IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 13/2019
[2019] NZSC 40

BETWEEN	ANZ BANK NEW ZEALAND LIMITED Applicant
AND	FINANCIAL MARKETS AUTHORITY Respondent

SC 21/2019

BETWEEN	ANZ BANK NEW ZEALAND LIMITED Applicant
AND	FINANCIAL MARKETS AUTHORITY Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	A R Galbraith QC, S M Hunter and V L Heine for Applicant H B Rennie QC, T C Stephens and J B Orpin-Dowell for Respondent
Judgment:	12 April 2019

JUDGMENT OF THE COURT

A The applications for leave to appeal in SC 13/2019 and SC 21/2019 are dismissed.

B Costs of $3,500 are awarded to the respondent.

REASONS

SC 13/2019

[1] The issue in the proposed appeal in SC 13/2019 is whether the Financial Markets Authority (FMA) can disclose to third parties documents obtained from

ANZ Bank New Zealand Ltd (ANZ) through the exercise of its statutory powers under s 25 of the Financial Markets Authority Act 2011 (the FMA Act). The documents relate to the Ponzi scheme run by Ross Asset Management Ltd (RAM). ANZ was RAM's banker.

[2] The FMA, in the course of its investigation, formed the view that ANZ may be liable to RAM investors in knowing receipt and dishonest assistance. The proposed disclosure would be to the liquidation committee of RAM (as a proxy for RAM investors) and to the liquidators of RAM for the purposes of:

(a) obtaining responses to the information received from ANZ and any additional information from the RAM investors;

(b) determining the next steps that should occur to enable the RAM investors to evaluate the merits of a claim against ANZ and to consider their position with respect to any such claim; and

(c) enabling the FMA to consider and determine whether to exercise its powers under s 34 of the FMA Act. Section 34 allows the FMA to exercise a person's right of action if it is in the public interest to do so.

[3] Before disclosure was made, the FMA would seek confidentiality agreements from members of the liquidation committee, the liquidators and their counsel.

The legislation

[4] Under s 59 of the FMA Act, the FMA cannot disclose any information or documents obtained by it under a s 25 notice other than in prescribed circumstances. The two relevant circumstances argued for are:

(a) s 59(3)(c):

> the publication or disclosure of the information or document is for the purposes of, or in connection with, the performance or exercise of any function, power, or duty conferred or imposed on the FMA by this Act or any other enactment; or

(b) s 59(3)(f):

> the publication or disclosure of the information or document is to a person who the FMA is satisfied has a proper interest in receiving the information or document; or

[5] Also relevant is s 59(4) which states that the FMA must not make disclosure under s 59(3)(f) "unless the FMA is satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or document".

Decisions of the courts below

[6] In the High Court, Fitzgerald J held for ANZ that the proposed disclosure was outside the powers of the FMA.[1] This was on the basis that the first purpose (set out at [2](a)] above) was not a material reason for the proposed disclosure.[2] This meant that the FMA's primary reasons for disclosure were the second and third purposes set out at [2](b)] and [2](c)] above. Fitzgerald J did not consider that these were legitimate reasons for disclosure. In her view, the FMA is a public body and the s 25 powers are given for public purposes and not to further purely private interests (in this case those of the RAM investors).[3]

[7] The High Court decision was overturned by the Court of Appeal.[4] The Court of Appeal held that there was a "good deal of evidence indicating that the first purpose was a genuine purpose".[5] As to the second and third purposes, the Court of Appeal held that the FMA Act contemplates the FMA working with investor groups in exercising its duties under s 34.[6] Contrary to the view of Fitzgerald J, the Court of Appeal did not consider that the FMA Act draws a "sharp public/private distinction":[7]

> … the scheme of the Act, and in particular s 34, recognises that civil redress against financial markets participants may help to meet the public interest in

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1 *ANZ Bank New Zealand Ltd v Financial Markets Authority* [2018] NZHC 691, [2018] 3 NZLR 377 (Fitzgerald J) [HC judgment].
2 At [126]–[128].
3 At [130]–[149].
4 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2018] NZCA 590 (Miller, Cooper and Asher JJ) [Substantive CA judgment].
5 At [43], see also [43]–[47].
6 At [53], see also [53]–[60].
7 At [66].

> promoting and facilitating the development of fair, efficient and transparent financial markets.

[8] The Court of Appeal noted "ANZ does not claim that the information is market sensitive or connected to commercially sensitive aspects of ANZ's own banking business".[8] The Court did, however, recognise that "privacy concerns arise because the documents reveal the personal identities … and financial affairs" of particular investors and the identities of ANZ employees.[9] The Court held that the confidentiality measures proposed by the FMA sufficed to meet s 59(4).[10]

Our assessment

[9] We do not consider that this application raises issues of general or public importance outside of the operation of the FMA Act.[11] As the Court of Appeal noted, it is difficult, given the existence of s 34, to draw a sharp public/private divide in relation to the FMA Act.

[10] There might be room for debate as to the scope of s 59(3)(c) and s 59(3)(f) but nothing raised by the applicant raises sufficient doubt that the decision on these particular facts is erroneous and therefore there is nothing that suggests any risk of a miscarriage of justice.[12]

[11] Further, the applicant has not pointed to any particular confidentiality concerns that are not sufficiently addressed by the proposals for confidential undertakings.

SC 21/2019

[12] This application is related to the application in SC 13/2019. ANZ seeks leave to appeal against the judgment of the Court of Appeal relating to whether redactions should be made to that Court's judgment[13] pending appeal.[14]

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8 At [70].
9 At [70].
10 At [73].
11 Senior Courts Act 2016, s 74(2)(a).
12 Senior Courts Act 2016, s 74(2)(b).
13 Substantive CA judgment, above at n 4.
14 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2019] NZCA 11 (Miller, Cooper and Asher JJ) [Suppression CA judgment].

[13] In that judgment, the Court of Appeal rejected ANZ's submission that extensive redactions to the judgment should be made. This was on the basis of the principle of open justice.[15] It did, however, make some redactions pending the outcome of the application for leave to appeal in SC 13/2019.[16]

[14] The FMA submits that the proposed appeal raises no issues of general or public importance. We accept that submission. Nor do we see any appearance of a miscarriage in the way the Court of Appeal determined whether the redactions requested by ANZ were necessary.[17]

Result

[15] The applications for leave to appeal are dismissed. Costs of $3,500 are awarded to the respondent.

Solicitors:
Chapman Tripp, Wellington for Applicant
Simpson Grierson, Wellington for Respondent

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15 At [7]–[9].

16 At [16]. We note that those interim suppression orders have fallen away with the determination of this leave application. However, as per the Suppression CA judgment "the order made by the High Court prohibiting publication of its decision of [the HC judgment] except in redacted form remains in force."

17 Senior Courts Act 2016, s 74(2)(a) and (b).