



HIGH COURT OF AUSTRALIA

6 April 2016

FISCHER & ORS v NEMESKE PTY LTD & ORS

[2016] HCA 11

Today the High Court, by majority, dismissed an appeal from the Court of Appeal of the Supreme Court of New South Wales. The High Court held that a trustee had validly exercised a power to "advance" and "apply" trust capital or income by creating a debt reflecting the value of shares held by the trustee at the time the advance was made.

The appellants are beneficiaries of the Nemes Family Trust ("the Trust"), of which the first respondent, Nemeske Pty Ltd, is trustee ("the Trustee"). The Trust's principal assets are shares in a second company, Aladdin Ltd ("Aladdin"). In July 1994, the value of those shares, \$3,904,300, was recorded in an "asset revaluation reserve". In September 1994, the Trustee passed a resolution which distributed the whole of the asset revaluation reserve to two other beneficiaries of the Trust, Mr Emery Nemes and Mrs Madeleine Nemes. In August 1995, the Trustee executed a deed purportedly charging the shares in Aladdin in Mr and Mrs Nemes' favour ("the Deed of Charge"). In the Deed of Charge, the Trustee recited that it was indebted to Mr and Mrs Nemes in the sum of \$3,904,300, and covenanted that it would pay the amount of that debt upon their demand. Mr and Mrs Nemes both died before any demand was made. Mr Nemes bequeathed all the shares in the Trustee and in Aladdin to the appellants. The residuary estate was left to other persons.

The appellants commenced proceedings against the Trustee, the executors of Mr Nemes' estate ("the executors") and other beneficiaries of the Trust, seeking declarations including that the distribution made from the Trust was of no effect or void. The executors cross-claimed, seeking payment of the amount allegedly owing to Mr Nemes' estate.

The primary judge in the Supreme Court of New South Wales held that the resolution was a valid exercise of the Trustee's power to advance and apply trust capital or income under the terms of the trust deed. That conclusion was upheld by the Court of Appeal, which also held that although there was no power to charge the shares, the covenant in the Deed of Charge confirmed that the debt owing to Mr and Mrs Nemes was payable on demand. By grant of special leave, the appellants appealed to the High Court.

The majority of the High Court dismissed the appeal, holding that the resolution was an effective exercise of the Trustee's power to advance and apply trust capital or income, notwithstanding that there was no change in the beneficial ownership of the shares. The majority held that the resolution created a creditor/debtor relationship, enforceable at law, between Mr and Mrs Nemes and the Trustee. Further, the covenant in the Deed of Charge supported the advance and application made by the Trustee's resolution.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*