



**Supreme Court of New Zealand
Te Kōti Mana Nui**

15 March 2016

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**MARK STEPHEN HOTCHIN v THE NEW ZEALAND GUARDIAN TRUST
COMPANY LIMITED**

(SC 92/2014) [2016] NZSC 24

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Mr Hotchin was a director of a number of finance companies which ceased trading in July 2008. The New Zealand Guardian Trust Company (Guardian Trust) was the trustee for the securities offered by one of these companies, Hanover Finance Ltd (Hanover Finance).

On 7 December 2007 Hanover Finance registered a prospectus containing an offer of secured debenture stock under a trust deed between Hanover Finance and Guardian Trust dated 18 July 1985. The prospectus was continuously distributed between 7 December 2007 and 23 July 2008, when Hanover Finance suspended the offer. The assets of Hanover Finance were not sufficient to meet its obligations.

The Financial Markets Authority (FMA) filed proceedings against Mr Hotchin and others alleging that the Hanover Finance prospectus contained untrue statements and that this had caused loss to investors. Similar allegations were made regarding the directors’ certificates issued to obtain extension of the prospectus. Overall, it was claimed that the Hanover Finance prospectus conveyed a misleading impression as to Hanover Finance’s financial position and failed to give proper emphasis to matters material to risk.

Mr Hotchin claimed that the Guardian Trust was liable to contribute to any compensation he was required to pay to the FMA and joined Guardian Trust as a third party to the FMA proceeding. His claim for contribution was on two alternative bases: under s 17(1)(c) of the Law Reform Act 1936 (the 1936 Act) and under the common law regime for equitable contribution. Guardian Trust applied to strike out the third party claim.

Under s 17(1)(c) of the 1936 Act, where damage is suffered by any person as a result of a tort, any tortfeasor may recover contribution from any other tortfeasor who is liable in respect of the same damage. It was accepted for the purposes of the strike out application that Mr Hotchin could be liable to the Hanover Finance investors in tort. The strike out application therefore stood or fell on whether Guardian Trust's liability to the investors was in respect of the "same damage" as Mr Hotchin's liability.

In the High Court, Winkelmann J concluded that the damage resulting from the alleged breaches of duty by the directors and that resulting from the alleged breach of duty by Guardian Trust were not the same damage. She said that Guardian Trust could not be liable for the loss independently caused by the directors, assuming the FMA's claim against the directors succeeded. For similar reasons, the claim for equitable contribution failed and the third party claim was struck out. The Court of Appeal upheld the decision of Winkelmann J.

The Supreme Court granted Mr Hotchin leave to appeal on the question of whether the Court of Appeal was correct to uphold the striking out of Mr Hotchin's third party claim.

After the hearing in the Supreme Court, the FMA and Mr Hotchin settled their proceedings. The Supreme Court has held unanimously that a settlement does not prevent a third party claim for contribution proceeding. As Mr Hotchin accepted, however, he will need to prove at trial that he is liable in tort to the investors.

As to the striking out of the contribution claim, by majority the Supreme Court has allowed the appeal (Elias CJ, William Young and Glazebrook JJ). With regard to s 17(1)(c) of the 1936 Act, the majority have held that the words of the statute require only the same damage. There is no additional requirement. In this case the claims against the directors and the claim against Guardian Trust both relate to the same damage, being the loss in value of the investments. As to equitable contribution, the majority are satisfied that the test is the same as under s 17(1)(c) and all that is required is the same damage.

The minority (Arnold and O'Regan JJ) would have held that same damage (both under the 1936 Act and for equitable contribution) requires a legal analysis of the claims against each tortfeasor to determine whether the tortfeasors have a common liability to the plaintiff. On the facts of this case, the minority is of the view that the damage suffered as a result of Mr Hotchin's negligent misstatements was not the same as the damage suffered as a result of Guardian Trust's negligent monitoring. They would have dismissed the appeal.

In accordance with the views of the majority, the appeal is allowed.

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