IN THE SUPREME COURT OF NEW ZEALAND

SC 51/2005

IN THE MATTER	of an Application for Leave to Appeal
BETWEEN	**KLAUS LOWER**
	Appellant
AND	**GARY TRAVELLER AND JOHN ANTHONY WALLER**
	Respondents

Hearing 2 December

Coram Elias CJ
Blanchard J

Counsel D J White QC and M H L Morrison for Applicant
M D O'Brien and B M Cash for Respondents

APPLICATION FOR LEAVE TO APPEAL

10.02 am

White As Your Honours please I appear with my friend Mr Morrison for the applicant.

Elias CJ Thank you Mr White, Mr Morrison.

O'Brien Yes if Your Honours please, my name is O'Brien and I appear with my learned friend Mr Cash for the respondents.

Elias CJ Thank you Mr O'Brien, Mr Cash. Yes Mr White.

White If Your Honours please the applicant accepts of course that the Supreme Court appropriately adopts a strict approach to applications for leave. But we say here that a substantial miscarriage of justice has occurred or will occur because in this case the High Court had no

jurisdiction to enter judgment against the applicant for 8.4 million dollars under s.320 of the Companies Act 1955.

Blanchard J Are you putting this on the basis of substantial miscarriage of justice rather than a point of general or public importance.

White Both Your Honour. But to begin with I was addressing the miscarriage of justice point. The issues of general and public importance arise both in relation to the questions of the application of ss.17 to 19 of the Interpretation Act. And then if one were to get that far, as far as the alternative grounds raised by the respondents are concerned in relation to the other, the section that we say would have been in force at the relevant time.

But just getting back to the miscarriage of justice point Your Honours. Our submission is that if the error is not corrected and the judgment is not set aside, that would an affront to the legal system. And we say that that is especially the case here for three reasons. First there does not appear to be any dispute between the parties that s.320 was repealed for all purposes as from the 1st of July 1994. And there's no dispute on that, it appears, either from the High Court judgment or the Court of Appeal.

So that the second point is the real issue is whether there was any ground for saving that repealed provision under which judgment was entered beyond that date.

And the third point is if the applicant is right and that there was no basis for saving the judgment beyond that date, then as the respondents contend, the judgment under the succeeding provision would have resulted in a reduction from 8.4 million to 6.3 million. That's a point made in their submissions to Your Honours at paragraph 2.12. Where they say that the only possible impact on changing liability from under s.320 to under s.189 or 135 would be to an award for the reduced period down to 6.3 million dollars. The applicant, as we've said in our submissions, does not accept that figure and is now quite sure how it was calculated. But for the purposes of this application, if one notices that figure, then our submission is that a reduction of 2.1 million can hardly be said to be a trifling matter and on its own would justify granting leave to hear the appeal.

Turning then to the prospects of success on the real issue as to whether there was any ground for saving s.320 beyond its repeal on 30 June 1994, our first point is as I've said that there doesn't seem to be any dispute that that was the position, that the section was repealed. Not disputed in any of the judgments or by the respondents. And our submission would be if leave were granted, that there was no basis on which s.320 could be saved beyond the 1st of July 1994.

And in order to indicate the basis on which that argument proceeds, it's necessary for me to take Your Honours to the judgments of the Court of Appeal in the Maney case and in this cases which appear in our bundle of authorities. (**Re Maney & Sons De Luxe Service Station Limited, Maney v Cowan** [1969] NZLR 116). First of all at tab.

Blanchard J Is this the point about the cause of action not accruing until a liquidator has been appointed or at least the company is in liquidation.

White Exactly Your Honour, yes. And that that is a matter of substance, not procedure.

Elias CJ I should indicate, and it's probably on a very superficial look at this, that I have difficulty with the cause of action concept here that s.320 and it's successor sections in the 1993 Act seem to me to provide a power which can be exercised as long a duty was breached under the existing law at the time of breach.

White If Your Honour by that means that there's a continuum between s.320 carried on through sections 189 and 135 and that when one, if the Court is dealing with it under ss 189 or 135, one can go back prior to their enactment.

Elias CJ I wasn't so much jumping to that, I was just questioning the idea of their needing to have been a completed cause of action including the liquidation. Because just looking at the statutes, I'm not sure that that jumps out at you.

White Well that's why I was going to take Your Honours.

Elias CJ Yes.

White To the Court of Appeal decision in re Maney.

Elias CJ Yes, yes.

White Because that's indeed.

Elias CJ That's where it comes from.

White That's where it comes from.

Elias CJ Yes I understand.

White And if, the submission would be that there is a clear conflict between the approach adopted in re Maney and in the Court of Appeal in this case. Re Maney is tab 3 of our bundle. And the relevant passages are in the judgment of the President, Mr Justice North starting at page 126 line 6. "The fundamental question as I see it then is whether s.320 as distinct from 321 does create new cause of action". And then he refers

to the submissions that were made. And he goes back to the English authorities which I don't think I need to take Your Honours through. But they are set out in full on that page and the next.

And then over on page 128, after referring to the English cases at line 18, the President said, "in my opinion it is plain that s.320 does create a new cause of action for it confers on a liquidator, a creditor or a contributory on liquidation the right to ask the Court in the circumstances stated to require the offending party to pay the debts or other liabilities of the company. This is surely a new liability and a new right not previously known to the law".

And then in paragraph further down that page, just after the quotation, "I am accordingly of the opinion that the liquidation is a material part of the cause of action and therefore the period of limitation does not begin to run until the commencement of the winding up and perhaps not until the appointment of the liquidator, a distinction which is of no importance in the present case".

And just to save me coming back to this matter to deal with one other point, if I can just note in passing at page 129 line 31, the President recorded that he was satisfied that moneys recovered under s.320 cannot be regarded either as a penalty or forfeiture. That's significant because of the provisions of s.19 of the Acts Interpretation Act. If it's not a penalty then that provision doesn't apply.

Then over the page Mr Justice Turner at page 131 at line 12, it does not appear that the period of limitation under s.320 or the date which it runs has ever been pronounced upon, even indirectly by any Court of competent jurisdiction. Then he refers to the authorities. And in line 41, "if these very obvious tests are applied to s.320 it is clear that the time cannot begin to run as regards the new causes of action which are given by the section until the winding up is commenced for until then there can be no liquidator to make a claim and if not the liquidator but some creditor or contributory of the Company is postulated as plaintiff, no such person can have a right of action until it has first appeared in the course of the winding up of the Company that there has been fraud".

So for completeness then. He also on page 132 between lines 39 to 50 agreed with the President that it was not a penalty.

And then Mr Justice Haslam at page 135 lines 28 to 30, "I agree therefore that s.320 is more than procedural in character and enables the claimant to set up a fresh cause of action which did not exist before liquidation".

So the position in Maney appears plain that it was, that the liquidation was a substantive requirement for the action under s.320. And prior to

liquidation there was no plaintiff because there was no liquidator or no person who had any rights to pursue.

Blanchard J But obviously there was an obligation or a duty not to conduct the affairs of the company in a reckless manner.

White If that's the way that s.320 was properly interpreted.

Elias CJ Well is there argument with that.

White Well it's the, I can see the line Your Honours are looking at.

Blanchard J I thought you might.

White One is.

Elias CJ Well I have no trouble with the fact that there has to be a liquidation in order for the remedy to be available to the liquidator.

White Yes.

Elias CJ But whether the claim that the liquidator makes has to refer, can refer to any breach which was a breach of the statute at the time the breach was entered into is the area of concern for me.

White Well can I before taking you to the, I was going to go next to the judgment of the Court below. But just to put this in context, can I take you back to the pleadings which are also in this bundle under tab 1.

Elias CJ Before you leave Maney though, it doesn't do more than say that there has to be a liquidation before you can use the section does it. That's really what it says.

White But that was a substantive requirement.

Elias CJ Yes.

