

## **FISCHER & ORS v NEMESKE PTY LTD & ORS (S223/2015)**

Court appealed from: Supreme Court of New South Wales, Court of Appeal  
[2015] NSWCA 6

Date of judgment: 11 February 2015

Special leave granted: 16 October 2015

Nemeske Pty Ltd (“Nemeske”) is the trustee of the Nemes Family Trust (“the Trust”), a trust which was established by a deed of settlement (“the Trust Deed”). The Trust’s beneficiaries included Mr Emery Nemes and his wife Mrs Madeleine Nemes (“the Nemes”), along with others including the Appellants. The Trust Deed also gave Mr Nemes a general power (“the General Power”) to vary it, the Trust Deed, by means of an oral resolution.

In May 1994 Mr Nemes orally resolved (“the Nemes Resolution”) to vary the Trust’s terms, such that the vesting day became 24 June 1992 instead of a date decades later.

The Trust’s only assets, which were originally valued at just \$1,000, were ten shares in Aladdin Ltd. By July 1994 however those shares had been revalued at \$3,904,300. In September 1994 Nemeske resolved (“the September Resolution”) that \$3,904,300 be distributed to the Nemes as joint tenants. Thereafter Nemeske’s books showed a debt of \$3,904,300 owed to the Nemes. In August 1995 Nemeske executed a deed of charge in which it covenanted to pay \$3,904,300 to the Nemes on demand. A director’s declaration made in May 2004 (“the Director’s Declaration”) also acknowledged Nemeske’s debt.

Mrs Nemes died in 2010 and Mr Nemes died in 2011. In 2013 the Appellants commenced proceedings against the executors (“the Executors”) of Mr Nemes’ estate, seeking a declaration that Nemeske, as trustee, was not indebted to the estate. On 24 March 2014 Justice Stevenson dismissed that claim and ordered that Nemeske pay the Executors \$3,904,300 plus interest.

On 11 February 2015 the Court of Appeal (Beazley P, Barrett & Ward JJA) unanimously dismissed the Appellants’ subsequent appeal. Their Honours held that the Nemes Resolution was ineffective because it purported to vary the Trust in a way which was contrary to a limitation contained in the General Power. They held however that the September Resolution was valid and it effectively applied \$3,904,300 of the Trust’s income or capital for the Nemes’ benefit. An action in debt then arose, an action which was also available to the estate. The Court of Appeal found that it was not statute-barred, as the relevant 12 year limitation period counted from May 2004 (being the date of the Director’s Declaration).

The grounds of appeal include:

- The Court erred in finding that the September Resolution of Nemeske, as trustee of the Trust, to make a distribution from the Trust:
  - a) effected a resettlement of some or all of the Trust property, or otherwise altered the obligation of the trustee with respect to such property, such that the trustee thereafter held some or all of the assets of the Trust (or former assets of the Trust) upon trust to pay \$3,904,300 to the Nemes; or

- b) created an equitable obligation to pay the Nemes \$3,904,300 as joint tenants, which obligation was to be satisfied by raising an amount from the assets of the Trust.

On 2 November 2015 a notice of contention was filed, the grounds of which include:

- In the events that occurred namely:
  - a) The September Resolution to distribute the asset revaluation reserve;
  - b) The crediting of the loan account of the Nemes in the books of Nemeske shortly thereafter in an amount the sum equal to the asset revaluation reserve;
  - c) The execution of the Deed on 30 August 1995.

Nemeske thereby effected a distribution of \$3,904,300 being a sum equal to the asset revaluation reserve to the Nemes and a simultaneous loan by them back to Nemeske of the amount of the distribution without it being a physical distribution in cash, and thereby became indebted to the Nemes.