IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-697
[2012] NZHC 151

UNDER	the Companies Act 1993
BETWEEN	AOTEAROA KIWIFRUIT EXPORT LIMITED Applicant
AND	ANZ NATIONAL BANK LIMITED Respondent

CIV-2011-470-928

AND BETWEEN	WAYNE BRUCE NORMAN Applicant
AND	AOTEAROA KIWIFRUIT EXPORT LIMITED (IN LIQUIDATION) First Respondent
AND	KIM SCOTT THOMPSON Second Respondent

Hearing: 3 February 2012

Appearances: S M Kilian for Wayne Bruce Norman
R Scott for Aotearoa Kiwifruit Export Ltd and K S Thompson
No appearance for ANZ National Bank

Judgment: 3 February 2012

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Kilian & Associates (S Kilian), P O Box 399 845 Albany Auckland 0752 for W B Norman
Norris Ward McKinnon (R Scott), Hamilton for Aotearoa Kiwitfruit Export and for K S Thompson
D P Weaver, P O Box 13 007 Tauranga
Phillips Fox (Iain Thain/Natalie Larnder), Auckland, for ANZ National Bank

[1] These matters arise out of a decision of Associate Judge Christiansen on 4 October 2011. He heard an application by Aotearoa Kiwifruit Export Ltd to set aside a statutory demand served on it by the ANZ National Bank. The ANZ National Bank claimed that it was a creditor of Aotearoa Kiwifruit Export Ltd under a guarantee of a loan given to another company, Maheatataka Coolpack Ltd. Mr Wayne Bruce Norman is the sole director of Aotearoa Kiwifruit Export Ltd (apart from the question of the appointment of his daughter as an alternate director) and he is also a director of Maheatataka Coolpack Ltd.

[2] Associate Judge Christiansen dismissed the application under s 290 of the Companies Act 1993. He held that there was not any dispute as to the liability of Aotearoa Kiwifruit Export Ltd under the guarantee. He also made an order under s 291(1)(b) of the Companies Act putting Aotearoa Kiwifruit Export Ltd into liquidation immediately. There was an alternative course he might have taken. That was to fix time for Aotearoa Kiwifruit Export Ltd to pay the amount of the debt and then to allow the bank to apply for a liquidation order if the company did not comply with the order for payment.

[3] The liquidator, Mr Thompson, is an experienced Hamilton insolvency practitioner.

[4] On 1 November 2011, a notice of appeal against Associate Judge Christiansen's order was signed and filed with the Court of Appeal. Mr Norman, as director of Aotearoa Kiwifruit Export Ltd signed the notice of appeal in the name of the company. I have been informed that since then the required security for costs has been paid into the Court of Appeal. So far no date has been allocated for the hearing of the appeal. Instead, Mr Norman lodged the application in CIV-2011-470-928 in early November 2011. He asked for an order granting him leave to begin the proceeding, that is, the appeal to the Court of Appeal on behalf of Aotearoa Kiwifruit Export Ltd. He also sought an order for costs against the liquidator on the

application. On that application the respondents are the company in liquidation and Mr Thompson the liquidator. However, it seemed to me that as the bank is the respondent to the appeal, it ought to be heard on that application. I directed that notice of the hearing today be given to the bank. I am grateful to Mr Thain for appearing at short notice.

[5] While that appeal is pending there is another matter of greater concern to Mr Norman. As I understand Mr Norman's position, Aotearoa Kiwifruit Export Ltd collected payments from Zespri New Zealand Ltd on behalf of a group of kiwifruit growers. The contractual arrangements with Zespri New Zealand Ltd required it to make payments for those growers to Aotearoa Kiwifruit Export Ltd which would in turn pass on those payments to the growers. Mr Norman is a director of one grower company and I understand also one of the trustees of a grower trust. The growers say that Aotearoa Kiwifruit Export Ltd holds funds paid out by Zespri New Zealand Ltd which belong to the growers beneficially – in other words, that the company now in liquidation is holding funds as a trustee for them.

[6] Mr Norman is concerned because he says that the growers have urgent need of the funds for their ongoing orchard operations. He seeks a prompt determination that the company holds funds on trust and requires directions to be made that the liquidator pay those funds out to the growers.

[7] The liquidator at this stage does not necessarily agree with the contention of the growers. He says he has made some investigation but has not come to a final view. His preliminary view is that the funds are company funds that are available to be distributed to creditors generally rather than funds held beneficially for the growers.