White Well it says more than that, because there is no plaintiff, there is no person in existence with a right of action.

Elias CJ Yes.

White Because there was no liquidator. Until there's a liquidation obviously.

Elias CJ Yes there's no one who can claim under the section.

White Exactly.

Elias CJ Yes.

White Yes, yes. In order to answer Your Honour's questions, if it can just take Your Honours to the pleadings under tab 1. And there are two relevant causes of action or rather there were. Judgment of course only being entered under the first one. And that appears on page 13 of the judgment. Sorry of the statement, this is the third amended statement of claim, the one on which the case proceeded to trial. And the first cause of action is that is headed, first cause of action, s.320 of the Companies Act 1955 unamended. And in paragraph 53, from 30 June 1993 to 30 June 1994 the first and second defendants were knowingly parties to the carrying on of business in a reckless manner in breach of s.321B. Particulars for the period from 30 Jun '93 to 30 June 1994. So the then plaintiffs, now respondents, clearly viewed their first cause of action as being limited to s.320 and only for that period.

Blanchard J And they've been found to have been in breach of s.320.

White Yes.

Elias CJ During that period.

Blanchard J And they're not appealing that point. So then the question is, is there still a procedure whereby s.320 can be invoked.

White Not retrospectively, not after it's repealed.

Blanchard J Well that may be very debatable.

White Because the, well I'm happy to concede that it's debatable but that's a matter that would be debated.

Blanchard J Well what about s.301 of the '93 Act.

White That's not pleaded.

Blanchard J You don't have to plead it. That's only a procedure.

White Well none of.

Blanchard J And the breach of duty is pleaded, the breach of duty is the one that's been found, breach of s.320.

White But that, the cause of action these, our submission is that there can be no judgment entered on this cause of action under s.320 by these plaintiffs who had no such cause of action. You can't enter a judgment on a cause of action which you didn't have.

Elias CJ Why not under s.301.

White They don't, that's not.

Elias CJ Doesn't have to be pleaded does it. I mean the breach under s.320 is pleaded and then the remedy is provided by the law in force at the time the claim is made.

White But that, I don't think I can put it other than the way I just have. That this is the first cause of action under 320. And judgment has been entered against the appellant under this provision on this cause of action alone. That's all. And we say that as a matter of law, these liquidators had no cause of action under s.320.

Blanchard J Well I understand the argument.

White And that's highlighted by the second cause of action on page 17. Because as a second and alternative cause of action under s.189 of the Companies Act 1955 as amended, and s.135 of the Companies Act 1993, they plead, and paragraph 65 makes this clear, for the period from 1 July 1994 to 18 Feb 1998. So they clearly saw their two causes of action as quite separate and relating to two separate periods of time. And that's the way in which they presented their case. And in the High Court judgment was entered only in respect of the first cause of action and that judgment was upheld in the Court of Appeal on the basis that Maney's decision could be avoided by the application of ss.17, 18 and 19 of the Interpretation Act.

Blanchard J I gather the s.301 point was argued in the Court of Appeal but they didn't think it was necessary to get to it.

White I wasn't of course counsel in the Court of Appeal, Your Honour but I do understand that the matter was, that it was raised but they didn't get to it, no. And that of course is one of the potential difficulties here which I will be coming to and that the whole raft of alternative grounds are raised by my learned friends in their submissions, none of which were dealt with either by the High Court or the Court of Appeal. And our position is that if Your Honours are satisfied that judgment ought not to have been entered on the first cause of action under s.320 and these other matters were to be pursued, then they would need to be pursued at a hearing at which the first step would be.

Blanchard J Well the s.301 point wouldn't need to be because the factual findings have all been made and are not contested. There might be an issue about whether s.301 could be used as a procedural question.

White Yes well.

Blanchard J Whether it can apply back before the commencement of the 1993 Act.

White Having a retrospective effect.

Blanchard J Yes.

White Yes.

Blanchard J And.

Elias CJ Well arguably not having a retrospective effect.

Blanchard J Yes. That's what I think.

White Well there's an issue.

Elias CJ Well it's not at all evident to me that it does have retrospective effect.

White Section 301.

Elias CJ Mm, if applied to a pre-existing breach. What would be retrospective is if the breach hadn't be proscribed pre the coming into the effect of the 1993 Act but in fact what is relied on is a breach of s.320.

White If there is to be consideration of s.301, not something dealt with either by the High Court or the Court of Appeal, then our submission would be that that's something that would need to be considered on the hearing of this appeal. It could not be utilised by Your Honours to reject an application for leave to appeal. Because there are.

Elias CJ As long as the point is arguable because presumably if it's not arguable, and I'm not suggesting it isn't arguable, but if it's not arguable, we'd be entitled particularly on the basis of your ground of miscarriage of justice, to simply say, well the Court of Appeal might have got it wrong but it's obvious that there was authority to make the orders and the findings of breach aren't challenged.

White If it was able to put as broadly as that.

Elias CJ Yes.

White Possibly but.

Elias CJ But don't you have to Mr White, don't you have to actually address us on why it's not, what it is arguable that s.301 doesn't, couldn't be used in these circumstances.

White Well the first point Your Honours is that there were no rights held by anybody in respect of any breach of s.320. They simply didn't exist.

Blanchard J But there had been a breach.

White Well that's because of, for that period.

Blanchard J Mm.

White Because of the concurrent findings of fact.

Blanchard J Yes.

White Taking the course of not challenging there.

Blanchard J If in the course of a liquidation it appears to the Court that a person who is a past or present director has been guilty of breach of duty in relation to the Company, then the Court can etc. Well there was a breach of duty.

White But not when that section was in force.

Blanchard J Yes there was.

White Section 301, you were reading s.301?

Elias CJ Yes but the duty doesn't have to be under 301. That is the remedy provided by the 1993 Act.

Blanchard J It's an entirely remedial section, it's the equivalent of s.321 of the 55 Act.

White Yes sir but none.

Blanchard J Well isn't that the explanation for the disappearance of s.320. That it was unnecessary to bring it forward because 301 was available for past breaches and 135, I think I've got the number right, was available after the 1st of July 1994. I mean what your client is contending for is a gap in the legislation which would certainly be something that would be highly unlikely that if Parliament had addressed its mind to it would have wished to see occur.

White That certainly is an argument that would need to be addressed in the event that there were a hearing of the appeal. As far as the impact of the legislative changes is concerned.

Blanchard J Mm.

White Which is why in our.

Blanchard J But you're up against a pretty difficult argument aren't you.

White In relation to the 301?

Blanchard J Yes.

White Well if it was as clear as that one would have assumed that it would have been accepted in one of the Courts below which it hasn't been.

Blanchard J Well they didn't get that far in the Court of Appeal.

White No.

Blanchard J Because they thought that there was a direct route for the use of 320.

White And.

Blanchard J We don't know what they thought about the 301 argument.

White And that hasn't been, the arguments in response either way haven't been put.

Elias CJ Well.

White And determined by a Court.

Elias CJ Yes that.

White And there would need to be an argument, well it gets back to Your Honour's question, if there is, if it's as plain as Your Honour suggests, then I see the difficulty.

Elias CJ Mm.

White But I'm submitting first of all that the point hasn't been determined below and that the applicant should have the opportunity of addressing that.

Elias CJ Are you.

White But not on this application.

Elias CJ Yes. Are you indicating that, and it would be fair enough Mr White, I'm not seeking to criticise, but are you indicating that you would want to think further about s.301 and are not in a position to address us on the rather peremptory notion that it knocks you out of the water. And therefore that leave shouldn't be granted.

White Yes I would Your Honour, yes. Because it hasn't been put in those peremptory terms before. And we are seeking leave in relation to errors that we say occurred in the judgments that were delivered in the Courts below.

Elias CJ On the other hand, perhaps we should look at this and invite you to consider it because if it were the case that it's a total answer, what is the point of putting the parties to the expense of a further hearing.

