IN THE SUPREME COURT OF NEW ZEALAND

SC 71/2009
[2009] NZSC 103

BETWEEN	CONWAY LEWIS First Applicant
AND	JOHANNA LEWIS Second Applicant
AND	KAREN BETTY MASON AND JEFFREY PHILIP MELTZER AS LIQUIDATORS OF GLOBAL PRINT STRATEGIES LIMITED (IN LIQUIDATION) Respondents

Court: Blanchard, Tipping and Wilson JJ

Counsel: P J Davey for Applicants
C A Murphy for Respondents

Judgment: 14 October 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 to the respondents.

REASONS

[1] This is a proposed appeal against orders made under ss 300 and 301 of the Companies Act 1993 requiring the appellants to contribute the sum of $560,000 to the assets of a company in liquidation, they having been directors of the company and having been found to have breached their duty to it under s 135 of the Act (reckless trading). The applicants have benefited from an earlier judgment of the Court of Appeal in this proceeding[1] in which, as the Court of Appeal has now

1 *Mason v Lewis* [2006] 3 NZLR 225.

confirmed, the maximum liability of the applicants was capped at $560,000. That was because the liquidators at the earlier time sought no more than that amount. That ruling did not, however, prevent the liquidators from establishing that the level of the company's indebtedness to which the liquidators' claim related was higher than $560,000.

[2] Three issues are sought to be raised by the appeal to this Court. The first concerns the size of the relevant indebtedness. The Court of Appeal has said that this was approximately $1.7m in the case of Mr Lewis and $1.3m in the case of Mrs Lewis, she having resigned as a director earlier than him. It is said that the Court of Appeal erred in including a secured creditor's claim for post-liquidation interest. However, it seems to us that the Court of Appeal was entirely correct on this point. There would be no logic in excluding such ongoing interest which is part of the loss suffered by creditors. It is beside the point that because of the liability cap of $560,000 the unsecured creditors will not benefit. In principle, the post-liquidation interest should form part of the creditors' pool for the purpose of assessing the liability of an errant director. The proposed argument for the applicant has no merit.

[3] The second issue raised for the applicants is whether the Court of Appeal erred in considering that the conduct of the applicants contributed to causing the creditors' losses. The argument appears to be precluded by a finding concerning causation made in the first appeal. But, in any event, it is plain that if the applicants had properly performed their directors' duties the losses very probably would not have occurred. If they had given proper attention to the affairs of the company they would surely have appreciated that it was incurring unsustainable losses. We agree with the opinion of the Court of Appeal[2] that the applicants could then have taken steps to ensure that further debts were not incurred.

[4] The third complaint by the applicants is that their culpability was less than that of the director who committed frauds and should not have been assessed as a

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2 [2009] NZCA 306 at para [82].

60% responsibility for the additional indebtedness. But whilst that argument might possibly have some substance, the existence of the cap on liability has the result that the quantum of the award is, in the case of both applicants, already a great deal less than 60% of the relevant indebtedness and we are not persuaded that, given the total neglect of their duties by the applicants, this Court would or should make the substantial adjustment which would be needed in order to alter the result reached in the Court of Appeal.

[5] No arguable point of public or general importance is raised nor is there any appearance of a miscarriage of justice.

Solicitors:

Gill, Coutts & Co, Auckland for Applicants

Shieff Angland, Auckland for Respondents