IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 104/2023
[2024] NZSC 95

BETWEEN	ADAM DAVID BANKS Applicant
AND	WILLIAM ROBERT FARMER First Respondent
	SIMON MATHEW GAMBLE Second Respondent
	CHRISTOPHER JAMES MASSAM Third Respondent
	DOUGLAS LEROY FREDERICK Fourth Respondent

Court:	Williams, Kós and Miller JJ
Counsel:	M G Colson KC, J W A Johnson and G D Simms for Applicant R J Hollyman KC and A J Steel for First Respondent A J Peat for Second, Third and Fourth Respondents
Judgment:	6 August 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents one set of costs of $5,000.

REASONS

[1] The applicant seeks leave to appeal to this Court on matters relating to the application of ss 135, 136 and 301 of the Companies Act 1993 and s 9 of the Fair Trading Act 1986 (FTA).

[2] The case arises from the insolvency and liquidation of Mako Network Holdings Ltd (Mako), a company which was responsible for developing and patenting a network security management system. The respondents were the directors of that company. The applicant, Mr Banks, is a creditor.

[3] Between 4 February 2011 and 24 April 2014, Mr Banks made various unsecured advances to Mako amounting to approximately $3.5 million, pursuant to three agreements:

(a) Agreement 1 (executed 4 February 2011) provided for an advance of £1,177,000 in three tranches. A term of the agreement was that Mako would not, without Mr Banks' prior consent, give security over any of its assets other than in the ordinary course of business.

(b) Agreement 2 (executed 30 June 2013) provided for two advances of £237,722.43 and £24,779.14, with the option of converting all advances (including those under Agreement 1) to equity in Mako in the event of an IPO.

(c) A final advance of $500,000 was made on 24 April 2014. No written agreement was executed, but this is referred to as "Agreement 3".

[4] Mako had considerable early success in commercialising its technology. From 2009, Mako's primary funding came from an equipment finance facility with Telecom Rentals Ltd (Telecom Rentals). However, in November 2013, Telecom Rentals unexpectedly failed to advance a sum of $5 million which Mako had anticipated receiving that month. Cashflow became a major concern. In December 2013, Telecom Rentals formally suspended all further advances to Mako under the existing facility agreement pending an independent review of the business. An agreement with Telecom Rentals to restructure Mako's debt was however executed in February 2014, providing Mako with a two-year debt holiday and $5 million in cash.

[5] In November 2013, Mako began negotiating a "productisation agreement" with Sprint Corporation (Sprint), a United States telecommunications giant.

This would have been a major source of business for Mako and also promised to improve its cashflow significantly due to the prospect of an upfront payment. Sprint however reversed its position on upfront payments and eventually withdrew from negotiations. A critical aspect of the argument before us turned on timing:

(a) Agreement 3 was found to have been made, at latest, on 25 March 2014, it thereafter remaining executory until performance;[1]

(b) On 20 April 2014, one of the respondent directors was advised that Sprint was now unwilling to bulk purchase Mako's product upfront, but Mr Banks was not advised of that fact;[2] and

(c) Mr Banks then made the advance of $500,000 on 24 April 2014, as agreed.[3]

[6] Mako was placed in receivership and liquidation in August 2015, owing creditors more than $30 million. Its assets were sold for around $3 million. Mr Banks received nothing. He commenced proceedings against Mako's directors, pleading breach of ss 37 and 55G of the Securities Act 1978, breach of s 9 of the FTA and breach of directors' duties under the Companies Act.

[7] Those proceedings were dismissed in the High Court,[4] and his appeal was dismissed in the Court of Appeal.[5] An application for recall of the Court of Appeal's judgment was also dismissed.[6]

[8] On appeal to this Court, Mr Banks' proposed grounds are three:

(a) that the Court of Appeal erred by not finding the respondents in breach of s 9 of the FTA, and by not granting relief under s 43;

---

1 *Banks v Farmer* [2023] NZCA 383 (Cooper P, Gilbert and Katz JJ) [CA judgment] at [285].
2 At [220]–[221] and [289].
3 At [190].
4 *Banks v Farmer* [2021] NZHC 1922 (Moore J) [HC judgment].
5 CA judgment, above n 1.
6 *Banks v Farmer* [2023] NZCA 607 (Cooper P, Gilbert and Katz JJ).

(b) that the Court of Appeal erred by not finding the respondents in breach of ss 135 and 137 of the Companies Act from an earlier point in time, and by not finding them in breach of s 136 at all; and

(c) that the Court of Appeal erred by not granting relief to the applicant under s 301 of the Companies Act in relation to breaches of ss 135 and 137 which had been established in the High Court and were not disturbed on appeal.

[9] He says that it is necessary in the interests of justice for this Court to hear and determine his appeal as it involves matters of general commercial significance.[7] We describe the content of Mr Banks' submissions in more detail below.

Our assessment

[10] We are satisfied that the criteria for leave are not made out in this case.