White I would agree with that.

Elias CJ Yes.

Blanchard J I mean the likelihood of there being another case going back so far now is remote. I mean the limitation.

White No.

Blanchard J Well no, not perhaps a limitation problem but the company would have fallen over long since.

Elias CJ Mr White would it assist you if we took a short adjournment and you briefly looked at the section and considered whether you would want further opportunity to argue it or perhaps put forward why in any event it might be a matter of importance which the Court should entertain. Would it assist you to.

White I'd appreciate that Your Honour.

Elias CJ Yes.

White And it's not as though I hadn't cast my mind to the provision.

Elias CJ No.

White It's simply that in the way in which the submissions for the respondents have been presented, it's touched on but not in the way that Your Honours.

Elias CJ Yes.

Blanchard J Yeah well I must admit that I had to try and figure it out for myself and we haven't actually heard Mr O'Brien, I just hope that I've anticipated his argument. But it did seem a pretty obvious one when I came to it.

White Well I'd better not say anything in response to that.

Elias CJ Well shall we take a 15 minute adjournment and then we'll come back in and hear whether you'd like to, what position you'd like to take.

White As Your Honours please.

Elias CJ Yes thank you.

Court adjourns 10.30 am
Court resumes 10.51 am

Elias CJ Thank you. Yes Mr White.

White If Your Honours please I take the opportunity of endeavouring to suggest that there are some issues in relation to s.301. However, if

necessary it may be appropriate for me to seek further time but may I start at least.

Elias CJ Yes.

White Section 301.

Elias CJ Do we have, where is it, sorry, in the materials.

White Yes.

Elias CJ I had it separately.

White It's in our bundle Your Honours. Tab.

Elias CJ 9 is it.

White 9. The last page.

Elias CJ Oh right, thank you.

White It refers, it provides that if in the course of liquidation of a company it appears to the Court that a person who has taken part etc or has misapplied or retained or become liable or accountable for money or property of the company or been guilty of negligence, default or breach of duty in relation to the Company the Court may do various things. As the note underneath the section indicates, that section was the equivalent of s.321 in the Companies Act 1955. And as Your Honours will know there were significant differences between ss 320 and 321. So this is not the counterpart of s.320.

It refers to a breach of duty in relation to the company. And there is we would submit a real issue whether s.320 imposed any duties on directors in relation to a company in respect of which there could be breach for the purposes of s.301.

And that's reinforced by the law commission report which is under tab 11 at page 44 under the heading, directors' duties, what are they and to whom are they owed. And in paragraph 184 the present law relating to the duties of directors is inaccessible, unclear and extremely difficult to enforce. Its reform is a matter of urgency. And then at paragraph 186, significantly these duties are not contained in the 1955 Act. They have to be gleaned from a large volume of complex case law.

And that view, that general point that s.320 didn't contain the duty is reinforced by reference to the company law text at paragraph 12 under the heading insolvent and reckless trading. The last sentence in the first paragraph under that heading, however s.320 was limited in its application to Companies already in liquidation. Application could be made only by the liquidator and it was established that any recovery

from directors was held for the benefit of the companies unsecured creditors. The prohibition on reckless and insolvent trading by directors was substantially reformed by the Companies Act 1993 both as to its doctrinal nature and as to the scope of its operation. While s.320 of the 1955 Act was part of the rights vested in the liquidator, section 135 of the Companies Act has been recast as a duty of the directors to avoid causing loss to the co.

So that there is a real, and that continues along that line. There's a real argument that the whole purpose of s.189 and 135 was to put into the Companies Act a duty. But that was not what s.320 was all about.

Elias CJ There's no duty in s.320?

White No Your Honour. And the contrast in the wording is clear.

Blanchard J There just be a duty underlying it though or at the very least a default which is another word used in s.301.

White But.

Blanchard J I mean what would be the justification for penalising someone at the behest of the liquidator for having been party to carrying on the business of the company in a reckless manner if there was no duty on the part of such a person to avoid doing that.

White But no duty was imposed by s.320. Whereas under s.

Blanchard J Not in terms it wasn't.

White Exactly.

Elias CJ Well where did it arise. Where did the reckless trading duty arise. I mean 320 followed the, what was the English report, Jenkins or was it earlier.

White Green?

Elias CJ It was pre-Jenkins wasn't it.

White Green?

Elias CJ Green yes. Yes. Green. And it both imposed the duty and provided the remedy didn't it.

White No Your Honour because unless there were a liquidation there was no guarantee that what might have been possibly described as reckless at one time, the company may have traded out of it. There was no, no one could take action under s.320 to do anything.

Elias CJ Yes.

White Sans liquidation.

Elias CJ Yes. No I understand that. There is no occasion to have recourse to the remedy provided by s.320.

White Or the, sorry.

Elias CJ Yes.

White Or the right.

Elias CJ But 320 articulates a duty surely because it wasn't in the pre-existing law. It came out of green.

White But if it had created a duty, why then was the Law Commission concerned about having a duty in s.135, it was unnecessary.

Elias CJ Well there are other passages in that report which indicated that it, my recollection, that it be brought forward so that there is a statement of what all the duties are. So you don't need to go to the case law. You didn't need to go to the reckless trading provisions. Because that was recognised to be another source of duty. But however, I'm just trying to get, your argument is that there is no duty in s.320.

White Section 320 does not create a duty.

Elias CJ Right.

White It doesn't create a right either. It doesn't do anything until there's a liquidation.

Elias CJ Yes I accept that.

White And there may not, and that can be demonstrated because if there was an event let us say that could be described as reckless trading at a point of time, subsequently, having taken the reckless risks, the company might well trade out. The risks might turn to be the opposite.

Elias CJ But that's just another way or restating the obvious point, that in order to have this remedy, the company has to be in liquidation.

White Yes.

Blanchard J Would you apply the same argument to subsection (c) of s.320 subs, sorry paragraph C of section 320 subs 1. A person who is knowingly a party to the carrying on any business of the company with intent to defraud creditors. No duty of that kind?

White Not in the terms of the section. Because nothing happens unless there is a liquidation.

Blanchard J So there's no obligation on a director under a 1955 Companies Act company to avoid.

White Well you run serious risks if you're ultimately.

Blanchard J Intent to defraud creditors.

White If ultimately there's a liquidation. But if there's no liquidation then, duty, if we're going to go into.

Blanchard J And you're not in default?

Elias CJ You're going to go into Hofeld, yes.

White Into Hofeld, then there must be a counterpart.

Blanchard J You are not in default either.

White Not in.

Blanchard J You can intend to defraud creditors and there's no default unless the company goes into liquidation.

White Well that must be right because that's what the section says. It only arises if, if and when, there's a liquidation.

Elias CJ Well the liability under the section only arises if there's a liquidation. I think that's obvious. The question is whether there's a duty that is referred to.

White Well Hofeld would say there has to be a countervailing right to enforce the duty of which there wasn't. That's the point. There has to be.

Blanchard J So the company would have been powerless to take action against it's director.

White Under s.320. I'm not saying possibly under some other common law.

Blanchard J Well Mr O'Brien's seeking to argue that as well.

White Yes.

Blanchard J But that's another matter.

White That's another matter not pleaded of course.

Blanchard J Mm.

White So.

Blanchard J Alright, well for myself I understand the argument that you would intend to put up.

White And taking that, there is on other, or perhaps two or three other points I could made on that. The first one is that we've included in our bundle, one hesitates to cite a mere High Court decision, but it is a High Court decision under tab 5 of walker and Allen, Justice Wild (**Walker v Allen** [2002] 1 NZLR 278). Which dealt with other provisions of the 93 legislation where it was held that in that case duties in relation to reporting did continue backwards, or were able to be relied on and that was because of the provisions of s.300. But that is to be distinguished from the position here.

Elias CJ Sorry, why? What does s.300 say?