[8] The way that the matter has been dealt with procedurally is that Mr Norman, through his counsel, filed a memorandum on 15 December 2011 seeking an urgent hearing. That came before Brewer J in Tauranga before Christmas 2011 but with the limited time available at the end of the year Brewer J did not feel able to deal with the matter. However, there is no formal proceeding before the court by all the growers seeking a determination from this court as to their entitlement to the funds,

nor is there any relevant application by the liquidator under s 284 of the Companies Act seeking directions from the court as to how he should deal with the funds held by the company.

[9] Today, Mr Kilian sought directions that the liquidator should be required to pay funds out to the growers. That request for an immediate determination in my view poses difficulties for the liquidator. That is because there is an appeal pending against the decision appointing the liquidator. Normally, when a winding up decision is under appeal, a liquidator may do little more than preserve the status quo until the outcome of the appeal is known. One reason why a liquidator may not wish to embark fully into realising company assets to carry out a liquidation is that there may be doubt as to his remuneration. He may not have any assurance that he will receive remuneration for his work if the order appointing him as liquidator is set aside on appeal.

[10] I deal first with the question of how the appeal is to be conducted and then with the request that the liquidator be directed to make a payment out.

[11] An appeal against a liquidation order poses procedural problems. Before liquidation, the company is under the management and control of directors, and directors are appointed in accordance with the company's constitution. Normally, that means that directors are appointed by shareholders, usually by order in resolution in a meeting of shareholders. Once an order for liquidation is made, then under s 248(1)(b) the directors remain in office but they cease to have powers, functions or duties other than those required or permitted to be exercised by Part 16 of the Companies Act. Those are very limited powers, functions or duties, generally limited to co-operating with the liquidator in the conduct of the liquidation providing information and documents to him. There is also the ability to apply under s 284 of the Companies Act. But, that aside, the directors effectively lose the power of management and control which they had before the liquidation order. After liquidation, directors cannot start proceedings in the name of the company. Similarly, the shareholders are powerless to appoint anyone else to conduct the management of the company once a liquidator is appointed.

[12] Once an order is made that a company be put into liquidation, the company itself would have a right to appeal against an order for liquidation, but the person who can exercise that right is the liquidator because he now has custody and control of the company and he has the power under the Sixth Schedule of the Companies Act to issue proceedings on behalf of the company. But a liquidator is never going to be interested in pursuing an appeal against a decision putting a company into liquidation because he owes his appointment to the order which appointed him. I have never in my experience seen any liquidator interested in pursuing an appeal to obtain an order setting aside the order under which he was appointed. Not surprisingly, in his affidavit in this proceeding, the liquidator has not welcomed the idea that there should be an appeal against the decision appointing him and he has suggested the issues raised by the growers and by Mr Norman can be resolved in the course of the liquidation, rather than by way of an appeal.

[13] Effectively, there has been a change of control within the company so that the people now in control of the company will no longer be motivated to run a challenge against the order putting the company into liquidation. That suggests that there might not be any right to appeal, or that any right to appeal might be no more than a bare technicality which could never be effective in practice.

[14] Mr Kilian has reminded me, of course, that s 66 of the Judicature Act 1908 confers an absolute right on any party to a proceeding in this court to appeal to the Court of Appeal to challenge any judgement or order of this court. An order under s 241 of the Companies Act that a company be put into liquidation is an order that comes within s 66 and ought to be able to be appealed just as any other order of this court should be subject to a right of appeal or review. But Aotearoa Kiwifruit Ltd, as the unsuccessful party to the decision of this court, will not itself appeal against the decision because it is now under the control of the liquidator. In this situation, the powers of this court have to be used in a way that will give those who have been adversely affected by the liquidation decision the power to challenge that decision by way of appeal in the Court of Appeal.

[15] It is helpful to identify the people who may be interested and adversely affected so as to be given standing to appeal. Under s 241(2)(c) of the Companies

Act, the court can make an order putting a company into liquidation on the application of defined people. Those people include the company itself, a director, a shareholder, a creditor, an administrator of the company in liquidation, the Financial Markets Authority, the Registrar of Companies and the Reserve Bank of New Zealand (if the company is a licensed insurer). The relevant people here are a director and a shareholder. If a director or a shareholder can apply for a liquidation order it follows, in my judgment, that they also have standing to oppose a liquidation order. They can enter an appearance under r 31.18 of the High Court Rules and thereby become a party to a liquidation proceeding. Under r 31.16 a shareholder may file and serve a statement of defence, although I note that a director does not appear to have an independent right to file a statement of defence. Nevertheless, if a shareholders and directors have sufficient interest to oppose a liquidation order, then they stand to be adversely affected by a liquidation order and have sufficient standing to be allowed to appeal against a liquidation decision. Shareholders are adversely affected by a liquidation decision because the company is now under the control and management of a liquidator who must conduct his liquidation in accordance with the Companies Act and in particular with his principal duty under s 253 which gives priority towards realising assets to be distributed to creditors before there is any distribution to shareholders. On a court-appointed liquidation the liquidator may not be a person of the shareholder's choice. Directors are also adversely affected by a liquidation order because before the liquidation order they had management and control of the company; the effect of s 248(1)(b) of the Companies Act is that they now lose that power of management and control and are replaced instead by a liquidator. That loss of power and control which they had before is an adverse effect which, in my judgment, gives them standing to challenge the decision on appeal.

