

IN THE SUPREME COURT OF NEW ZEALAND

SC 127/2013
[2013] NZSC 138

BETWEEN	PATRICK DEAN NORRIS Applicant
AND	THE QUEEN Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: Applicant in person
M J Inwood for Respondent

Judgment: 4 December 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Norris was convicted in a judge alone trial (Judge Behrens QC) of one count of theft by a person in a special relationship pursuant to s 220 of the Crimes Act 1961.¹ He was sentenced to home detention, community work and reparation.²

[2] On 31 October 2013 the Court of Appeal dismissed Mr Norris' appeal against conviction but allowed his sentence appeal in part.³

¹ *R v Norris* DC Nelson CRI-2011-042-001272, 16 October 2012.

² *R v Norris* DC Nelson CRI-2011-042-001272, 24 January 2013.

³ *Norris v R* [2013] NZCA 526 (Ellen France, Rodney Hansen and Mallon JJ) [Appeal decision].

[3] Mr Norris now seeks leave to this Court to appeal against the refusal to quash his conviction. He also applies for bail pending any appeal.

Background

[4] In August 2009, Mr Norris was appointed the liquidator of Astra Enterprises Limited (Astra). In that capacity, he received and deposited Astra's assets of \$80,960.51 into the trading account of his business, Norris Management Services. The funds were sufficient to satisfy Astra's identified debts but three months later those funds were dissipated, with neither the shareholders nor the creditors receiving any payment. There appears to be no dispute that Astra's money had been used to buy items for and repay debts of Norris Management and Mr Norris.⁴

[5] The Crown case was that Mr Norris had dealt with Astra's property otherwise than in accordance with his duties as a liquidator. An important plank of the Crown case was that Mr Norris had created invoices totalling some \$80,000 to try and justify the dissipation of the Astra funds. The Crown case was that little work had been done on the file. This was supported by three strands of evidence:⁵

- (a) evidence of two employees who were employed at Norris Management over some of the relevant period;
- (b) evidence of the limited contact between Mr Norris and those who might have expected to hear from him in relation to the liquidation; and
- (c) expert evidence from Mr Laurence Chilcott, an insolvency practitioner.

The District Court's reasons for verdict

[6] Judge Behrens found each of the four elements of s 220 proved beyond reasonable doubt:

⁴ Appeal decision at [19].

⁵ Appeal decision at [12]–[15].

- (a) Mr Norris had control over the Astra funds.
- (b) That control was in circumstances that required him to account for or deal with that property, or any proceeds arising from it.⁶ There were requirements with regard to the creditors that were binding on Mr Norris.⁷
- (c) Mr Norris knew of those circumstances, being an inference available from his experience as a liquidator generally, his position regarding the lawfulness of his depositing the Astra funds into the Norris Management bank account and the evidence of the employees as to what they observed in relation to the Astra file.⁸
- (d) Mr Norris intentionally dealt with or failed to account for the property or any proceeds arising from it otherwise than in accordance with the requirements on him as liquidator.⁹

The Court of Appeal decision

[7] On appeal to the Court of Appeal Mr Norris challenged both the finding that he had control over the Astra property in circumstances that required him to account for it and the finding that he knew of those circumstances.¹⁰

[8] The Court of Appeal rejected both challenges. It undertook a review of the approach to s 220 of the Crimes Act in New Zealand and the equivalent provisions in England and Australia. It then considered the relevant provisions of the Companies Act 1993 and Companies Act 1993 Liquidation Regulations 1994.¹¹

⁶ Appeal decision at [20].

⁷ Appeal decision at [21].

⁸ Appeal decision at [22]–[25].

⁹ Appeal decision at [26].

¹⁰ Appeal decision at [32].

¹¹ Appeal decision at [36]–[60].

[9] The Court concluded that, as liquidator, Mr Norris acquired Astra's funds on specific terms. The money was not his to use as he liked, but was earmarked for creditors. In this regard, the Court referred to the comments in one of the texts:¹²

the liquidator has duties under the [Companies] Act which are focussed on protecting creditors. ... It has been said that [the duty in s 253 of the Companies Act] and a liquidator's duty to have regard to the views of creditors gives rise to a duty of care owed to the creditors.

[10] Mr Norris sought to adduce allegedly fresh evidence on appeal. This application was declined. The Court held that this was not a case where the proposed new evidence might reasonably have made a difference to the verdict.¹³

Grounds in leave application

[11] In his application for leave Mr Norris essentially repeats the same grounds he relied on both before the District Court and the Court of Appeal. He submits that liquidators do not owe a duty to creditors to account for a company's funds. In particular, there is no fiduciary obligation imposed by the Companies Act. He also submits that there should be no conviction for theft in circumstances where a liquidator has taken fees to which he was legally and beneficially entitled. He submits that all that is alleged is overcharging.

Our assessment

[12] As the Court of Appeal said, Astra's funds were not available to be used by Mr Norris for his own purposes. Mr Norris was required to deal with Astra's funds in accordance with his duties as liquidator. Further, the finding with regard to the invoices went well beyond overcharging. The trial judge held that there was "a blatantly dishonest course of action to try to cover up Mr Norris's failure to deal with or account for the property of Astra to the creditors".¹⁴ This finding was available on the evidence.

¹² John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) at [31.5.1(1)] (footnotes omitted).

¹³ At [89].

¹⁴ Set out at [26] of the Appeal decision.

[13] The Court of Appeal applied settled principles to the facts as found. No issue of general or public importance or commercial significance arises. Nor is there any risk of a substantial miscarriage of justice.

[14] Mr Norris also seeks to challenge the Court of Appeal's refusal to allow him to adduce new evidence. The Court of Appeal applied settled principles to that application. Nothing put forward by Mr Norris suggests that the Court's assessment of the evidence may have been wrong.

Conclusion

[15] The application for leave to appeal is dismissed.

[16] As leave has been declined, there is no need to deal with the bail application.

Solicitors:
Crown Law Office for the Respondent