IN THE SUPREME COURT OF NEW ZEALAND

SC 109/2014
[2014] NZSC 176

BETWEEN	ARTHUR SYLVAN MORGENSTERN First Applicant	
	TANYA MAY LAVAS Second Applicant	
AND	STEPHANIE BETH JEFFREYS AND TIMOTHY WILSON DOWNES Respondents	

Court: William Young, Glazebrook and Arnold JJ

Counsel: C T Walker for Applicants
N H Malarao and K M Wakelin for Respondents

Judgment: 2 December 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants are to pay the respondents costs of $2,500 and reasonable disbursements to be fixed by the Registrar.

REASONS

The proposed appeal

[1] Morning Star (St Lukes Garden Apartments) Ltd ("MS St Lukes") was involved in a large development. The first applicant, Mr Arthur Morgenstern, owned 99 of the 100 shares in MS St Lukes and the second applicant, Ms Tanya Lavas owned the other share. Stage one of the development (241 apartments and associated retail units) was completed in 2005. Stage two involved a further 53 apartments, six commercial units and a two-storey commercial building. As it turned out, the required resource consents were not held and work on stage two stopped in

2006. The resource consent problem was not able to be resolved until 2010 and construction work on stage two did not recommence until late 2010.

[2] On 30 March 2007, Morning Star Enterprises Ltd ("MSE"), another company associated with Mr Morgenstern and of which he was a director, acquired all of the shares in MS St Lukes. The total consideration was $3.5 million. MSE sold these shares the following year for $1.

[3] The respondents are the liquidators of MSE and sued him in respect of, inter alia, the acquisition of the MS St Lukes shares. The claim was brought under ss 131, 135, 137, 298 and 301 of the Companies Act 1993.

[4] The evidence as to the 30 March 2007 value of the MS St Lukes shares was not satisfactory. The trial Judge was plainly satisfied that they were not worth $3.5 million but he was not satisfied as to the amount of the excess.[1] He therefore dismissed a claim against Mr Morgenstern under s 298 of the Companies Act. He was, however, satisfied that Mr Morgenstern was in breach of his obligations to MSE and acted generally in breach of ss 131, 135 and 137.[2] The loss suffered by MSE was, in his assessment, $3,499,999 (being the amount paid for the shares less the realisation of $1) and he gave judgment against Mr Morgenstern for that amount.[3]

[5] Mr Morgenstern's subsequent appeal to the Court of Appeal was dismissed.[4] The liquidators' cross appeal on the s 298 finding was also dismissed but this was on the basis that as the judgment for $3,499,999 had been upheld, "no practical purpose would be served in entering judgment against [Mr Morgenstern] again for the same amount in the context of the s 298 cross-appeal".[5]

[6] The applicants now seek leave to appeal against the judgment of the Court of Appeal on what we see as three bases, each of which we will address.

---

1 *Jeffreys v Morgenstern* [2014] NZHC 308 (Rodney Hansen J) [*Morgenstern* (HC)] at [96].
2 See [97]–[116].
3 At [120] and [129].
4 *Morgenstern v Jeffreys* [2014] NZCA 449 (O'Regan P, Harrison and White JJ) [*Morgenstern* (CA)].
5 At [112].

An onus of proof on Mr Morgenstern to prove that the transaction occurred at fair value?

[7] Both the High Court and Court of Appeal were of the view that it was for Mr Morgenstern to show that the transaction was at fair value.[6] According to counsel for Mr Morgenstern, they also acted on the basis that a director selling an asset to a company must obtain a contemporaneous independent valuation.

[8] We do not read the judgments of the courts below as proceeding on the basis that there is a duty to obtain a contemporaneous valuation. On the other hand, a director who does not do so may well find it difficult later to establish that the transaction did occur at fair value and was generally a proper one for the company to enter into. And for reasons explained in *Sojourner v Robb*, it might be thought to be reasonably obvious that there is an onus on a director (as a fiduciary) in such circumstances to establish fair value.[7]

The failure of Mr Morgenstern to call evidence from the accountants on whom he claimed to have relied

[9] Mr Morgenstern, in his evidence, claimed to have relied on the advice of certain accountants. He did not, however, call them to give evidence. Unsurprisingly, his failure to do so was the subject of adverse comment from both the High Court and the Court of Appeal.[8]

The relief granted

[10] The total amount owed to the creditors of MSE is $1,315,807.80, of which $794,987 is said to be owed to a company owned by Mr Morgenstern.[9]

[11] As the Court of Appeal pointed out, the award of $3,499,999 can be justified either on a restitutionary basis or as "but for" assessed compensation.[10] The figure of $1,315,807 does not allow for the liquidators' costs. Any surplus in the

---

6 *Morgenstern* (HC), above n 1, at [93]; and *Morgenstern* (CA), above n 4, at [56]–[58] and [65].
7 *Sojourner v Robb* [2007] NZCA 493, [2008] 1 NZLR 751 at [21]–[31] and at [76].
8 *Morgenstern* (HC), above n 1, at [102]; and *Morgenstern* (CA), above n 4, at [81](c).
9 See *Morgenstern* (CA), above n 4, at [93](d).
10 At [98]–[102]. A purely restitutionary claim would not encompass the $35,000 paid to Ms Lavas, but in context we do not see this material.

liquidation will be returned to Mr Morgenstern. There is no reason to suppose that the liquidators (who are subject to court control) will act irrationally should Mr Morgenstern put them in sufficient funds to discharge all debts and meet the liquidation costs.

Conclusion

[12] The proposed appeal does not raise a question of law of public or general importance and there is no appearance of a miscarriage of justice. The application for leave to appeal is therefore dismissed.

Solicitors:
Gilbert Walker, Auckland for Applicants
Meredith Connell, Auckland for Respondents