was the trustee, the company is in liquidation, you've been told that you can't do anything more on behalf of the company but you're continuing to instruct Ms Page as though you're in charge?
> A I only saw it as the trust Your Honour.
>
> Q Yes, of which you were not a trustee?
> A Sorry, yes, I didn't understand my obligations.
>
> Q Well you see Ms — and just to be clear Ms Morrison's point is that your actions in instructing Ms Page, continuing to instruct Ms Page, are more consistent with the company not being the trustee than it being the trustee. So what's your comment on that?
> A I always considered it a trust.

[25] In my view, this exchange illustrates Mr Little's unsophisticated understanding of the trading trust structure and is not strong evidence that the company was never appointed as trustee.

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[11] Agreed Bundle of Documents Volume 2 at page 562.
[12] Notes of Evidence at 92-93.

[26] Mr Parsons, an insolvency practitioner, supported Mr Little's position. In his brief of evidence he stated:[13]

> I do not believe that there is any uncertainty in relation to the company's role as trustee. It would appear to be quite simply a corporate trustee for an established trust. The only issue in doubt appears to be when the company became the corporate trustee.

[27] When giving evidence Mr Parsons was asked whether he considered any of the discovered documentation to be inconsistent with the company being formally appointed as a trustee. He replied:[14]

> The only documentation which I have seen which relates to trusts appears to be various bank guarantees and indemnities which refer to the trust guaranteeing and also Mr Little guaranteeing the liability at that time. So it does fit in with the timeline that they were using a trust method, that's what we call it, to operate their businesses. I accept that the bank account is in the name of the company but that is not unusual that the banks, although they're executing documents which relate to guarantees for trusts their record keeping may not be as prudent and it's best practice and on the face of the bank statements Mr Levin would have initially thought it was a company trading.

[28] Significantly, the professionals involved with the company and the trust considered the company to be a corporate trustee. Mr Salmon, formerly the trust's accountant, stated in his email to Meredith Connell his belief that the company is a corporate trustee:[15]

> I do not believe that Ascent Business Directions Ltd ever acted as accountants for NZ Natural Therapy Ltd as it never traded, it acted as a trustee company only.

[29] That is consistent with an email sent by Ms Julie Page, who succeeded Mr Salmon as the trust's accountant, to the liquidators in which she expressed the view that the company did not have any assets or liabilities:[16]

> I have never prepared any financial statements for NZ Natural Therapy Trust Limited. As far as I am aware it is a company with no assets or liabilities. I do not hold any minutes or company records either.

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13 Brief of Evidence at [93].
14 Notes of Evidence at 132.
15 Above n 11.
16 Exhibit number 1.

[30] Further, in the trust balance sheet as at 31 March 2009 the BNZ cheque account is noted under current liabilities in the sum of $77,104.22.[17] Given that the account was in the name of the company the author must necessarily have been assuming the company was the trustee.

[31] Finally, and notwithstanding the plaintiffs' submission to the contrary, I consider the fact that accounts were produced in the name of the trust and not the company suggests that the company was appointed as a corporate trustee.

[32] Whilst valid criticisms can be levelled at Mr Little's evidence, the overall picture suggests that the company was the corporate trustee of the trust. It is clear that Mr Little relied on and deferred to his financial advisors when it came to the mechanics of his business. Those advisors are consistent in their views that the company was the corporate trustee of the trust.

[33] As Mr Dale submits, the only impediment to finding that the company was a corporate trustee is the absence of a deed of formal appointment as trustee. But that absence is in the context of an absence of nearly all documents relating to the business of the company and the functioning of the trust. In reliance on the evidence of Mr Little's financial advisors, when viewed in its overall context, I find on the balance of probabilities that the company was validly appointed as a corporate trustee and operated as such.

**Result**

[34] The plaintiffs' first cause of action fails.

[35] Costs are reserved.

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Brewer J

[17] Agreed Bundle of Documents Volume 1 at page 304.