Fair Trading Act claims

[11] The applicant submits that the lower Courts erred in finding that the respondents' conduct was not misleading despite their failure to disclose material changes in circumstances to him. He refers to three specific omissions as "examples only" of the broader point that the "picture being painted about Mako was positive, despite the fact that there were negative developments unfolding". He says the Court of Appeal did not properly consider the respondents' conduct as a whole, and whether a reasonable person in his position would have been misled. He argues that this case raises a matter of general commercial significance as the issue of silence or failure to update or correct information in the context of liability under the FTA has not yet come before the Supreme Court.

[12] We consider this argument an attempt to revisit concurrent factual findings in the High Court and Court of Appeal. Both lower Courts analysed the alleged misrepresentations and omissions in considerable detail and reached the same

7 Senior Courts Act 2016, s 74(2)(c).

conclusions, a consideration weighing against the granting of leave.[8] It is established authority already that a failure to disclose information may, in certain circumstances, amount to misleading conduct, and that question does not need to be revisited by this Court.[9] The guidance given already by this Court in *Red Eagle Corp Ltd v Ellis* applies also in claims for misleading conduct by omission.[10]

Companies Act claims

[13] In argument before us Mr Colson KC sensibly focused his argument on s 136 of the Companies Act and the entry into and performance of Agreement 3. We agree that is the only relevant potential breach which might sound in damages. Section 136 provides:

> **136 Duty in relation to obligations**
>
> A director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

The s 136 duty is "premised on the basis that directors ought not to commit a company to obligations unless confident on reasonable grounds that they will be honoured".[11]

[14] In the High Court, Moore J assessed the reasonableness of the respondent directors' beliefs as at 24 April 2014, the date on which the sum of $500,000 was advanced.[12] He concluded that, as at that date, the directors still reasonably believed Mako would be able to meet its obligations under Agreement 3, because an agreement with Sprint remained likely.[13] While agreeing with Moore J's conclusion, the Court of Appeal's analysis differed. Instead it took 25 March 2014 as the relevant date for assessment of the directors' compliance with s 136, that (at latest) being the date of entry into Agreement 3.[14] As at that date, the directors had reasonable grounds to

---

8 *Erwood v Maxted* [2012] NZSC 81 at [5].

9 Fair Trading Act 1986, s 2(2); *Sullivan v Port Albert Investments Ltd* [2019] NZCA 168 at [77]; and *Janus Nominees Ltd v Fairhall* [2009] NZCA 280, [2009] 3 NZLR 757 at [41].

10 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492; and see *McAlister v Lai* [2018] NZCA 141 at [25]–[28].

11 *Yan v Mainzeal Property and Construction Ltd (in liq)* [2023] NZSC 113, [2023] 1 NZLR 296 at [244].

12 HC judgment, above n 4, at [500].

13 At [503].

14 CA judgment, above n 1, at [286].

believe Mako would be able to perform its obligations to Mr Banks, given their reasonable expectation then that the agreement with Sprint would be concluded imminently.[15] As noted above, not until 20 April 2014 was one of the directors advised that Sprint was unwilling to bulk purchase Mako's product upfront.[16]

[15] The applicant wishes to argue that the effect of s 136 is that on receipt of the adverse information on 20 April 2014—four days before the $500,000 was advanced—the respondents were bound then to stop Mr Banks from advancing the $500,000 four days later. Mr Colson submitted the appeal would provide an opportunity for this Court to clarify the application of s 136 in circumstances where, between the execution of the contract and the time for its performance, the directors became aware that it could not then perform its obligations under that contract. That amounted to a matter of general commercial significance as it has the potential to apply to a range of commercial contracts and arrangements.

[16] We accept that the argument advanced, in the abstract, is one of potential general commercial significance. However, we do not consider this an appropriate appeal in which to examine the question. That is because the applicant faces insuperable factual findings that, even as at 24 April 2014:

(a) the Sprint deal, objectively assessed, remained a realistic prospect likely to lead to binding contracts;[17] and

(b) the directors reasonably believed Mako would be able to meet its obligations under Agreement 3 when they fell due.[18]

[17] Although the Court of Appeal made its like assessment at the earlier 25 March 2014 date,[19] the evidence does not go so far as to establish that the 20 April 2014 communication by Sprint meant no contract would now be entered into. As the High Court Judge found, negotiations with Sprint continued well after that, and only in "late

---

15 At [287].
16 At [289].
17 HC judgment, above n 4, at [435].
18 At [503].
19 CA judgment, above n 1, at [287].

April to mid-May 2014 at the earliest" should the respondents have concluded that it was unlikely an agreement with Sprint acceptable to Mako would be obtained, evidently referencing further adverse communications delivered on 26 April and 17 May 2014.[20]

[18] In these circumstances it is unnecessary to consider the s 301 argument.

Conclusion

[19] For the reasons given above we are not satisfied that it is necessary in the interests of justice for the Court to hear and determine the appeal.[21]

Result

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

[21] The applicant must pay the respondents one set of costs of $5,000.

Solicitors:
Wynn Williams, Auckland for Applicant
Lodder Law Ltd, Auckland for First Respondent
Maberly & Co, Auckland for Second to Fourth Respondents

---

20 HC judgment, above n 4, at [155], [435]–[439] and [501]–[503].
21 Senior Courts Act, s 74(1).