

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 87/2018  
[2018] NZSC 120

BETWEEN ROBT JONES HOLDINGS LIMITED  
Applicant

AND ANTHONY JOHN McCULLAGH AND  
STEPHEN MARK LAWRENCE  
Respondents

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: D G Chesterman for Applicant  
B P Keene QC and L M Van for Respondents

Judgment: 6 December 2018

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JUDGMENT OF THE COURT

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- A** Leave to appeal is granted (*Robt Jones Holdings Ltd v McCullagh* [2018] NZCA 358).
- B** The approved question is whether the payments totalling \$262,758.05 made to the applicant by MSH No 2 Pty Ltd on behalf of Northern Crest Investments Ltd were insolvent transactions as defined in s 292 of the Companies Act 1993.
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REASONS

[1] The approved question is worded to provide a framework for the applicant's argument that a payment of the company will not be an insolvent transaction within s 292 of the Companies Act 1993 unless, in addition to the requirements of s 292(2), it diminishes the assets that would be available to creditors in the liquidation of the company or otherwise disadvantages the general body of creditors.

[2] The Court of Appeal indicated that it would be content to find that the basis on which MSH No 2 Pty Ltd (MSH) made the payments to the applicant on behalf of Northern Crest Investments Ltd (Northern Crest) was that the payments were either a loan or the redirection of licence fees payable to Northern Crest.<sup>1</sup> If the applicant's argument outlined at [1] above is upheld, it may become necessary to resolve the issue of whether the payments were a loan or a redirection of licence fees. If the payments were a loan, it appears that the assets available to creditors of Northern Crest were not diminished and the general body of creditors were not disadvantaged, but that would not appear to be the case if the payments were a redirection of licence fees payable to Northern Crest.

[3] The parties should address in their submissions on the appeal whether it will be necessary to resolve the basis on which the payments by MSH to the applicant were made if the applicant's argument outlined at [1] above succeeds and, if so, how the Court should resolve it. Submissions should address whether, if the issue requires resolution, this Court should deal with the issue itself or the case should be remitted to the Court of Appeal for that Court to deal with it.

Solicitors:  
Gillespie Young Watson, Lower Hutt for Applicant  
Anthony Harper, Auckland for Respondents

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<sup>1</sup> *Robt Jones Holdings Ltd v McCullagh* [2018] NZCA 358 (Cooper, Winkelmann and Williams JJ), at [120]. In the High Court, Gordon J found the payments were a loan by MSH to Northern Crest: *McCullagh v Robt Jones Holdings Ltd* [2017] NZHC 2182, [2018] NZCCLR 8 at [163].