

IN THE SUPREME COURT OF NEW ZEALAND

SC 51/2016
[2016] NZSC 100

BETWEEN HILARY JANE CALVERT AND HGW
TRUSTEES LIMITED AS TRUSTEES
OF THE FRONGOPOULOS TRUST
First Applicant

CHRIS JAMES
Second Applicant

AND GRANT BRUCE REYNOLDS AS
LIQUIDATOR OF JAMES
DEVELOPMENTS LIMITED (IN
LIQUIDATION)
Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: M R Sherwood King and M A F Gilkison for Applicants
J M McCartney QC and A C Sorrell for Respondent

Judgment: 9 August 2016

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants (jointly and severally) must pay costs of \$2,500 to the respondent.**
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REASONS

[1] The first applicants (the trustees) are trustees of the Frongopoulos Trust (the trust). They were found liable for a debt of \$740,000 owing to the respondent as liquidator of James Developments Ltd (JDL). Dunningham J found they were liable for this sum and that their limitation defence (and a number of other defences no longer in issue) failed.¹ Their liability arose from an advance that had been made to

¹ *Reynolds v Calvert* [2015] NZHC 400 [High Court judgment].

the then trustees of the trust. In addition the second applicant, Mr James, was found in breach of his duty as a director of JDL to act in good faith and in the best interests of JDL.² However, the Judge found that this breach did not cause loss to JDL.³

[2] On appeal, the Court of Appeal dismissed the applicants' appeal and allowed a cross-appeal by the liquidator. It found that Mr James was also liable to the liquidator for \$740,000 plus interest under s 301 of the Companies Act 1993.⁴

[3] The trustees did not dispute that the \$740,000 was owed to JDL but argued that the action to recover it was out of time. This limitation defence failed because it was found that the trustees concealed the right of action first by alteration of records of JDL and the trust prior to the liquidation of JDL and secondly by the evasiveness of their dealings with the liquidator when he was inquiring about the debt.⁵

[4] The trustees seek to raise three points about the operation of s 28 of the Limitation Act 1950, which provides for the postponement of the limitation period in cases in which the right of action is concealed by fraud. We see the issues arising in respect of those points as essentially factual issues. None gives rise to a point of public or commercial significance. The Court of Appeal largely upheld the High Court findings, and we do not see any risk of a miscarriage if leave to appeal is not granted on those points.

[5] Mr James seeks to raise on appeal an argument that the Court of Appeal was wrong to find him liable to pay \$740,000 to the respondent under s 301 of the Companies Act on the basis that there was a causal link between his breach of director's duties and the loss to JDL of \$740,000. Mr James succeeded on this point in the High Court, on the basis that his breach of duty in participating in the alteration of the records of JDL and of the trustees to conceal the advance made to the trustees by JDL was not causative of loss to JDL. This was because of his belated admission that those steps should not have been taken and the consequent

² At [113] and [115].

³ At [110]–[111] and [119].

⁴ *Calvert v Reynolds* [2016] NZCA 151 (Harrison, Stevens and Miller JJ) [Court of Appeal judgment].

⁵ High Court judgment, above n 1, at [77]–[98]; Court of Appeal judgment, above n 4, at [21]–[57].

finding that the \$740,000 was owed by the trustees to JDL.⁶ The Court of Appeal said the alteration of JDL's records (in breach of his director's duty to JDL) was an attempt to give the trust a limitation defence it did not have to defeat JDL's and, subsequently, the respondent's claim to recover the \$740,000.⁷ The fact the loss was contingent on the success of the limitation defence did not affect the causative nature of his misconduct and he should be concurrently liable (with the first applicants) for JDL's loss.

[6] We sought further information from counsel as to whether the trustees had paid, or could pay, the amount they owe to the respondent. Counsel advised that the total amount for which the trustees are liable to the respondent, being the \$740,000 debt, plus interest and Court costs, is \$1,203,599.69. The trustees have paid \$1,150,000, so only \$53,599.69 is outstanding and arrangements have been made for payment of this. The trustees' payment of the amount they owe to the respondent means that the loss for which Mr James would be liable under s 301 under the Court of Appeal judgment is made good, which means he will have no liability in practical terms. In those circumstances, we do not consider it would be in the interests of justice to allow a further appeal on this point.

[7] The final proposed appeal ground effectively seeks the reversal of this Court's decision in a case decided six years ago between JDL and Mana Property Trustee Ltd.⁸ This is misguided, not only because Mana Property Trustee Ltd is not a party to the current proceeding, but also because the decision of this Court was final and was made six years ago.

[8] It is not in the interests of justice to grant leave to appeal and the application is therefore dismissed.

⁶ High Court judgment, above n 1, at [119].

⁷ Court of Appeal judgment, above n 4, at [60].

⁸ *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805.

[9] The applicants must pay costs of \$2,500 to the respondent. Their liability is joint and several.

Solicitors:
Mackay & Gilkison, Wellington for the Applicants
Whitlock & Co, Auckland for the Respondent