White Yes, it provided a remedy against directors past or present for breach of the companies statutory duties to keep proper accounting records. So that it was a specific provision in s.300.

Elias CJ Well you say it's distinguishable but was it comparable in the way expressed. You say it actually imposed a stand alone duty.

White It was distinguishable because it was not comparable.

Elias CJ Yes.

White Yes.

Elias CJ Well I was just looking for it to see whether that's right. But it's not here.

White I was just reading out from the text on paragraph 32 where the judge said what the purpose of it was.

Elias CJ Well if the purpose is to provide a remedy, that's why I'd like to see the text of s.300, if the purpose is to provide a remedy it seems quite similar.

White Well I'm sorry Your Honour, I don't have s.300.

Elias CJ Rt. We'll I'm not sure that really it is distinguishable then. Is this, sorry, this is the 1993 Act.

White Yes.

Elias CJ Yes.

White But the obligations to keep accounting records had run on in the same way unlike s.320 which had been repealed. That's the point of distinction. There was no equivalent to s.320 and that's not disputed, beyond the repeat on 30 June 1994. Contra the parallel provisions relating to the keeping of accounting records which ran on continuously under the two sets of legislation.

Elias CJ Well it's difficult to understand this argument without looking at the provisions isn't it. But.

White Well that gets back to, I mean I've done what I can in the time Your Honour.

Elias CJ Yes, yes.

White The other point I wanted to raise was that this was argued in the Court of Appeal as my learned friend have indicated but not dealt with. And I can really do no more than just indicate what was said for the appellant, the applicant here in the Court of Appeal. And it may be helpful if I just raise that briefly. It was said that it is necessary to consider if the general misfeasance provision contained in s.321 of the 1955 Act now found in s.301 of the 1993 Act. The respondent chose not to plead a claim based on s.321, so that point was taken.

Blanchard J But it's only a procedural section.

White Well only in the same way as s.321 was. But s.321 doesn't take the place of s.320.

Blanchard J I understand that.

White And section.

Blanchard J Because s.320 had its own mechanism.

White Yes Your Honour. But s.301 replaces 321, not 320.

Blanchard J Yes.

White In terms. So that the same differences would apply. And the pleading point was taken. And reliance or reference was made to the decision in Arataki Properties limited v Craig where a cause of action under s.321 accrues at the time of the wrongdoing, not at the time of the winding up. So there is that distinction. And even putting limitation issues to one side, the fact that s.320 creates a stand alone statutory cause of action is of paramount importance. It's part of a class of statutes which was described and then there's reference to authority. So I suppose the point I'm making Your Honours is that there certainly were arguments raised of substance on the part of the applicant on the equivalent, on this point. No doubt my learned friend similarly have arguments.

Blanchard J Is there a limitation point here. When was this proceeding commenced.

White Yes according to the registry number, 1998.

Blanchard J Right.

White So I think the position that I'm in Your Honours at the moment is that this issue was raised and argued at least in the Court of Appeal, I'm not sure about the High Court. But no judgment delivered on it. And that in our submission there are arguments that can certainly be advanced for the applicant in relation to that in respect of which the applicant would wish to be heard.

Elias CJ Yes thank you.

White I was then, before we ventured down the s.301 line, going to take Your Honours to the judgment of the Court of Appeal below. And I perhaps should still do that.

Blanchard J This is on the s.320 direct point.

White Yes, yes.

Blanchard J Well for myself at the moment anyway, subject to anything Mr O'Brien may say, I'd be inclined to think that the section 320 question and the use of the interpretation Act does raise a point of general or public importance. What I've been interested for myself in exploring is whether the s.301 route was sufficiently clear cut that one could say that you were inevitably going to fail on that ground and therefore no miscarriage of justice. And you've, in advancing the arguments, tried and demonstrate that that isn't the position.

White Yes, that it would be going too far at this point to say that it's inevitable, I suppose if that's.

Blanchard J In criminal law terms we couldn't apply the proviso.

White Yes Your Honour.

Elias CJ I'm not sure that that's the right analogy for leave or we might be applying, or we might be granting a lot of leave. But I think really what's being put to you is that perhaps you don't need to develop your argument on the other points.

White No.

Elias CJ Because, subject to what's said, and you can reply, we are minded to accept that there's a point of general and public importance if you're driven to the Interpretation Act.

White Yes.

Elias CJ As the Court of Appeal was.

White Well in those circumstances, if there is anything else I can usefully say at this point Your Honours.

Elias CJ Thank you Mr White.

11.11 am

Elias CJ Yes Mr O'Brien.

O'Brien Yes if Your Honours please I would like to start by inviting you to go just a tad further than something Justice Blanchard put about s.320. Your Honour said that it's very unlikely that Parliament would have intended there to be a lacuna. I would say Your Honours it is inconceivable that Parliament would have intended for there to be a lacuna and the ready answer is either the application of s.301 or the application of the Interpretation Act and in the way that the Court of Appeal has applied it. But either way, we get to the position where ultimately the judgment is upheld. And I'd like to start with that 301.

Elias CJ But Mr O'Brien you haven't given notice of seeking to uphold the decision of the Court of Appeal on other grounds than their decision.

O'Brien I think I did maam. But if I might just check.

Blanchard J Well you can do so orally if you haven't. I didn't notice it either. You've certainly mentioned 301 but it was a bit obscure what you were doing when you mentioned it, if I can put it that way.

O'Brien If I may come back to that point Your Honour. First of all paragraph 5 on page 10 of my written submission. I did mention it there maam.

Blanchard J Oh, yes I'm sorry. I'd missed that. I'd got too excited at an earlier stage of the submissions.

O'Brien I'm very pleased you did Your Honour. So why did I raise it in the way I raised it? Well partly for the reasons enunciated in 5 because of what I did need to give notice that we supported the judgment.

Blanchard J Mm.

Elias CJ Yes.

O'Brien On that other ground. And indeed it was raised and argued in the Court of Appeal.

Elias CJ Yes.

O'Brien But as Mr White says, there was no decision on it. But it was argued.

Elias CJ Yes.

Blanchard J Was the common law point argued in the Court of Appeal.

O'Brien Yes sir. Yes. We were very keen, having had this point arise in the Court of Appeal which hadn't arisen in the High Court, we were very keen to cover all of the necessary territory so that the case could be brought to an end. And Your Honours if I can just come back to 301. But on that point that I just raised, so that the case could be brought to an end, this case has been going on for 7 years. It's 2 ½ years since the High Court hearing. It's two years since the High Court judgment. It has consumed considerable time, considerable cost and that is a cost to the creditors who have already lost a considerable amount. My submission, and Sir the liquidator's funds inevitably are limited. The judgment is still to be enforced. So we have yet to cross the border into Germany and that may not be an easy matter. And in my submission it's time, in the interests of justice, for the case to stop. And of course Your Honours would grant leave if it's in the interests of justice to do so. My submission is that it's not. And it's not because there has been no miscarriage of justice. It's not because in my submission it's not a matter of general or public importance and I will come back to that, but at the end Your Honours, given your indication, and it is not because the right result has been achieved and it can be achieved by other mechanisms including in particular s.301 or for that matter, the application of the common law.

And if I might Your Honours just start with 301. I would simply adopt what's clearly Your Honours' thinking, that it is available. My friend says no because s.320 is not a duty. The answer to that in my submission Your Honours is that it's not framed as a duty but it clearly imposed a duty for otherwise there would be no liability. And it was generally seen as a duty.

And it's seen as a duty from it's intro in 1980 I think it was. I should say Your Honours, I think 320 was introduced in about 1933 but at that point, as can be seen from the Maney case, at that point it, that is s.320, did not include paragraphs A or B and here we've proceeded on the basis of paragraph B. It was just C, that is the fraudulent trading provision. So one might argue that the decision in Maney doesn't necessarily apply to the reckless trading part which was introduced many years later. That would be an argument which would be put with some difficulty but it is open. But my point, which I'll circle back to

about, but I'd like to advance while I'm here, is that whilst Maney quite clearly says that it was the statutory intro of a new cause of action, it was only talking about that in terms of paragraph C, which is the fraudulent provision and that was from the time of its intro in about 1993 (sic). By 1980 my submission is, and was in the Court of Appeal, that the duty not to allow a company to trade recklessly had become part of the common law.

