

IN THE SUPREME COURT OF NEW ZEALAND

SC 90/2017  
[2017] NZSC 160

BETWEEN ANGELA CLAIRE SHAW AND IAN  
ALEXANDER SHAW  
Applicants

AND COLIN DAVID OWENS AND DAVID  
STUART VANCE AS THE  
LIQUIDATORS OF ALUMINIUM PLUS  
WELLINGTON LIMITED  
Respondents

Court: Elias CJ, Glazebrook and Ellen France JJ

Counsel: Applicants in person  
J R Sumner for Respondents

Judgment: 20 October 2017

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JUDGMENT OF THE COURT

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- A The application for an extension of time to appeal is granted.**
- B The application for leave to appeal is dismissed.**
- C Costs of \$2,500 are awarded to the respondents.**
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REASONS

**Introduction**

[1] Mr and Mrs Shaw apply for leave to appeal against a judgment of the Court of Appeal,<sup>1</sup> which partially upheld a judgment of Brown J.<sup>2</sup>

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<sup>1</sup> *Shaw v Owens* [2017] NZCA 315 (Harrison, Miller and Clifford JJ) [CA decision].

<sup>2</sup> *Owens v Shaw* [2016] NZHC 1400 [HC decision].

## Background

[2] Mr and Mrs Shaw are trustees of the I & A Shaw Family Trust (the Trust), which operates as a glazier and a manufacturer of aluminium joinery. One of its suppliers, CSR Viridian (New Zealand) Ltd (Viridian), was only prepared to contract with a company. Mr and Mrs Shaw therefore incorporated a company, Aluminium Plus Wellington Ltd (Aluminium Plus), to contract with Viridian.<sup>3</sup> Aluminium Plus essentially operated as a conduit for the Trust. It had no bank account and simply passed on supplies from Viridian to the Trust, which then paid Viridian's invoices directly.<sup>4</sup>

[3] Between 7 October and 20 December 2013 Aluminium Plus did not pay for materials supplied by Viridian to the value of \$61,043.05 because it considered them defective.<sup>5</sup> Viridian subsequently obtained a default judgment against Aluminium Plus in the District Court for \$87,648.82 including interest and credit consultant's costs of \$14,108.90, together with other costs and disbursements. Aluminium Plus failed to pursue a notice of defence and counterclaim, which it had originally filed to Viridian's claim. Nor did it take any steps to apply to set aside the default judgment.<sup>6</sup> Costs for the counterclaim were also entered against Aluminium Plus.

[4] Aluminium Plus was wound up by order of the High Court for its failure to comply with Viridian's statutory demand for \$88,814.54.<sup>7</sup> On 18 October 2014 Messrs Owens and Vance were appointed as the liquidators of Aluminium Plus. The company's only creditors other than Viridian were owed just over \$10,000.<sup>8</sup>

[5] The liquidators issued proceedings in the High Court to recover from Mr and Mrs Shaw the sums owing by Viridian (\$99,005.03) plus the costs and disbursements of liquidation (\$26,879.56).

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<sup>3</sup> CA decision, above n 1, at [2].

<sup>4</sup> At [3].

<sup>5</sup> At [4].

<sup>6</sup> At [5].

<sup>7</sup> Comprising the judgment for Viridian of \$87,648.82, costs of \$1,068.50 for the counterclaim and interest of \$97.22.

<sup>8</sup> CA decision, above n 1, at [6].

## High Court judgment

[6] Brown J in the High Court, based on evidence given by Mr Shaw and despite indications to the contrary,<sup>9</sup> proceeded “on the somewhat surprising footing” that Mr and Mrs Shaw as directors of Aluminium Plus had in December 2013 agreed to release the Trust from the purchase and supply agreement<sup>10</sup> so that it had no obligation to pay the extant Viridian invoices.<sup>11</sup> He said that, although “it may appear to be a rather fictional arrangement”, his impression of Mr Shaw was that such an arrangement “would appeal as logical to him”.<sup>12</sup>

[7] Brown J, however, upheld the liquidators’ claims that Mr and Mrs Shaw were guilty of reckless trading and negligence in breach of the duties imposed by ss 135 and 137 of the Companies Act 1993 respectively.<sup>13</sup> The recklessness of Mr and Mrs Shaw arose from their election to release the Trust from its obligation to pay Viridian on Aluminium Plus’ behalf for supplies of materials.<sup>14</sup> This decision exposed Viridian to the risk of loss because Aluminium Plus had no income or assets to pay the invoices then outstanding.<sup>15</sup> The negligence of Mr and Mrs Shaw lay in releasing the Trust from its agreed role as funder of Aluminium Plus’ purchases in circumstances where there was no other source of funding and the prospect of an offsetting counterclaim was speculative.<sup>16</sup>

[8] Brown J ordered Mr and Mrs Shaw to pay compensation under s 301 of the Companies Act of \$125,884.59.<sup>17</sup>

## Court of Appeal judgment

[9] The Court of Appeal was satisfied that Mr and Mrs Shaw’s decision in December 2013 to release the Trust from its obligations was in breach of their duty to exercise the care, diligence and skill expected of reasonable directors, given that

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<sup>9</sup> See HC decision, above n 2, at [26]–[27].

