



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

26 MAY 2017

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***HAMISH MCINTOSH v JOHN HOWARD ROSS FISK AND DAVID
JOHN BRIDGMAN***

(SC 39/2016) [2017] NZSC 78

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

The issues

This case concerned a claim by liquidators to set aside a payment made by a company to an investor while it was insolvent. The company, Ross Asset Management Ltd (RAM), purported to offer investment management services but was in fact operating a Ponzi scheme. The appellant had deposited \$500,000 with RAM. He was provided with reports that purportedly showed the returns achieved on his investment. These returns were fictitious. Before the fraud was discovered and the company was placed in receivership and then liquidation, RAM repaid the appellant \$954,047, being his initial investment of \$500,000 plus fictitious profits of \$454,047. The respondents (the liquidators) then sought to set aside the payment of \$954,047 made to the appellant.

Result

This Court has held, by majority, that the respondents are able to set aside RAM’s payment of the fictitious profits to the appellant, but are not able to set aside the payment of the initial investment. That means the appellant retains \$500,000 but has to pay back \$454,047.

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Background

In April 2007, the appellant provided \$500,000 to RAM to invest on his behalf. The funds, any securities purchased and the income from those securities were to be held on a bare trust for the appellant by another company, Dagger Nominees Ltd (Dagger). RAM was entitled to deduct management fees for its investment services. Similar arrangements were entered into with other investors. The investors, including the appellant, were provided with reports that outlined the securities purchased on their behalf and the returns purportedly achieved.

As it transpired however, the investors were victims of fraud. RAM and its principal, Mr David Ross, were operating a Ponzi scheme. The securities that were purported to have been purchased on their behalf and the reported returns achieved were fictitious. The investors' funds were misappropriated almost immediately upon receipt, pooled and used to perpetuate the fraud by using the pooled funds to repay investors who wished to withdraw their funds plus fictitious returns. In addition, the pooled funds were used to pay RAM's operating expenses and fund drawings by Mr Ross.

In September 2011, the appellant gave notice to RAM that he wished to withdraw his funds. He was paid \$954,047 in a series of instalments in November 2011. This represented the original investment of \$500,000 and the fictitious returns of \$454,047. A report provided to the appellant purported to show how his portfolio had been sold to realise the money paid to him. In fact none of the sums paid had come from shares held on the appellant's behalf. They were sourced from the deposits of other investors and sales from a pool of securities held by RAM. At the time the appellant was paid out, RAM was insolvent.

RAM was placed in receivership in November 2012 and liquidation in December 2012. The respondents were appointed first as receivers and then as liquidators. In July 2014 they filed proceedings claiming the return of the \$954,047 paid to the appellant under the claw back provisions of the Companies Act 1993 (ss 292 or 297) or the Property Law Act 2007 (s 348). The appellant argued that those sections did not apply and that in any event he had given value for the payment and had changed his position in reliance on it, and therefore the defences under s 296(3) of the Companies Act and s 349 of the Property Law Act applied.

In the High Court, MacKenzie J allowed the liquidators' claim to recover the \$454,047 of fictitious profits paid to the appellant, but held that the appellant could retain the initial investment of \$500,000. This was upheld in the Court of Appeal by majority.

This Court granted leave to appeal on two questions:

- (a) whether an order should have been made setting aside all or part of the payment made by RAM to the appellant and requiring the appellant to pay the relevant amount to the respondents; and
- (b) if so, whether the order should have been to set aside the payment to all of the \$954,047 paid to the appellant or \$454,047, being the difference between the amount paid to the appellant and the \$500,000 he invested with RAM.

In his appeal to this Court, the appellant argued that the Court of Appeal was wrong to order him to return the fictitious profits and to reject his change of position defence. The respondents cross-appealed, arguing that the appellant should also have been ordered to repay the initial investment.

Reasons

This Court by majority has dismissed the appeal and the cross-appeal.

The majority (Arnold, O'Regan and Ellen France JJ and William Young J writing separately) found that the requirements for setting aside the payment made by RAM to the appellant were established under both the Companies Act and the Property Law Act and that the change of position defences in those statutes did not apply. However, the majority held that the appellant provided value for the payment back to him of the initial investment of \$500,000, because at the point that RAM misappropriated the appellant's funds they had become indebted to him for that amount. Therefore, the appellant had a defence in respect of that sum under s 296(3) of the Companies Act and s 349 of the Property Law Act. Accordingly, the Court of Appeal was correct:

- (a) not to allow the claim to set aside the payment back to the appellant of the initial investment of \$500,000; and
- (b) to allow the claim to set aside the payment to the appellant of the fictitious profits of \$454,047.

Glazebrook J, in a dissenting judgment, agreed that the requirements for setting the payment aside under both the Property Law Act and the Companies Act were met, and that the change of position defences did not apply. However, she would have held, because of the particular circumstances of the investment, including that RAM was operating a Ponzi scheme, that the appellant did not provide value for the initial investment of \$500,000 and therefore no defence was made out under s 296(3) of the Companies Act or s 349 of the Property Law Act. Accordingly, Glazebrook J would have dismissed the appeal but allowed

the cross-appeal, requiring the appellant to repay the full amount of the payment of \$954,047.

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