



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

31 AUGUST 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

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

(SC 39/2016) [2017] NZSC 129

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

This Court’s judgment in *McIntosh v Fisk* [2017] NZSC 78 dismissed the appellant’s appeal and the respondents’ cross-appeal and upheld the order made in the High Court. That order required the appellant to pay \$454,047.62, received as part of the repayment of funds in a failed Ponzi scheme, to the liquidators of the company, Ross Asset Management (RAM).

The question of interest on the \$454,047.62 outstanding was reserved in the High Court. This Court gave the parties the opportunity to file submissions on the point in the event they did not reach agreement. The parties were not able to agree and submissions were filed. This Court’s further judgment deals with the payment of interest.

Background

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 paid the appellant \$954,047.62, being his initial investment of \$500,000 plus fictitious profits of \$454,047.62. The

respondents (the liquidators) then sought to set aside the payment of \$954,047.62 made to the appellant.

In the High Court, the liquidators' claim was dismissed in respect of the initial investment of \$500,000, but upheld in respect of the fictitious profits of \$454,047.62. The appellant was ordered to pay this sum to the liquidators. The appellant's appeal and the liquidators' cross-appeal to the Court of Appeal were both dismissed. This Court, by majority (Glazebrook J dissenting), upheld the decision of the lower Courts.

The liquidators sought an order that the appellant pay interest on the sum outstanding from the date of their appointment (17 December 2012) at the rate set pursuant to s 87(3) of the Judicature Act 1908 of five per cent per annum.

The appellant accepted that the liquidators would normally be entitled to interest on the claw back sum but he submitted various aspects of the case meant no interest should be payable. In the alternative, the appellant submitted that if interest was to be paid that payment should run from the date of the High Court judgment (22 June 2015) or the date of the liquidators filing their application to set aside the payment (17 July 2014). The appellant accepted that the rate of any interest payable would be five per cent per annum.

Reasons

It was not disputed that the Court has jurisdiction to order the payment of interest, either under s 87(1) of the Judicature Act, s 295(c) of the Companies Act 1993 or s 348(2) of the Property Law Act 2007.

This Court has found that the purpose of an interest award is not punitive, but rather to compensate for the loss of the use of money in circumstances where the party in receipt of the money has had the benefit of its use. In this case, the appellant had the use of the money since he was paid by RAM and as a result the company had been deprived of the use of that money. Accordingly, there was no reason in principle not to award interest in this case.

The Court has also found that the interest award should run from the date the liquidators were appointed. Under s 87(1) of the Judicature Act the interest may run from the date when the cause of action arose, and with respect to the claim under the Companies Act that was the date the liquidators were appointed. Establishing the date the cause of action under the Property Law Act arose was more difficult, but this question did not need to be resolved because interest in this case could be awarded under either s 87(1) or s 295.

Result

This Court has held that the appellant is required to pay interest at the rate of five per cent per annum on the sum of \$454,047.62 from the date of the liquidators' appointment (17 December 2012).

Contact person:

Kieron McCarron, Supreme Court Registrar (04) 471 6921