And I will come back to that. But staying Your Honours with 301. The argument put to the Court of Appeal, and if I may put it to Your Honours now, is simply this. That s.320(1)(b) effectively created a duty. And the legislative intent was that an officer in breach of that duty not to trade recklessly, could be personally responsible for the companies debts. They'd be accountable for that once the company was in liquidation. But nevertheless the duty was created, the duty arose before the liquidation. The liquidation was a necessary procedural step before action could be taken.

Section 301, and may I say Your Honours as I said at the start, it's inconceivable that Parliament on enacting the new legislation intended that there would be no remedy against directors who had already breached and who were continuing to breach the reckless trading provision but whose companies hadn't at the time of intro, i.e. 1 July 1994, entered into liquidation. Imagine the position Your Honours for example if the liquidation had begun in late July 1994 and the breaches had occurred in may, was there to be no remedy. Surely not. And surely that's not part of Parliament's intention. And the easy route to achieving Parliament's clear purpose is s.301.

And may I also add on that Your Honours that whilst the new reckless trading provision, which is s.135 of the 93 Act, is framed differently than was s.320, it is a codification of the accepted interpretation of 320(1)(b) and the wording comes straight from … decision of Justice Bisson in Thompson and Innes. I can see Your Honour nodding.

Elias CJ Mm.

O'Brien So 320 is without, sorry 135 as it is now or 189 as it was in the transitioning provision of the 55 amended Act, is exactly codification of the interpretation of 320. So did Parliament intend that the law continue? Absolutely. Is there any doubt about that? In my submission none whatsoever. Unfortunately Parliament didn't include a specific transitional provision. Nevertheless it did include.

Elias CJ Why do you say unfortunately? Because I would have thought on your argument, none was necessary.

O'Brien Maam, because if there had been one I wouldn't be here today.

Elias CJ I see.

O'Brien And the case would have stopped some time ago.

Blanchard J Was there a s.301 equivalent in the transitional 1955 Act provisions.

O'Brien Yes there was Your Honour but I don't recall and I was looking for it before and couldn't find it. I don't recall the section number. But the 1955, the transitional provisions effective as I call them, the transitional Act was the, were, was the amendments to the 1955 Act. And the amendments to the 55 Act effectively introduced the 93 Act, or at least these parts of it, into the 1955 Act. So s.320 in its new guise, became s.189.

Blanchard J And they kept the winding up terminology.

O'Brien Yes I think they did Your Honour, that's right. Unfortunately I don't have, and it's actually quite hard now to find, the 55 amended legislation. But there definitely was a provision equivalent to 301. But in my submission Your Honour that doesn't necessarily matter anyway because by the time this proceeding was issued and certainly by the time it came to Court, the applicable provision was 301.

Blanchard J Yeah. So the result of Mr white's argument would have been that if on the 30th of June 1994 somebody carried on, or was knowingly a party to the company being carried on in a fraudulent manner, and it was so bad that caused the company to go over the edge of the cliff, and it went into liquidation, sorry went into winding up immediately thereafter, there was no comeback via the s.320 route.

O'Brien Yes Your Honour.

Blanchard J And no equivalent.

O'Brien Mm. And may I put an even worse example, although not perhaps so clear, a company which incurred losses for example of 6 million dollars a year but continued to trade not just for one day beyond 30 June 1994 but for three or four years, and then went into liquidation, could there be no remedy dating back to pre-94? Because that is this case. This company traded year after year incurring losses of 6 million dollars.

Blanchard J Well there would be a remedy of course for the post-July 94 period.

O'Brien There would be Your Honour yes. And that may affect quantum. That is my other argument here. That is another reason why this point raised in this Court or sought to be raised in this Court is, with respect, an exercise in futility. Because it leads to, it's a point in a vacuum. Because it is so clear from the High Court judgment with respect and the Court of Appeal judgment that Mr Lower as the guiding director of this co, was allowing it to trade recklessly. Not just in April 1994 or

may 1994 or June 1994 but in July 1994 also. So that that reckless conduct did continue. Unfortunately we didn't have a judgment under the amended legislation. We don't have a judgment under the amended legislation. But nevertheless the finding, the factual findings are there.

And it's worth, if I might Your Honours, and this is a point I haven't raised but I seek Your Honours' leave to, in my submission, the respondents have suffered prejudice or would suffer, are suffering prejudice as a consequence of Mr Lower's change of position on s.320. They did not plead, speaking of pleadings, they did not plead or he did not plead that s.320 was inapplicable. And if that was to be their case then it should have been pleaded. It's effectively an affirmative defence. To the contrary, it was, and this was at a time may I say Your Honours, when he was represented as he is now by senior counsel, he had Mr Harrison QC acting for him until he became a judge of the High Court and then he had Mr Farrell acting for him. And all through it he had Lownes Jordan acting for him. And not only was the non-applicability of 320 not pleaded, but it was agreed or accepted might be a better way of putting it, before the trial and at the trial that 320 did apply.

Now I don't know why.

Blanchard J Did you object when the point was raised in the Court of Appeal.

O'Brien Yes Your Honour we did raise the prejudice point in the Court of Appeal. The law seems quite clear and I can give Your Honour the references from my Court of Appeal submissions, that it's open to a party to raise a point of statutory interpretation in an Appellate Court even if they have accepted a different approach in the lower Court. But there's a caveat to that. And the caveat is, unless it causes prejudice to the other party. And we said in the Court of Appeal and I'd say again now, well it does. Because if they'd raised it in the High Court, we would have done two things. We would have slightly, and only slightly, recast our pleading so that it was quite clearly a pleading of a breach of duty under common law.

Now in my submission our pleading does that anyway, but we would have done that. We would have referred, not necessarily in the pleadings because it's not necessary, but we would have referred to 301. And we would have had a somewhat different emphasis during the trial which ran for 9 days, in the evidence on the period from 1 July 1994 as opposed to the period from April 94. In fact the evidence covered the entire period of the companies history from go to woe. But there was a focus on the April, may, June 1994 period. Now we would have just changed that slightly to include a focus on July. So, yes did I raise it in the Court of Appeal? Yes Your Honour.

We raised prejudice, Interpretation Act, common law, 301 and the application of the 55 Act. And I've given notice of intention in the written submission to raise all of those except the prejudice point Your Honour. But if I may, I do raise it now. And should leave be granted, not that I'm suggesting for a moment it should, but should it, then I would want to raise it at the hearing.

So with respect Your Honours, I would rely on, well not rely but I would commend to Your Honours with the greatest of respect, His Honour's Justice Wild's decision in Walker and Allen which applied 301 to breaches of the s.300 equivalent in the 55 legislation. Maam I do have a copy of s.300 here if it's of any help. I've only got my book with a few scribbles in it but nothing at 300.

Elias CJ I'd just like to have a quick look at it just to clear it away thank you.

(Book handed up)

O'Brien It's essentially, it's in similar terms. It essentially creates a liability for not keeping proper accounting records.

Elias CJ Yes.

O'Brien And I believe it's triggered on liquidation.

Elias CJ Yes.

O'Brien And I believe that is in that, it's similar to the old, its equivalent section in the former legislation.

Elias CJ Yes I must say I find it difficult to see much difference in principle between that and s.320. But that's a very superficial quick reading.

O'Brien Well then Your Honour I'm in very good company. Because I don't see any difference in principle either.

Elias CJ Yes. Thanks.

(Book returned)

O'Brien If I might refer Your Honour briefly to Justice Wild's decision which is at tab 6. And if I might begin at paragraph 19 which is on page 283.