[16] If a director wishes to challenge a liquidation decision on appeal, he is not exercising any power of control over the company itself. Instead, he is exercising an independent right which arises out of the fact that he has lost his control and management of the company because of the liquidation decision.

[17] It is open here to allow those with a sufficient interest in the liquidation, and who have standing in the eyes of the Companies Act, to be made parties to the

proceeding so that they can then run an appeal in their own right rather than in the name of the company. That is the course that was taken by Woodhouse J in *Buxton v Mainline Contracting Ltd*.[1] In that case Mrs Buxton, a director of Mainline, applied under s 165 of the Companies Act for leave to bring a derivative action for a company in liquidation. The proposed derivative proceeding was an appeal against the liquidation order. Woodhouse J followed the decision of Wild J in *Headley v Albany Power Centre Ltd (In Liq)*[2] and held there was no jurisdiction to use s 165 following liquidation. But the parties in that case fashioned a remedy. Woodhouse J accepted a proposal that a shareholder be joined and that that shareholder would be able to seek leave to appeal. That outcome ensured that, subject to the Court of Appeal extending time to appeal under the Court of Appeal (Civil) Rules, there could be an effective appeal against the liquidation order.

[18] There are other examples of parties being added to a proceeding after judgment. In *McDonald v Simmons*,[3] Anderson J added beneficiaries as parties to a proceeding after judgment in the course of a recall judgment. And in *Beneficial Owners of Whangaruru Whakaturia (No.4) v Warin & Ors*,[4] the Court of Appeal approved *McDonald v Simmons* and suggested in that case that beneficial owners of Maori land not a party to a proceeding in the High Court might seek recall to have themselves joined as parties.[5] As it happened, in that case recall was not available because the judgment had already been sealed.

[19] A court can recall a judgment under r 11.9 of the High Court Rules. The leading authority on recall is the judgment of Wild CJ in *Horowhenua County Council v Nash (No.2)*[6] which says:

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or

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1 *Buxton v Mainline Contracting Ltd* HC Auckland CIV-2010-404-1224, 22 October 2010.
2 *Headley v Albany Power Centre Ltd (in liq)* (2004) 9 NZCLC 263,658.
3 *McDonald v Simmons* (1994) 8 PRNZ 12.
4 *The Beneficial Owners of Whangaruru Whakaturia (No.4)* [2009] NZCA 60; (2009) 19 PRNZ 296; [2009] NZAR 523.
5 At [45].
6 *Horowhenua County v Nash (No.2)* [1968] NZLR 632 at 633.

> a new judicial decision of relevance and high authority; secondly, where counsel have failed to the direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[20] I am satisfied that this is one of those rare occasions where it is open to the court to use the power under the third category – that is, that there is some other very special reason why justice requires that the judgment be recalled. That very special reason in this case is that the rights of appeal conferred by s 66 of the Judicature Act should be real rights and should not be thwarted by the effects of a liquidation order which is the subject of appeal. I am able to exercise the recall power in this case because the order of Associate Judge Christiansen has not been sealed.

[21] Mr Norman is not only a director of Aotearoa Kiwifruit Export Ltd, but he also holds a small number of shares in his own right. Both as director and as shareholder, he has standing to be joined as a party to proceeding CIV-2011-470-697 under s 290 of the Companies Act. I now make an order joining him as a party so that he may now bring an appeal in his own name against the decision of Associate Judge Christiansen. If required, that order is to apply retrospectively to the date when he filed his original appeal on behalf of the company to the Court of Appeal.

[22] However, in case there is doubt whether it is possible for that order to take effect retrospectively, Mr Norman would do well to consider applying to the Court of Appeal for an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules. It will be for the Court of Appeal to decide whether leave should be granted if an extension of time is sought. It is not for me to pre-empt the decision of the Court of Appeal.

[23] I do, however, offer these comments. This case has arisen out of the exercise of the power under s 291(1)(b) of the Companies Act that the company be put into liquidation immediately after the application under s 290 was dismissed. That is unusual. I am not aware of any authoritative decisions giving guidance on how the powers under s 291(1) of the Companies Act should be exercised. It has generally been my practice not to make an immediate order unless I regarded the company which is the subject of the application as effectively moribund. It appears that this

company was in active business at the time the order was made. It may be useful, at least for Associate Judges who consider applications under s 290, to have guidance from the Court of Appeal on how the powers under s 291 should be exercised.

