

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA349/2018
[2019] NZCA 244**

BETWEEN PETER BRENT HOME HUBBARD AND
 HARLEY HAYNES
 Applicants

AND KIWIRAIL LIMITED
 Respondent

Court: Miller and Collins JJ

Counsel: Applicants in person
 M L Campbell and S J Thomson for Respondent

Judgment: 24 June 2019 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time to file the case on appeal and apply for a hearing date is declined.**
- B The application for leave to adduce further evidence is declined.**
- C No order as to costs.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Messrs Hubbard and Haynes (the applicants) wish to appeal a decision of Associate Judge Smith,¹ in which he:

¹ *KiwiRail Ltd v Oceanic Palms Ltd* [2018] NZHC 1164.

- (a) ordered the liquidation of Oceanic Palms Ltd (Oceanic Palms); and
- (b) refused to stay his decision pending other litigation.

[2] The applicants are the shareholders and directors of Oceanic Palms. A notice of appeal was filed by them one day out of time. Brown J granted an extension of time in which to appeal. The notice of appeal was deemed to be filed on 6 August 2018. As a consequence, the case on appeal had to be filed by 6 November 2018. Failure to comply with this deadline would mean the appeal would be treated as having been abandoned, unless an application for an extension was made before 6 November 2018 or within three months of that date.²

[3] On 21 December 2018, the applicants applied for an extension of time to file the case on appeal. Further applications for an extension of time to file the case on appeal were made on 29 January, 29 March and 23 April 2019. The applicants applied for a fixture on 26 April 2019. The case on appeal was filed on 30 April 2019. In addition, on 26 April 2019 the applicants filed an application to submit a “supplementary bundle” of documents.

[4] Two applications are addressed in this decision:

- (a) the application for leave to extend time for filing the case on appeal;
and
- (b) the application for leave to adduce further evidence.

Background

[5] The current applications are part of a protracted dispute arising from a lease that Oceanic Palms had with KiwiRail Ltd (KiwiRail). The dispute began when KiwiRail increased the rent that Oceanic Palms was to pay. Oceanic Palms refused to pay the increased rent. It then unsuccessfully sought in the High Court relief against forfeiture of the lease.³ Oceanic Palms’ appeal from that decision was dismissed by

² Court of Appeal (Civil) Rules 2005, r 43(3).

³ *Hubbard v KiwiRail Ltd* [2016] NZHC 1061.

this Court.⁴ An application for leave to appeal was dismissed by the Supreme Court.⁵ Oceanic Palms then made application for interim relief under the Judicial Review Procedure Act 2016. That application was dismissed by the High Court.⁶ KiwiRail then served a statutory demand on Oceanic Palms. When Oceanic Palms failed to comply with the notice of demand, KiwiRail successfully applied for liquidation of Oceanic Palms. It is the appeal from that decision that was deemed to have been filed on 6 August 2018.

[6] The applicants bring this appeal in their personal capacity, as opposed to on behalf of Oceanic Palms. While the applicants remain directors of Oceanic Palms, since the company has been put into liquidation, they are unable to exercise the powers of directors.⁷ The High Court has previously recognised a right, independent from the company, for directors to challenge a liquidation order of their company.⁸ This right arises out of the fact that a director has lost control and management of the company once it has been put into liquidation. For the purposes of this application, the applicants' standing to appeal the liquidation order is accepted. KiwiRail has, through its counsel, informed this Court that the liquidation of Oceanic Palms is now well advanced, and its assets have been sold.

Application for an extension of time to file case on appeal

[7] The applicants are lay litigants. Although they now have some familiarity with this Court's rules and procedures, we grant them some latitude on account of the fact that they are not represented.

[8] The delay in filing the case on appeal is due to a misapprehension on the part of the applicants that their submissions in support of the appeal were to form part of the case on appeal. We also extend the applicants some latitude on account of their misunderstanding about the requirements of a case on appeal.

⁴ *Hubbard v KiwiRail Ltd* [2017] NZCA 282, (2017) 18 NZCPR 620.

⁵ *Hubbard v KiwiRail Ltd* [2017] NZSC 153.

⁶ *Oceanic Palms Ltd v KiwiRail Ltd* [2018] NZHC 679.

⁷ Companies Act 1993, s 248(1)(b).

⁸ *Aotearoa Kiwifruit Export Ltd v ANZ National Bank Ltd* HC Tauranga CIV-2011-470-697, 3 February 2012 at [16].

[9] The real difficulty with the application is the absence of any merit to the appeal. There are four insurmountable hurdles facing the applicants:

- (a) They wish to argue that KiwiRail's decision to increase the rent payable by Oceanic Palms was made in bad faith, contrary to the duties and responsibilities of a state-owned enterprise and/or otherwise unreasonable. Those claims have, however, already been conclusively determined in favour of KiwiRail in the lease forfeiture and judicial review proceedings.
- (b) The applicants wish to argue that the rent calculations relied upon by KiwiRail were corrupt. The valuation relied upon KiwiRail was, however, found to be reasonable by this Court.⁹
- (c) The applicants also wish to argue that they were unaware of the time limits in the statutory demand notice. This argument is implausible as the time limits for paying the sum demanded was clearly set out in the statutory demand.
- (d) The appeal is now likely to be moot as the liquidation of Oceanic Palms is almost complete.

[10] In the absence of merit to the appeal, we decline the application for an extension of time to file the case on appeal.

Application to adduce further evidence

[11] The application for leave to adduce further evidence is rendered moot by our decision to decline the application for an extension of time to file the case on appeal. For completeness we note, however, that the documents that are the subject of the application include legal submissions and a copy of s 4 of the State-Owned Enterprises Act 1986. Those documents are not evidence and should not form part of

⁹ *Hubbard v KiwiRail Ltd*, above n **Error! Bookmark not defined.**, at [41]–[42].

a case on appeal. The remaining documents comprise affidavits that do not affect in any way our assessment of the merits of the appeal.

[12] The application for leave to adduce further evidence is therefore declined.

Result

[13] The application for an extension of time to file the case on appeal and apply for a hearing date is declined.

[14] The application to adduce further evidence is declined.

[15] There is no order as to costs.

Solicitors:
Russell McVeagh, Wellington for Respondent