Elias CJ Tab 6?

O'Brien Sorry maam, it's tab 5.

Elias CJ Alright, thank you.

O'Brien And I'd like to commend if I may the first few sentences. Relevant are the 55 Act, the amended 55 Act and the 93 Act. The amendments to the 95 Act applied from 1 July 1994.

Blanchard J Sorry, where are you reading from.

O'Brien Paragraph 19 Your Honour, sorry.

Blanchard J Oh sorry.

O'Brien But it's in particular that next sentence which in my submission lies at the heart of this case. I accept the Plaintiff's submission that those amendments were intended to ensure that a consistent regime applied during the 3-year transition period until the 1993 Act applied to all cos. And the same point here. The reckless trading provisions introduced in the 1955 amendments, sorry amendment Act, were intended to ensure a consistent regime. There was not intended to be a lacuna in the legislation to allow parties such as Mr lower or others to escape what would otherwise be a clear liability.

Blanchard J I notice that in paragraph C of his paragraph 20, he actually describes, oh no, that's a reference to the amended 55 Act, I'm sorry.

O'Brien I think it is Your Honour. And then further Your Honour he at paragraph 25 notes that 300 creates a statutory cause of action. But goes on to conclude and I don't have the paragraph marked, but goes on to conclude that 301 applies to the breaches of earlier legislation.

And perhaps it 300 actually Your Honour. It's a while since I read that case fully. But the same principle applies nonetheless. His Honour there held that 300 encompassed breaches under the earlier legislation. Our point here is that 321 can. There's absolutely no reason why it can'. And Your Honour Justice Blanchard said, if it's not a breach of duty, it's certainly a default.

I can't say much more about 301 Your Honours. My concluding submission on that would be it is plainly applicable and, moreover, achieves what surely must have been Parliament's purpose and intention of continuity between the two regimes.

I have mentioned Your Honours and Your Honours have noted that I've also raised the notion that the breach that occurred in 1994 or thereafter could be a breach not only of the statutory provision but of the common law. My friend says well it's not pleaded. Well I'd respectfully differ and suggest it is pleaded, although not clearly and not as such. We pleaded a breach of s.320 and headed the section of the statement of claim up with that. And Your Honours this is at tab 2 on page 13.

Elias CJ Tab 1.

O'Brien Thank you maam. At page 13 we said from 30 June 93 to 30 June 94 the first and second defendants, while officers of SPS were knowingly parties to the carrying on of SPS's business in a reckless manner in breach of s.321B of the Companies Act 1955 unamended. With respect, if the sentence were stopped after the words reckless manner and didn't refer to the section, that would be sufficient. So the additional words are unnecessary but their inclusion cannot preclude that in my submission from being a pleading of common law breach of duty not to trade recklessly. And certainly that amendment may have been made, who can say, probably would have been made had the now appellant raised the point then.

And the question that gives rise to is whether in fact there is any common law requirement on directors not to trade a company recklessly. That is not entirely clear. But it is reasonably clear and in my submission a very attractive proposition that it is part of the common law and Your Honours may be familiar with Justice Cooke's, His Honour's the President's comments in Nicholson v Permacraft, a case where the Court of Appeal said quite clearly that when a company is in a situation of insolvency or near insolvency, then a duty arises to the creditors via the co, that's a duty to the company in effect, not to allow the company to continue trading. And that has been adopted and referred to in several other decisions. I haven't put all of these into my submissions. I've just flagged that this is another route home. And clearly today wouldn't be the time to get into the detail of that. But the point is, there are other remedies. And 301's the clear one so I didn't think I needed to push the common law.

And the other point Your Honour.

Elias CJ You wouldn't resist the argument that the common law route raises a question of general and public importance do you.

O'Brien No I couldn't resist that.

Elias CJ No, no.

O'Brien Because it hasn't been decided as such.

Elias CJ Yes.

O'Brien And these provisions are important.

Elias CJ Yes.

O'Brien And therefore they do give rise to matters of general and public importance.

Elias CJ Yes.

O'Brien But can I just say though on that point, that that's not to say that the application of s.320 gives rise to matters of general or public importance. It doesn't because it's gone now. And in any event, this case doesn't raise, as put to Your Honours, any questions about the application to facts of s.135 as it now is or s.189 as it was from 1 July 94. If it did, there would be a matter of public importance or general importance. The only matter here, I think as Your Honour Justice Blanchard indicated, which might fall into that category is the question of the application of the Interpretation Act to repealed legislation. And I will briefly.

Elias CJ So we have to give leave unless there's no answer to the s.301 route.

O'Brien With respect Your Honours no. I said may. In my submission no, it's not properly seen. The application of s.17 and 18 of the Interpretation Act in this case, in my submission, do not give rise to a matter of general or public importance because.

Elias CJ Because.

O'Brien It is a case of their application to a provision which has been repealed for many years and which will not come before the Court again so far as we know. And I think we can safely say it will not come before the Court again. So the question then becomes, well is the decision, does it have a precedent effect of importance. Now that is really the question of, it's really the question of whether existing rights require that there be an existing cause of action. That seems to me to be my friend's best point, the question of how one interprets the Interpretation Act or applies it is that. That's the question that is here for the appeal.

But in my submission what this really is, what it's really all about is the application of a reasonably clear piece of legislation with settled principles to particular facts which are in fact unique. And Your Honour Justice Blanchard has I think referred with approval to a point of Justice Tipping's in the Wellington Diocesan case which my friend refers to, that the distinction between, and I'm quoting from that now, the distinction between what is and is not a right for present purposes must often be one of great fineness. Yes, it must often be. But that's really about the application of the Interpretation Act. Not about particular points of precedence or particular points of uncertainty. There will always be uncertainty about the application of an Act to a particular set of facts. Or often. But that surely doesn't qualify it for the attention of this Court.

The question must be, will it be or become an important precedent. And in my submission, not necessarily and there is in any event no need for it. Because it's quite clear from the existing cases referred to by my friend, that inchoate or contingent rights are included within the concept of existing right in the Interpretation Act. If that is so and the

cases say it is, then that must surely included cases where a cause of action isn't fully matured. Which is my friend's point here.

So with respect Your Honours I would seek to persuade you that this isn't, doesn't give rise to a matter of general or public importance. It certainly has no direct precedent effect because 320 will not come before the Court again. And it's difficult to think of analogous situations which are likely to arise in practice. It is certainly not a burning question requiring the attention of this Court.

It's closer, in my submission, to the application of common law to a contract point. How it's to be applied to a particular contract. Of course the common law and the full relation of the common law is of importance but its application to a particular set of facts will not often be.

Lastly if I may circle back Your Honours to the other reason why this will ultimately be a case in a vacuum if it were to proceed, and therefore shouldn't, is that the findings in the Courts below quite clearly say Mr Lower was trading the company recklessly beyond 30 June 1994 i.e. into July 94. So whilst there's no judgment applicable to that period because the Court didn't need to consider it, at least the High Court didn't, the factual findings are sufficient in my submission. The only question that then arises is, well does it affect the quantum. And Mr White's quite rightly pointed out that in my written submission I have referred to that at paragraph 2.12 Your Honours. And may I just take a moment to explain that.

What I said there Your Honours is that if the same methodology that was adopted in assessing the quantum in the High Court were to be applied from 1 July there would a different and there would be. Which isn't necessarily good for me but there would be a difference, it would be 6.3 million. And whilst my friend says, we're not sure how we get to that, it's in the submissions that were presented to the Court of Appeal. So it is a calculated figure. But what I do go on to say there is this: that the Court's calculation of quantum was not precise and wasn't intended to be precise and Justice Young himself said so when he said that, as I quote at the end of 2.12, some element of rough justice may be called for. I'm of the view that the section allows scope for this in that it requires exercise of a judicial discretion. Well in the exercise of that judicial discretion it would be quite open for the Court to leave the quantum as it is, even if it is making a finding not under s.301 or 320 but under s.189 of the 55 Act as amended. It's only two months' difference in time.

