IN THE SUPREME COURT OF NEW ZEALAND

SC 46/2016
[2016] NZSC 94

BETWEEN	VIVIEN JUDITH MADSEN-RIES AND HENRY DAVID LEVIN AS LIQUIDATORS OF PETRANZ LIMITED (IN LIQUIDATION) First Applicants
	PETRANZ LIMITED (IN LIQUIDATION) Second Applicant
AND	DARRELL WARREN KARANEIHANA PETERA First Respondent
	DIANA JOY PETERA Second Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: N H Malarao for Applicants
No appearance for Respondents

Judgment: 28 July 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order for costs.

REASONS

[1] The first and second respondents (the Peteras) were the sole directors and shareholders of the second applicant, Petranz Ltd, which went into liquidation on 30 January 2009. It owed around $132,000, most of which represented liability for unpaid taxes (and penalties). Both the liquidators (the first applicants) and Petranz sued the Peteras, alleging various breaches of duty and claiming that the Peteras

were liable to repay Petranz their shareholder current accounts and certain remuneration they had received as directors. Lang J held that the Peteras owed around $140,000 on their current accounts[1] and, in addition, ordered them to pay $64,000 arising from breaches of their duties to the company[2] and $20,000 for failing to keep adequate accounting records.[3] The Judge declined the company's application for repayment of directors' remuneration. The Judge found that although the Peteras had not complied with s 161 of the Companies Act 1993 in paying the directors' remuneration, they had established in terms of s 161(5) that the payments were fair to the company at the time they were made.[4] In making the fairness assessment under s 161, the Judge accepted that regard should be had to the company's actual and contingent creditors at the time.[5]

[2] Petranz appealed against Lang J's decision in respect of directors' remuneration. Having considered the structure of the Companies Act, the Court of Appeal concluded that that the concept of "fairness" in the Act, and in s 161 in particular, did not require consideration of the interests of creditors.[6] Rather, it required consideration of the potentially competing interests of a company and its directors, of a company and its shareholders, and of shareholders themselves.[7] Nevertheless, directors may be liable "to contribute to an insolvent company's assets to reflect losses attributable to the payment of director remuneration and, in turn, a company's failure to meet its obligations to its creditors".[8] The Court upheld Lang J's finding that the remuneration was fair to the company at the time it was made.[9]

[3] Petranz now seeks leave to appeal against the Court of Appeal's decision. The primary ground of appeal is that the Court of Appeal interpreted the phrase "fair to the company" in s 161(5) incorrectly, in particular by not taking the company's

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1 *Madsen-Ries v Petera* [2015] NZHC 538 [*Madsen-Ries* (HC)] at [46].
2 At [105].
3 At [108].
4 At [49]–[51].
5 At [49].
6 *Madsen-Ries v Petera* [2016] NZCA 103 (Winkelmann, Courtney and Clifford JJ) [*Madsen*-Ries (CA)] at [17] and [38].
7 At [38].
8 At [17]. See also [34]–[39].
9 At [49].

worsening insolvency at the time the payments were made into account in the "fairness" analysis.

[4] We accept that the interpretation of the phrase "fair to the company" in s 161 raises an arguable issue of general or public importance. That does not mean that the Court must grant leave to appeal, however.[10] We are not satisfied that it is necessary in the interests of justice that we hear this appeal, for two reasons.

[5] First, Lang J accepted that the interests of creditors were relevant to the s 161 fairness analysis.[11] He nevertheless found that the Peteras had proved that the payments were fair to the company,[12] an assessment upheld by the Court of Appeal.[13] So if Petranz were to succeed on the legal argument, it would not simply be a matter of quashing the decision of the Court of Appeal and reinstating the decision of the High Court. Rather, the Court would be required to undertake its own assessment of whether the payments were fair to the company in the particular circumstances of this case. The Court would not normally give leave in respect of issues of that type as they are matters of application rather than principle.

[6] Second, the Court of Appeal noted that although the company's debt on insolvency was around $132,000, the amount sought by the liquidators from the Peteras totalled just under $600,000.[14] These included the liquidators' costs, which up to trial were approximately $280,000, with further costs incurred since then in relation to the hearings in the Courts below. Given the level of the company's indebtedness and the amounts awarded by Lang J, there is clearly an issue of proportionality.

[7] We also note that it is unlikely that any further award against the Peteras would have any practical significance given their apparent financial situation. The Peteras appeared for themselves in the High Court but entered no appearance in the Court of Appeal. They have advised that they are not in a position to participate in the leave application or any subsequent appeal because they cannot afford a lawyer

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10 See, for example, *LFDB v SM* [2014] NZSC 197 at [20]–[21].
11 *Madsen-Ries* (HC), above n 1, at [49].
12 At [51].
13 *Madsen-Ries* (CA), above n 6, at [48].
14 At [8].

and are facing bankruptcy proceedings brought by the liquidators. In a practical sense, the appeal is moot as far as they are concerned. Moreover, as a consequence of their financial position, if leave were granted, there would be no contradictor.

[8] Accordingly, the application for leave to appeal is dismissed. Given that the Peteras did not participate in the application, there is no order for costs.

Solicitors:
Meredith Connell, Auckland for Applicants