[24] There is another point that might be useful for the Court of Appeal to rule on, or at least to give some advice to the High Court. If the appeal succeeds, there will be the question as to the liquidator's remuneration. A liquidator's right to remuneration from the company may be derived from the liquidation order appointing him. If his appointment by the court is set aside on appeal, the question arises whether he will be entitled to any remuneration for his work pending the appeal. The question will also arise if he is entitled to remuneration, who should pay him. The company would presumably take the stance that as the order putting the company into liquidation ought not to have been made, then the company ought not to have to pay the liquidator's costs. The liquidator would say that he has carried out his work pursuant to an order which at least had interim effect pending appeal, and he ought not to be out of pocket. No doubt the creditor, the bank, would have reasons why it should not be liable to pay as well. Some guidance from the Court of Appeal in this area would be useful.

[25] I turn to the other matter – the application for payment out to the growers. At the moment, all that is before the court is a memorandum from Mr Norman lodged, as I understand it, as a trustee of one of the grower trusts but I gather that he is only one of a number of trustees. There is not any effective proceeding before the court which could allow the court to make any decision. In particular, the particular growers are not adequately identified. They appear to be trusts but the names of all the trustees are not given. Obviously if a trust is to bring a proceeding in this court all trustees would need to be named as parties. It is unclear to me that Mr Norman, as a director of Aotearoa Kiwifruit Export Ltd, would be able to seek orders for payment out to grower groups, instead of the grower groups themselves. In the absence of any effective proceeding before the court, it is not open to me to make any orders today in respect of the matter.

[26] Further the liquidator should not be expected to deal with the matter while his appointment is under challenge. He says that he has still to investigate matters fully.

I can understand that Mr Norman would be frustrated by that response because the order for the company to be put into liquidation was made in October 2011 and I understand the frustration of growers, generally, that funds are frozen in the company when they believe that they are rightfully entitled to them.

[27] However, Mr Thompson is handicapped in being able to investigate matters because an appeal against his appointment is pending in the Court of Appeal. It would be wrong to require Mr Thompson to undertake serious investigation of the growers' claims until Mr Thompson knows for certain whether or not he is validly appointed as liquidator. Effectively, while an appeal is pending, Mr Thompson can do little more than preserve the status quo.

[28] I accept that the growers have an arguable case for being beneficially entitled to funds which they say the company is holding. That is, their claim is not completely frivolous and cannot be dismissed out of hand. They have provided the material which goes to show that Aotearoa Kiwifruit Export Ltd is little more than a conduit between Zespri Ltd and them for payment. I can understand their claim that the company was no more than a trustee of the fund for them. Nevertheless, so far I have only had the growers' material put in front of me and I cannot dismiss the possibility that there may be a contrary argument and that there may be material that Mr Thompson may find in the course of an investigation which may cast the matter in a different light. At this stage, until the Court of Appeal has made a decision on the appeal against the liquidation order, I do not think it is fair on Mr Thompson to require him to commit to serious effort to respond to the growers' claims.

[29] There are two ways by which the growers could bring the matter before the Court. They could either bring an independent proceeding against the company claiming that the company holds property to which they are beneficially entitled – that would require the court to grant leave for such a proceeding under section 248(1)(c) of the Companies Act. Alternatively, they could apply for directions under s 284(1), but for that they also need leave of the court. Mr Kilian expressed a preference for leave to be granted under s 248 rather than s 284.

[30] For my purposes I do not need to express a preference. Although the matter is put as an oral application, I am prepared to deal with it and to grant leave to the grower groups under either s 248(1)(c) or under s 284(1) to apply to the court either by way of a proceeding to recover funds or to apply for directions. However, no such application should be launched until the appeal to the Court of Appeal has been disposed of.

[31] I appreciate that the growers have urgent need of their money. I can only say that it is in the hands of the parties to make sure that the appeal to the Court of Appeal is pursued expeditiously. I note that the Court of Appeal has issued a Fast Track Practice Note to allow appeals to be brought on a fast track basis. The Court of Appeal also remains open to appeals on an urgent basis. There is a real need for the appeal to be dealt with expeditiously and I trust that it can be.

[32] The final matter that remains is the question of costs. The application today has been really to allow Mr Norman to get his appeal rights in order so as to allow his appeal to run. The liquidator and the bank have taken a responsible attitude by not opposing, and instead have indicated their co-operation. In the circumstances I reserve costs, indicating that the costs today can be regarded as part of the costs of the appeal. It may be something that could be addressed in the Court of Appeal.

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R M Bell
Associate Judge