IN THE SUPREME COURT OF NEW ZEALAND

SC 18/2010
[2010] NZSC 56

BETWEEN	AI NEE CHEAN Applicant
AND	HERALD VICTOR DE ALWIS First Respondent
AND	M E AND H V DE ALWIS Second Respondent
AND	JOHN WAH KUM Third Respondent
AND	CONNIE FAY LING KUM Fourth Respondent
AND	MARSHA ADREINNE TAI PING TAN Fifth Respondent
AND	PETER THUTT PITT WEE Sixth Respondent
AND	PAUL SENG POH KHOR Seventh Respondent

Court: Blanchard, Tipping and Wilson JJ

Counsel: E Orlov for Applicant
G A D Neil and J Carlyon for Sixth Respondent

Judgment: 18 May 2010

JUDGMENT OF THE COURT

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

REASONS

[1] The proposed appeal concerns the liability of a director, the applicant, under s 37(6) of the Securities Act 1978 to repay share subscription moneys in the amount of $150,000 unlawfully raised by Luvit Foods International Limited without issuance of a prospectus. The subscriber for the shares in question was Mr Wee, the sixth respondent. (The applicant was successful in the Court of Appeal in having summary judgment in favour of the other respondents overturned.) Mr Wee's subscription was paid by him to the company on 27 September 2001. It is accepted for the purpose of summary judgment that it cannot be said that Ms Chean became a director before 15 October 2001 but, on that basis, she was a director at the time when liability of the directors arose two months after the subscription, in terms of s 37(6).

[2] The Court of Appeal held, in a convincing judgment,[1] that s 37(6) applies to a director who is in office at the date on which the repayment obligation arises. If the provision was limited to directors who were in office at the time of an invalid allotment, it would say so. The Court of Appeal also concluded that Ms Chean was not protected by the proviso to the subsection which says that a director is not liable if he or she proves that the default in the repayment of the subscriptions was not due to any misconduct or negligence on his or her part. The Court concluded that the onus of proof in this respect lay on Ms Chean who had provided no evidential foundation for her assertion that the default in repaying Mr Wee's subscription was not due to any misconduct or negligence on her part. This is a factual issue and the applicant has not demonstrated the possibility that there has been a miscarriage of justice in the determination by the Court of Appeal, nor in that Court's refusal to admit new evidence concerning the application of part of the amount paid by Mr Wee.

[3] The further proposed argument concerning the finding of issue estoppel against the applicant is insufficiently arguable. Nor is there any basis for the applicant's argument that there was a separate estoppel operating in her favour based

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1 *Chean v De Alwis* [2010] NZCA 30.

on a statement in an earlier High Court judgment that Mr Chean (the applicant's husband) was the sole director of Luvit. That matter was not in issue between the parties to that judgment.

Solicitors:
Botany Law, Auckland for Applicant
Meredith Connell, Auckland for Sixth Respondent