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ARTICLE

Looking into Directors' Private Affairs: New Zealand Court of Appeal Rejects Australian Approach

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Synopsis

In its recent decision in *Finnigan v Ellis*[1] the New Zealand Court of Appeal considered whether the Court had jurisdiction to order a former director of an insolvent company to provide personal financial information to a liquidator. This information was sought so that the liquidators could decide whether it was economically worthwhile to pursue a claim against the former director. The Court of Appeal recognised that the Australian Courts had taken a permissive approach pursuant to similar legislation, and that, generally it is desirable to have uniformity with Australian law in commercial matters. However, the Court was critical of the Australian approach and held that the Companies Act 1993 did not permit liquidators to inquire into the private financial information of a former director.

Background

The appellants were the liquidators of Wenztro Co-operation Ltd, of which Mr Ellis was a former director. The liquidators had commenced proceedings against Mr Ellis alleging breaches of his duties as a director.

Before incurring further cost, the liquidators wanted to know whether they would be able to recover funds from Mr Ellis in the event that they were successful in obtaining judgment against him.[2] Mr Ellis refused to provide any information about his financial means (interestingly, two other directors provided the requested information at the liquidators' request), and the liquidators applied to the High Court for orders requiring disclosure. The High Court declined the liquidators' application.

The key questions on appeal were:

(a) whether the Court has jurisdiction to order a director to disclose privately-held personal financial information about his or her means for the purpose of establishing judgment worthiness; and

(b) if so, whether that jurisdiction ought to be exercised in the case before the Court.

The relevant legislation, sections 261 and 266 of the Companies Act 1993, provide that:

(a) S 261 – A liquidator may, require (among others) a director or former director of the company to provide the liquidator with information about the business, accounts, or affairs of the company or to be examined on oath by the liquidator in relation to the business, accounts, or affairs of the company.

(b) S 266 – the Court may order a director to be examined on or to produce records or documents relating to any matter relating to the business, accounts, or affairs of the company.

The central question was therefore whether, in circumstances where the liquidators had an extant claim against Mr Ellis, his personal financial information (ie his ability to satisfy a judgment) related to the 'affairs of the company'.

Decisions

High Court

The High Court noted that the liquidators' application was novel and controversial, and was critical of the breadth of information sought. The High Court assumed that it had jurisdiction to make the orders sought by the liquidators, but declined to make the orders in the circumstances.

Court of Appeal

The Court of Appeal noted that there appeared to be no New Zealand cases where liquidators had used ss 261 and 266 to obtain the private financial information

Notes

1 [2017] 2 NZLR 123; [2017] NZCA 488.

2 Subsequently, the liquidators obtained judgment of approximately $766,000 plus interest against Mr Ellis and other directors of Wenztro. See *Finnigan v Ellis* [2018] NZHC 1146.

of prospective defendants to ascertain their judgment worthiness.

There were instances where liquidators had sought and been granted access to information about the evidential strength of claims against former directors, but that was as far as the New Zealand Courts had taken the use of ss 261 and 266 when it came to the gathering of information relevant to civil litigation from examinees.

The liquidators' argument was that the New Zealand courts ought to adopt the Australian position. The Australian courts have held that the equivalent legislation permits liquidators to obtain personal financial information from directors.

Like ss 261 and 266, the Australian legislation does not expressly authorise that outcome, but rather provides for examinations about the 'examinable affairs' of the company. However, the Australian courts have held that information about an examinee's financial worth is relevant to: (a) assessing whether it is prudent to pursue litigation against him or her; and (b) allowing the liquidators to place a value on the prospective cause of action, which is a chose in action and therefore a company asset.[3]

The Court of Appeal acknowledged the desirability of uniformity with Australian law in respect of commercial matters, but for several reasons held that the Australian approach should not be followed.

First, as a matter of statutory interpretation, the Court of Appeal considered that the phrase 'any matter relating to the ... affairs of the company' was limited to information about the company's management, accounts, and the handling of its business affairs including its assets and liabilities. While that would include information as to mismanagement of the company's affairs, it would not include the private financial affairs of directors, shareholders and employees. Given that a company is a separate legal entity, and that one of the purposes of the Companies Act is to 'define the relationships between companies and their directors, shareholders and creditors', a clear indication would be required to allow liquidators to gather information that would ordinarily be quite distinct from the records of the company.

