



HIGH COURT OF AUSTRALIA

Public Information Officer

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CHARLES DELIUS SOMERVILLE ALEXANDER AND OTHERS trading as MINTER
ELLISON v PERPETUAL TRUSTEES WA LIMITED AND PERPETUAL TRUSTEES
COMPANY LIMITED

The High Court of Australia today dismissed an appeal by Minter Ellison, which had sought to have the Perpetual Trustees companies contribute to repayment of trust money lost by 40 investors.

The decision follows a related April 2003 decision, *Youyang Pty Ltd as trustee of the Bill Hayward Discretionary Trust v Minter Ellison Morris Fletcher (later Minter Ellison)*, in which the Court unanimously held Minters liable in respect of an investment by a family trust and ordered the law firm to restore the lost \$500,000, plus interest and costs, to the trust fund.

In both cases, investors had invested substantial amounts in a preference share issue by EC Consolidated Capital Limited (ECCCL) which went into liquidation in 1997, resulting in the loss of all money invested. In today's decision, investments were made via the Perpetual Trustees companies, which were trustees of two managed superannuation funds, identified as first-level trusts. Minters were both solicitors for ECCCL and agents for Perpetual Trustees. Perpetual Trustees handed over investors' subscriptions which Minters held in its trust account, constituting the second-level trust. ECCCL was to receive the money only after providing deposit certificates, issued by a Dresdner Bank subsidiary as security for subscribers' investments. Minters never received the deposit certificates, but released the funds to ECCCL. Perpetual Trustees failed to ensure subscriptions conformed with the required terms.

The investors, some of whom were trustees for other investors, successfully sued Perpetual Trustees in the New South Wales Supreme Court. Minters were then found liable to the Perpetual Trustees companies for \$12.44 million to replenish trust funds or to repay investors. Minters claimed Perpetual Trustees should share this liability. The NSW Court of Appeal dismissed an appeal by Minters, which appealed to the High Court, claiming the Court of Appeal erred in holding that it was not entitled to contribution from Perpetual Trustees to the repayments.

The High Court appeal turned on construction of sections of Victoria's Wrongs Act concerning contribution. Section 23B provides for claims for contribution from anyone liable for the same damage. Minters was not liable to the investors. Perpetual Trustees were liable to the investors for breach of the first-level trusts. Minters were liable to Perpetual Trustees for breach of the second-level trusts. The question was whether Minters and Perpetual Trustees were liable for the same damage.

Only six members of the Court sat on the appeal, the other member of the court having been involved in the proceedings as counsel. The High Court being evenly divided, the appeal failed and was dismissed (Judiciary Act section 23(2)(b)).

- *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.*