

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 29/2019
[2021] NZSC 104

BETWEEN

VIVIEN JUDITH MADSEN-RIES AND
HENRY DAVID LEVIN AS
LIQUIDATORS OF DEBUT HOMES
LIMITED (IN LIQUIDATION)
First Appellants

DEBUT HOMES LIMITED (IN
LIQUIDATION)
Second Appellant

AND

LEONARD WAYNE COOPER
First Respondent

LEONARD WAYNE COOPER AND
TRACEY COOPER AS TRUSTEES OF
THE L & T COOPER FAMILY TRUST
Second Respondents

Court: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and
Williams JJ

Counsel: N H Malarao and P V Shackleton for Appellants
R B Hucker and R F Selby for Respondents

Judgment: 24 August 2021

JUDGMENT OF THE COURT

**A The application for recall of this Court's judgment of
24 September 2020 (*Madsen-Ries v Cooper* [2020] NZSC
100) is dismissed.**

B The respondents must pay the appellants costs of \$1,500.

REASONS

Background

[1] In our judgment of 24 September 2020 in *Madsen-Ries v Cooper*, we made a costs order against the respondents.¹ This means that both the first and second respondents bear joint and several liability for the payment of the costs order.

[2] By memorandum of 1 July 2021, Mr and Mrs Cooper seek recall of this Court's judgment to clarify that the costs order is made solely against Mr Cooper as first respondent. This is on the basis that the second respondents took no active steps either in this Court or the Court of Appeal, although they were represented by the same counsel as Mr Cooper in the High Court. Further, it was only a small part of the argument that an order should not have been made, under s 299 of the Companies Act 1993, that the security in favour of the second respondents be set aside to the extent of any compensation payable by Mr Cooper. Mr Cooper submits that it was in his capacity as director of Debut Homes Ltd that he made submissions on the s 299 issue.

[3] The appellants say that the L & T Cooper Family Trust sought to uphold the Court of Appeal's decision on the s 299 order and made submissions through Mr Cooper. It did not differentiate its position from that of Mr Cooper. Further, the submissions advanced in this Court on the s 299 order were inextricably intertwined with the breach of duty issues. They also say that related parties to the same appeal should be discouraged from effectively appointing one party to pursue all appeal points in order to try and shield themselves from costs awards.

Our assessment

[4] It is true that the second respondents were not recorded as being represented in this Court. However, it would be artificial to allow Mr Cooper to compartmentalise his roles in this manner and assert he was acting in only one capacity when making submissions on the s 299 issue. We also accept the

¹ *Madsen-Ries v Cooper* [2020] NZSC 100 at [191].

appellants' submission that the issues of breach of duty and s 299 were inextricably intertwined.

Result

[5] The application for recall of this Court's judgment of 24 September 2020 (*Madsen-Ries v Cooper* [2020] NZSC 100) is dismissed.

[6] The respondents must pay the appellants costs of \$1,500.

Solicitors:

Meredith Connell, Auckland for Appellants

Hucker & Associates, Auckland for Respondents