

Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh [1998] 3 NZLR 171

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Facts

- The plaintiffs were members of a staff superannuation scheme of the defendant employer and trustee (**Fortex**). The scheme was managed by a trust company under a trust deed. Fortex banked certain of the plaintiffs' contributions into its general account which operated in overdraft at all material times.
- When Fortex went into receivership, the plaintiffs issued proceedings against Fortex and the trustee of Fortex's secured debenture holders for a declaration of express, constructive or remedial trust to enable them to take priority over secured and unsecured creditors for unpaid employee and employer contributions.
- The primary judge held there was no express or constructive trust but recognised a restitutionary remedial trust in favour of the plaintiffs. The defendants appealed and the plaintiffs cross-appealed, relying inter alia on unjust enrichment.

Held

- Express trust had to have certainty of subject matter. There were no such trusts in this case because there was no identifiable subject matter, any retained moneys merely reducing Fortex's debt and having no separate identity. Further, there had to be an intention to establish an express trust. There was no evidence that Fortex intended to constitute itself trustee of retained moneys.
- Equity acts as a Court of conscience to intervene to prevent those with rights at law (in this case, the debenture holders) from enforcing those rights when in the eyes of equity it was unconscionable to do so.
- The plaintiffs therefore had to point to something which made it unconscionable for the debenture holders to rely on their rights at law. However, failure by Fortex to pay contributions did not impinge on the debenture holders' consciences.
- Accordingly, there was no justification for the intervention of equity.

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