And Your Honours may have noticed in the High Court judgment that His Honour Justice Young made a substantial deduction for what he termed to be the contribution of the creditors. He took off something like a third of what would otherwise be the judgment, 6 million dollars. Well interestingly, when the appellant says there are some differences

between the current legislation and the old legislation, yes there are. The primary difference is that the current legislation is focused more on the company and the earlier legislation is focused more, or as much, on creditors. And there is at least some authority to suggest that under the current legislation one assesses quantum as a loss to the company as opposed to a loss to creditors. If that's done, it would call into question His Honour's deduction of the 6 million. My point being that quantum in this case was terribly difficult to assess. We gave His Honour Justice Young 18 different calculations. And he varied a couple of them and came to what he came to. Which the Court of Appeal endorsed. There is no, it does not necessarily follow that if judgment were entered under the 55 Act that the quantum would change. And I would venture to suggest it wouldn't although it's not a matter we can get into today Your Honours. I just want to explain that yes I had to say, and I do say, the application and methodology would give rise to a different figure. But that's not to say the methodology would be strictly adopted if we advance the date of breach by some 2 months.

But those Your Honours are my submissions. And the primary submission really is that, viewed as a whole, there is not and has not been any miscarriage of justice in this case which warrants the Court's attention. And it wouldn't be in the interests of justice to allow this matter to proceed. Rather it would be in the interests of justice to allow the liquidators to begin the enforcement process in Germany.

Thank you Your Honours.

11.50 am

Elias CJ Yes thank you Mr O'Brien. Yes Mr White.

White I'm not sure whether in reply Your Honours wish to hear from me in respect of the points raised by my learned friend in relation to the Interpretation Act as not being matters of general and public importance.

Elias CJ Yes I would like to hear what you say on that.

White That then does require me to take you back to the judgment of the Court of Appeal. Tab 2 in our bundle. And to present what I was going to say before Your Honour indicated that I didn't need to. Because this of course is an application for leave to appeal against this judgment and the reasoning in this judgment.

In paragraph 48 on page 492 in the Court of Appeal it's recorded that the principal legal issue in the appeal concerned whether s.320 applies to the first cause of action. And just pausing and interpolating there Your Honours. My learned friend, quite understandably, talked about how the case was run in the High Court compared to the Court of

Appeal and the pleadings points that had been taken. There is always a difficulty in appellate Courts being asked to carry out effectively a post mortem on what's happened below and the risk that in doing so hindsight can be used in an inappropriate way.

Blanchard J Do you accept that this point wasn't taken in the High Court.

White I accept Your Honour that my learned friend has correctly advised Your Honours that it was not only not taken, it was agreed that the first cause of action should proceed as it did in the High Court. My predecessors there, for reasons no doubt thought appropriate, presented the case in that way. And I also accept that this issue was raised for the first time in the Court of Appeal. And I don't, I wasn't there but my learned friend says that whether it should have been was also raised. I would accept that too. But the fact of the matter is that it was raised and that indeed it turned out to be as the Court of Appeal said, the principal legal issue. And that is what happened and that's the basis on which it comes to Your Honours, that that was the principal legal issue.

Then in paragraph 50, the Court of Appeal then turned to the question of when a cause of action under s.320 accrued as being addressed by this Court. And then dealt with re Maney. And I don't need to refer to those passages because I've already taken Your Honours to those. But we then come to paragraph 54 and this is the one I did wish to draw to Your Honours' attention. This reasoning has no application to the present case where the effect of treating the liquidation as an element of the cause of action is rather to restrict the application of s.320 during the period in which it was in force. The principle that the liquidation of a company is an element of the cause of action under s.320 was however a well established interpretation of s.320 and does not obviously permit of variation in the present case simply because all other elements of conduct giving rise to the liquidators' cause of action are in place. Accordingly, unless there is some principled basis for treating section 320 as being saved until SPS was put into liquidation the legislation which has been repealed must be treated as having never existed so that there is no basis for the High Court finding.

Now that is what we would agree with. And that's the way it was considered by the Court of Appeal, that section 320 was repealed. And unless it could be saved, that first cause of action would fail. That's the approach that the Court of Appeal adopted. And then they turn immediately to set out s.17, 18 and 19. Both 17 and 18 refer in submissions 1B to an existing right and 18 in subs 1 to an existing right. That's the language then used.

Can I just pick up what I wanted to say in relation to s.19 deals only with liability to a penalty for an offence or for a breach of an enactment. One has to read that slowly. It's a penalty for an offence or a penalty for a breach. So 19 is only concerned with penalties. And I took Your Honours to the decisions, the passages in re Maney where it

was held that whatever else s.320 did, it didn't impose a penalty as such, so that s.19 didn't apply and that can be put to one side.

Then in paragraph 57, after referring to the leading decision in this area of the Privy Council in Director of Public Works and Ho Pang Sang and an article by Professor Burrows, they continue, under s.20(e)(3), the equivalent in that Act of 17(1)(b) the requirement was that a right be acquired. The term used in the 1999 Act is existing but the change is only one of modern expression.

And then there's reference to the Dental Council case. So the point simply being, for the argument as to the effect of these provisions, is of course a matter of wide significance as to whether existing right is still to be read as referring to an acquired cause of action right. And that's picked up in Justice Tipping's passage where the reference is to the essence of an accrued right in this contest is that something must have happened to give the person claiming the right the ability to prosecute. And or course that just goes straight back to what Maney held.

And then there's a reference in paragraph.

Elias CJ Well not quite I would have thought. Interesting that they don't refer to duty though under 17(1)(b), that it's all put on right.

White Yes.

Elias CJ Because I would have thought that the question was not really the right of the liquidator to bring.

Blanchard J There is a reference to duty.

Elias CJ Is there?

Blanchard J Section 17(1)(b).

White The last word is duty.

Elias CJ Oh yes, I see, yes, yes. Thanks.

Blanchard J And the same in 18.

Elias CJ Yes. Sorry, no I'm talking about in the Court of Appeal reasoning.

White Well the Chief Justice is quite.

Blanchard J Oh yes, yes, indeed.

Elias CJ Yes. Because on one view it's not a question of the right to bring the claim. It's a question of whether there was an existing duty on the

directors and the right to bring the claims arises, this is this s.301 argument again. Yes.

White But that really rather highlights what I'm.

Elias CJ Yes.

White I'll come to that, I'll do that now in part Your Honour. But that's not what the Court of Appeal did.

Elias CJ No.

White And it's being raised now and I would submit as I have in relation to s.301, and will do so very briefly again in a minute, that there are arguments about these matters. Particularly in the absence of any judgments in the Court below which would justify this Court hearing those arguments, not on a leave application but on a proper hearing. And a number of the matters that my learned friend's raised really rather reinforce that: common law and his acknowledgement that there's a question as to whether that duty applied; the whole question of quantum. All of those points, without necessarily agreeing with them, I'm prepared to acknowledge that they are valid points which the respondents would be able to raise in the way in which this case has been dealt with by the Courts below and in the way in which it now reaches Your Honours. And I will come in a moment with some trepidation to what the powers of Your Honours sitting on an application for leave are, just to politely remind myself if not Your Honours that that's what Your Honours are dealing with. And I'll come to it straight away.

Elias CJ Yes.

White And that you are somewhat restricted in what you might do beyond that.

Elias CJ Yes and we're not sitting as a full bench and if we were to biff this in a peremptory fashion, it would be a decision of some significance.

White With that I agree entirely Your Honour.

Elias CJ Because it would be indicative of a substantive point.

White Precisely Your Honour. And whether it's referred to in criminal law proviso terms or, the wording I wrote down, yes that Your Honours would have to be satisfied that my friend's success on 301 was inevitable.

