



**Supreme Court of New Zealand
Te Kōti Mana Nui**

06 October 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**CRAIG DUTHIE AND KIRSTEN TAYLOR-RUITERMAN AND DRK
CHARTERED ACCOUNTANTS LTD v DENISE MICHELLE ROOSE
AND DENISE DEVELOPMENTS LTD AND DMR DEVELOPMENT LTD**

(SC 10/2017) [2017] NZSC 152

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

In this case, the Supreme Court was asked to determine a number of interrelated issues concerning a negligence claim brought by Ms Denise Rose and her two companies, Denise Developments Ltd (DDL) and DMR Development Ltd (DMR), against Ms Rose’s accountants. The claim is based on the contention that the accountants negligently advised Ms Rose as to the tax consequences of what was then a proposed sale of land by DDL to DMR. As a result of this advice, the sale went ahead with the result that DDL incurred a substantial tax liability.

The property transaction was pursuant to an agreement for sale and purchase which was entered into on 14 April 2008 and settled on 2 May 2008. The claim for damages was filed on 1 May 2014.

The accountants contended that the claim had been brought outside the six year period within which cases of this sort can be brought under the Limitation Act 1950. The six year period started to run when a loss was first suffered by Ms Rose and her companies and the accountants maintained that this was on 14 April 2008, the date the land sale contract was entered into. Ms Rose and her companies denied this, arguing that the cause of action arose when the transfer was completed on 2 May

85 Lambton Quay, Wellington
P O Box 61 DX SX 11224
Telephone 64 4 918 8222 Facsimile 64 4 471 6924

2008, which was when, on their argument, DDL's liability to tax arose. On this basis they maintained that the claim had been brought inside the limitation period, albeit only by a day.

The High Court was asked to determine a preliminary question whether the claim was barred by limitation. This was dealt with as if a strike-out application was before the Court, with the issue being whether it was arguable that the negligence claim was not barred by limitation.

The High Court concluded that loss occurred on the date the agreement was entered into, 14 April 2008, and accordingly that the six year limitation period had elapsed when Ms Roose and her companies commenced the proceedings on 1 May 2014.

The Court of Appeal took a different view, concluding that Ms Roose and her companies first suffered loss on 2 May 2008, when the transfer was settled. Accordingly, on this approach, the proceedings were commenced within the six year limitation period.

On a further appeal to the Supreme Court, the accountants argued that the tax loss occurred on entry into the agreement because DDL's liability to pay tax arose at that time. In the alternative, they argued that, if the tax liability did not arise until 2 May 2008, Ms Roose and her companies had suffered other and ancillary losses prior to 1 May 2008 in that: (a) they had already incurred costs in relation to the then proposed transfer (accounting, legal and valuation) which they would not have incurred but for the allegedly negligent advice they had received ("wasted costs"); and (b) once the agreement was in place, avoidance of tax liability would have incurred further costs ("unwind costs").

The Court has unanimously dismissed the appeal. William Young J delivered the reasons of the Court. Ms Roose and her companies were liable to taxation under s CB 14 of the Income Tax Act 2007. This section imposes tax on "the amount" the vendor "derives from disposing of land". This means that a liability to tax arises only at the point that the vendor derives income from the disposal of land. In accordance with general principles, which the Court considered were applicable even though the parties were related, such derivation did not occur until the transfer was effected on 2 May 2008.

The Court dismissed both ancillary loss arguments. The "wasted costs" argument had not been advanced in the Courts below and insufficient material was before this Court to deal with it. The argument as to unwind costs was dismissed on the basis that, if the true position as to tax had been appreciated prior to 2 May 2008, liability could have been avoided without cost simply by not completing the transfer.

Contact person:

Kieron McCarron, Supreme Court Registrar (04) 471 6921