<sup>10</sup> At [28].

<sup>11</sup> At [30].

<sup>12</sup> At [28].

<sup>13</sup> The claim under s 136 was dismissed.

<sup>14</sup> At [44].

<sup>15</sup> At [43].

<sup>16</sup> At [52].

<sup>17</sup> At [66]. This comprised the company’s debts of \$99,005.03 plus the costs and disbursements of the liquidation of \$26,879.56 referred to above at [5].

the inevitable and immediate consequence was to render Aluminium Plus insolvent.<sup>18</sup>

[10] The Court of Appeal, however, considered that Brown J erred in allowing all of the liquidators' costs of \$26,879.56 within the compensation award. It therefore allowed the appeal to the extent of quashing the amount of the High Court judgment of \$125,884.59 and substituting the amount of \$106,505.03.<sup>19</sup>

### **Extension of time**

[11] The application for leave to appeal was out of time by three days.<sup>20</sup> An extension of time to appeal is granted. The length of delay is short. It arose through inadvertence and there is no prejudice to the respondents from the three day delay.

### **Application for leave**

[12] Mr and Mrs Shaw submit that Brown J failed to appreciate that the December 2013 agreement was also a settlement of all claims the Trust may have had against Aluminium Plus in relation to faulty glass supplied to it. It is submitted that Brown J could not accept part only of Mr Shaw's evidence about the agreement. This affected the issue of liability of the directors under ss 135 and 137.

[13] Mr and Mrs Shaw also submit that the Court of Appeal was wrong to accept an apparent concession by their counsel with regard to the counterclaim. In their submission there was inadequate or no weight put on the counterclaim against Viridian. They say that the directors' intentions, properly understood, were to use the counterclaim as a means of establishing the amount owing. Any shortfall would have been paid to the Trust. The intention therefore was not to leave the company in an insolvent state.

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<sup>18</sup> CA decision, above n 1, at [15]. The Court therefore did not need to deal with the recklessness issue: at [11]. Nor did it, because of a concession made by counsel for the Shaws, need to take into account Aluminium Plus' counterclaim against Viridian: at [10].

<sup>19</sup> At [16] and [24].

<sup>20</sup> Pursuant to r 11 of the Supreme Court Rules 2004, the application for leave to appeal should have been filed on 22 August 2017. It was, however, filed on 23 August and served on 25 August 2017.

[14] Mr and Mrs Shaw also submit that s 135 should not be applied to a single transaction and that it and ss 136 and 137 require actions “in a business sense culpable or gross”. They also submit that they were prejudiced by the requirement to file an information capsule in the District Court under r 2.15 and r 2.39 of the then current District Courts Rules 2009.

[15] The respondents submit that the factual findings were open to Brown J who was not obliged to accept all of Mr Shaw’s evidence. In any event it is clear that Brown J understood the alleged scope of the December 2013 agreement. As to the counterclaim, the Court of Appeal was not obliged to consider it after the concession by counsel. In any event Aluminium Plus did not prosecute the counterclaim. Further, neither the Trust nor Aluminium Plus ever paid Viridian’s judgment debt. This is inconsistent with Mr and Mrs Shaw’s current assertion that Viridian would be paid if no defence to its claims was established. It is submitted also that the Court of Appeal applied the correct legal tests under ss 135 and 137.

### **Our assessment**

[16] The matters Mr and Mrs Shaw seek to raise are largely factual and related to the particular circumstances of this case. It is therefore not of general public or commercial importance. Further, nothing raised by Mr and Mrs Shaw suggests that the Court of Appeal’s decision was wrong or that it has resulted in the risk of a miscarriage of justice.<sup>21</sup>

### **Result**

[17] The application for an extension of time to appeal is granted.

[18] The application for leave to appeal is dismissed.

[19] Costs of \$2,500 are awarded to the respondents.

Solicitors:  
Ford Sumner, Wellington for Respondents

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<sup>21</sup> In the sense required in civil cases: see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.