Elias CJ Mm.

White Well we are doomed to failure. And we of course say that that would be.

Elias CJ And.

Blanchard J Close to doom's not enough.

Elias CJ Quite frankly, although we haven't obviously conferred about this, I would have thought it was also arguable that if we were going to take that course, if it were absolutely clear, there'd have to be some hesitation about deciding that as a Court of two.

Blanchard J I concur with that.

Elias CJ Yes.

White That was exactly the point I was trying to make as politely as I possibly could.

Elias CJ Yes, yes.

White Yes.

Elias CJ Fair enough.

White Picking up, well yes just looking at the Court of Appeal then again. Your Honour's absolutely right, they've looked at it through the focus of rights, not duties.

Elias CJ Yes.

White Paragraph 60 then, and this is the crunch paragraph, they say a purposive approach to the 1955 and 1993 legislation also indicates that a right to bring a proceeding was in existence at the time that the 1955 Act was repealed. And then they talk about the common legislative purpose. And then line 33, the requirement under s.320 of the 1955 Act that the company be in the course of being wound up was obviously linked to when it would be practicable. It is a procedural requirement rather than a substantive one. Now not surprisingly, we submit that that's completely contrary to Maney which held the opposite. And in this context the Court of Appeal just simply hasn't addressed that point. And that's, in the context of this judgment, our strongest point to show that the Court of Appeal's reasoning is wrong.

So that was what I wanted to say on that point. And if that's right, then obviously the issues relating to the impact of ss.17 and 18 of the acts interpretation are of general importance, although one accepts that the possibility of any cases.

Elias CJ They're not going to apply to s.320. No.

White Yes but that's not, that doesn't detract from the significance of the general statutory interpretation provisions.

Elias CJ Yes.

White And certainly all the filling the gaps point is overstated, that does raise issues of quite significance. Coming back then and to respond with one further point on the 301 type argument. And again acknowledging that, my learned friend took Your Honours to Walker and Allen and that's at tab 5. There was a paragraph in that judgment I just would wish to draw to Your Honours' attention as providing some further ammunition for distinguishing this case although I appreciate Your Honour the Chief Justice thought it was not distinguishable.

But if I can take you to page 286 paragraph 29, where His Honour said, first the repeal of s.151, which was the old duty to keep accounts, from 1 July did not affect the consequences of anything done or suffered under 151, or the ability to bring a proceeding for a breach of 151 committed while it was in force, and he relies on the interpretation Act, in short accrued liability. And those are the words I emphasise, accrued liability, for any breach of the 151 duty was not extinguished. Nor the ability to bring a proceeding in respect of it terminated by repeal. I think it more accurate to refer to a continuing liability than to an existing duty but the concept is essentially the same. Now the argument would be, and as Your Honours would appreciate, that that's quite different under those line of cases from under s.320 where there was no accrued liability at the time of repeal.

Elias CJ But this was a, well my brief look at s.300 indicated that it too was a claim by a liquidator although I don't know whether the liquidation.

White It's not the comparison between 300 and 301.

Elias CJ Oh I see.

White It's the comparison between the statutory provisions that were being relied on to have the recovery. What was being relied on with the 151 and it's, well it's 151, and the breach of the duty to keep the accounts.

Elias CJ Yes I see.

White Pre-amendment. And there the judge says, in that case, that was an accrued liability under 151. Because that was the position. But it's the contrast between 151 and 320.

Elias CJ But he's talking about the fact that there was an existing duty to maintain proper accounting records. And what's argued against you is that there was a duty not to trade recklessly. But then that's back into your argument.

White Well we're back into the argument.

Elias CJ Yes.

White But just what I'm raising before when I said that it was a basis for distinction, that helps me to just explain to Your Honours more clearly.

Elias CJ Yes I see.

White That there is a basis for distinction that we would wish to argue.

Elias CJ Yes, thank you.

White I suspect that's all I can say.

Elias CJ Yes.

Blanchard J Can I just ask you about something that hasn't been traversed Mr White. Assume that we granted leave. And assume that you were completely successful in relation to the matters that we've discussed today. The position then would be that there was no longer any judgment as given by the High Court judge. But he's only dealt with part of the case.

White Yes, yes.

Blanchard J The matter would presumably then have to go back to the High Court.

White My learned friend in their written submissions say that in that event the alternatives are either for the Supreme Court to, and the Chief Justice has answered that option.

Elias CJ Yes.

White Or to remit it, yes. If that is appropriate. And no doubt if we got to that stage, Your Honours would hear submissions from the applicant as to the appropriateness of that course.

Blanchard J Yes.

White In all the circumstances.

Blanchard J Yes because I was looking at Mr O'Brien's paragraph 2.11. And I preface this by saying that it seems to me that given the Courts below, you could hardly resist the ability of the respondent if leave were given to put up their section 301 and common law arguments. I'm just not so sure though that the Supreme Court could get into the business of looking at liability from July 1994 onwards.

White We would agree with that Your Honour yes.

Blanchard J But that would be something that in the contingency that I'm talking about, would have to go back to the High Court.

White Yes Your Honour. Which really I suppose reinforces the point I was making earlier as to the. One acknowledges the difficulties with that. But that's the way Your Honours have had submissions presented to you on the basis of the way this case was run in the Courts below. And that's what happens.

Blanchard J You at least are blameless.

White I couldn't possibly, Your Honour may say that, I couldn't possibly comment.

Elias CJ There's probably some scope for the future. I should indicate that if we were minded to grant leave in this case, I'd be keen to see this matter brought on promptly. And I've obtained from the Registrar indications of when we might be able to hear it in February. And I would be minded in the leave to indicate when the hearing will be.

White My learned friend have sought urgency and I couldn't possibly resist that. Subject to particular dates in February, I do have dates available in February Your Honour.

Elias CJ Yes, yes. Mr O'Brien.

O'Brien Maam, I have a, whilst I would prefer the case to go no further, if it were to, I unfortunately have a real difficulty with February. I have a 10 day trial in the High Court. It doesn't begin until the 20th but it's moderately complex and I anticipate.

Elias CJ We could hear you in the week of the 7th.

O'Brien Yes maam. That would be better.

Elias CJ Alright.

O'Brien Might I enquire whether March would be a possibility maam.

Elias CJ Yes, yes. The first week in March.

Blanchard J That might be safer.

O'Brien The reason I, although the case in the High Court.

Elias CJ Well if counsel are responsible and perhaps rather than specify a date we can indicate that we expect the matter to be set down in February or early March.

White Certainly Your Honour. It's only a question of specific dates that creates a problem.

Elias CJ Yes exactly. I think that's what we'd do. But I think we'll take an adjournment, a short adjournment to work out where we're going from here.

White As Your Honours please.

O'Brien As Your Honours please.

Court adjourns 12.12 pm
Court resumes 12.20 pm

Elias CJ Yes well we will grant the application for leave for the determination of the following question: whether the High Court was entitled under s.320 of the Companies Act 1955 or s.301 of the Companies Act 1993 for default or breach of duty arising under statute or common law to make in this proceeding an order declaring the appellant responsible for a portion, namely 8.4 million, of the debts and liabilities of South Pacific Shipping company limited on the ground of his being a party to the carrying on of its business in a reckless manner prior to 30 June 1994 when s.320 was repealed.

Now is there any matter that arises. I'm thinking in particular of security for costs in this case.

O'Brien Well maam I raise the question of whether the appellant ought to be paying part of the debt. And I leave that with Your Honours.

Elias CJ No, we wouldn't entertain that on this application.

O'Brien No I didn't think Your Honours would. Yes security at the normal rate.

Elias CJ At the normal rate. Alright, to be fixed by the Registrar.

O'Brien Thank you maam.

Elias CJ Thank you.

O'Brien As Your Honours please.

White As Your Honours please.

Elias CJ Thank you counsel for your assistance.

Court adjourns 12.22 pm