Second, the Court of Appeal questioned the reasoning of the Australian authorities, and in particular the Full Court of the Federal Court's application of earlier English authorities in *Grosvenor Hill (Qld) Pty Ltd v Barber*. According to the Court of Appeal, the key English decisions cited in *Grosvenor*[4] did not support a right of cross-examination on a prospective defendant's judgment worthiness: one involved an inquiry into the existence of an assigned right of indemnity, and the other simply affirmed that the legislature intended liquidators to have broad powers of discovery subject to the limits of justice.

The Court of Appeal also considered that any argument that could be made for parity with Australia was displaced by countervailing privacy concerns, which the Court noted may be given greater recognition at New Zealand law. As the extended meaning advanced by the liquidators would be applicable to both of ss 261 and 266, it would give liquidators and creditors coercive powers of investigation into the details of private financial information without any logical or necessary relationship to the affairs of the company.

Given New Zealand's developing privacy jurisprudence, Parliament's affirmation of a reasonable expectation of privacy in the type of information sought by the liquidators, and the fact that privacy values underpin several of the explicit rights in the New Zealand Bill of Rights Act 1990, the Court was not persuaded that further extension of ss 261 and 266 was a permissible interpretation of parliamentary intent.

Discussion

Alternative mechanisms

Interestingly, it appears that notwithstanding the Court of Appeal's decision, the liquidators pressed on with the litigation, and obtained judgment against Mr Ellis despite the expressed concerns that he may take steps to dissipate his assets.

The Court of Appeal had noted that there are specific processes available to deal with that type of concern pursuant to the High Court Rules, for example charging orders or freezing orders.

Indeed, the freezing order procedure is likely to be more responsive to concerns about dissipation, as it allows applicants to apply for ancillary orders seeking information about assets as well as orders preventing the dissipation of assets. However, to obtain a freezing order the liquidators would need to provide evidence to satisfy the Court that there is a danger that the prospective judgment will be unsatisfied because assets might be disposed of.

It appears that at least by the time of the appeal the liquidators did have evidence of that kind. However, in light of the decision that there was no jurisdiction to make the orders sought, the Court held that the evidence would not have a material bearing on the result of the appeal (it would have gone to the redundant question of discretion).

Notes

3 *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301, (1994) 120 ALR 262 (FCA).

4 *Massey v Allen* (1878) 9 Ch D 164 (Ch) and *Re Greys Brewery Co* (1883) 25 Ch D 400 (Ch) at 403–404, as cited in *Grosvenor* at 308–309.

Federal Court's classification of claims by companies

As is referred to above, the Australian approach was to characterise an examinee's financial information as allowing liquidators to place a value on a prospective cause of action, which is a chose in action and therefore a company asset.

The New Zealand Court of Appeal mentioned that approach, but did not squarely address it, despite it arguably being the best explanation as to why the financial information of a former director might relate to the affairs of the company.

In any event, in the context of the New Zealand regime, the following issues with the Australian approach would need to be considered:

(a) it opens up access to a new category of contingently relevant material (prior to judgment it is not certain whether a claim will be established and, accordingly, whether the defendant's asset position bears on the worth of a company asset);

(b) in New Zealand the categories of person who can be subject to the liquidator's powers pursuant to s 261 are broad, and include shareholders, employees and persons who have 'knowledge of the affairs of the company', among others. On the Australian approach, any person holding information about the means of a potential defendant would arguably be subject to those powers; and

(c) it is unclear why liquidators ought to have access to information about the judgment worthiness of defendants that other plaintiffs cannot access.

Further, as was noted by the Court of Appeal, if the extended definition was adopted, any prospective defendant could be required to disclose personal financial information at the liquidator's request.

Privacy concerns

The Court referred to the developing privacy jurisprudence in New Zealand as a factor counting against the extended interpretation advanced by the liquidators. While it appears that the position is now settled in respect of the present issue (at least on the current form of the law), it will be interesting to follow the development of that jurisprudence and the effect that it may have on liquidators' access to more orthodox categories of information.

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