IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 25/2022
[2022] NZSC 70

BETWEEN	EVAN KERRY STEWART Applicant
AND	ELIZABETH HELEN KEENE AND LUKE NORMAN AS LIQUIDATORS OF EVERSONS INTERNATIONAL LIMITED (IN LIQUIDATION) Respondents

Court:	O'Regan and Williams JJ
Counsel:	K W Clay for Applicant M J Tingey and C W Gambrill for Respondents
Judgment:	3 June 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents costs of $2,500.

REASONS

[1] The applicant is the sole director and shareholder of Eversons International Ltd (Eversons), a company in liquidation. The respondents are the liquidators.[1] They obtained orders in the High Court requiring the applicant to submit to examination in that Court in relation to the business, accounts or affairs of Eversons; and to produce

[1] Helen Elizabeth Keene and Vivian Judith Fatupaito were the liquidators of Eversons throughout the lower Court proceedings. Ms Fatupaito subsequently resigned as liquidator pursuant to s 283(2) of the Companies Act 1993, and appointed Luke Norman as her successor. Ms Keene and Mr Norman are the current liquidators of Eversons.

to the liquidators any books, records or documents in his possession or control in relation to the same.[2]

[2] The applicant's appeal against these orders was dismissed in the Court of Appeal.[3] He now seeks leave to appeal in relation only to the examination order.

Facts

[3] In 2018 the applicant placed Eversons into liquidation following demand by the Commissioner of Inland Revenue for payment by the company of tax arrears in excess of $3.7 million. The Commissioner appears to be the sole creditor.

[4] Eversons' accounts revealed that the company had transferred significant funds to offshore companies including transfers in excess of $3.1 million to Bionutrient Customs Ltd (Bionutrient), a company of which the applicant is also a director. The liquidators' statutory demand to Bionutrient for the return of just under $3 million bore no fruit. The liquidators' commenced proceedings against Bionutrient, but these have not been progressed.

[5] An application for summary judgment in the sum of $2 million was then brought against the applicant. This was the amount recorded in Eversons' shareholder's current account by which the applicant was overdrawn (the current account claim). The application was dismissed on the basis that the Court was not satisfied as to the absence of an arguable defence.[4] The Court did acknowledge however that the applicant had not co-operated with the liquidators.

[6] The liquidators issued a s 261 Companies Act 1993 notice in relation to books and records in the applicant's possession, with particular focus on Eversons' assets and overseas investments. No useful information was elicited. The applicant then

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2 *Fatupaito v Stewart* [2021] NZHC 1679 (Associate Judge Paulsen) at [97]. The orders were made pursuant to s 266 (2)(a) and (b) of the Companies Act 1993.
3 *Stewart v Fatupaito* [2022] NZCA 21 (Collins, Duffy and Dunningham JJ).
4 *Eversons International Ltd (in liq) v Stewart* [2020] NZHC 3188.

attended an examination at the liquidators' offices, but again no meaningful information was elicited. The application under s 266 of the Companies Act followed.

The section

> **266 Powers of court**
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> (1) The court may, on the application of the liquidator, order a person who has failed to comply with a requirement of the liquidator under section 261 to comply with that requirement.
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> (2) The court may, on the application of the liquidator, order a person to whom section 261 applies to—
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> (a) attend before the court and be examined on oath or affirmation by the court or the liquidator or a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:
>
> (b) produce any books, records, or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.

[7] As a director and shareholder of Eversons, Mr Stewart is someone to whom s 261(2) applies, and therefore he falls within the scope of s 266.

Lower Court judgments

High Court

[8] In the High Court the liquidators argued that the orders were necessary and that the current account proceedings did not make them oppressive.

[9] The applicant submitted that the orders sought were unnecessary and oppressive. The claim of oppression had two limbs; a liquidator should not get the benefit of both examination and prior or collateral proceedings, and the applicant would be deprived of a limitation defence. The limitation defence argument was that a record of examination could be used as an acknowledgement of liability. He could therefore be deprived of that defence against the liquidators' claim on the shareholders' current account. He also submitted that other factors should be considered, including the reason for the company failure and the liquidators' delay in making the application. Further he argued he had complied with requests for information, there would be no

prejudice to the liquidators in refusal of the order, and the previous examination was conducted unfairly.

[10] Associate Judge Paulsen found that the Court had jurisdiction to make the orders sought. Relying on obiter in *Finnigan v Ellis*, he considered an order for examination can be made against an examinee, even where other proceedings against the examinee are underway.[5]

[11] The Associate Judge then concluded that it was appropriate to exercise his discretion in favour of making an examination order. In particular he noted the applicant's continued lack of co-operation with the liquidators.

[12] The Associate Judge made the orders, but to prevent loss of the potential limitation defence the orders were conditional on the liquidators providing a written acknowledgement that they would not rely on the record of examination in any other proceedings as an acknowledgement of liability.

Court of Appeal

[13] In the Court of Appeal, the applicant reprised the arguments advanced in the High Court.

[14] The Court found that there was nothing in the language of s 266 to suggest that it should not apply when an alternative legal proceeding is on foot. Nor were there any policy reasons for the section to be read down in that way. The Court accepted that the powers under the section must not be used oppressively, vexatiously or unfairly, or to obtain an unfair or improper advantage including in collateral litigation.

[15] The Court agreed with the approach of the Associate Judge to the exercise of his discretion under s 266. The applicant had been uncooperative, it was reasonable to expect him as sole director to know what had happened to the company assets, and the applicant's claim of lack of knowledge was implausible. Further, there was nothing oppressive in the fact there had been earlier litigation in relation to

5 *Finnigan v Ellis* [2017] NZCA 488, [2018] NZLR 123.

Bionutrient, since that only arose because the applicant was a director of that company. Nor was it oppressive to oblige the applicant to explain what he had done with the overdrawn funds from his Eversons current account. This must follow, the Court considered, from the fact that his explanation for the overdrawn account was that the funds had been invested on behalf of Eversons.

Submissions in this Court

[16] The applicant makes three arguments in support of his application for leave:

(a) the New Zealand courts should reject the application of the Australian authorities applied in the Court of Appeal and instead follow English authority which provides there is no proper basis to compel a public examination where other proceedings are on foot.

(b) the Court of Appeal erred when holding that there were no policy reasons for reading down the scope of s 266. In particular s 27 of the New Zealand Bill of Rights Act 1990 provides such policy reason.

(c) alternatively, the Court of Appeal had failed properly to analyse the way in which the High Court had exercised its discretion to grant an examination order. In particular it failed to properly assess whether the making of such an order was oppressive in light of the existence of collateral proceedings.

[17] The liquidators oppose the application, arguing; that the approaches in Australia and England would have produced the same result in this case; that recourse to s 27 of the New Zealand Bill of Rights Act cannot assist a jurisdictional argument and at best can only go to discretion; and there is no basis upon which to conclude that the evaluation undertaken in the High Court and affirmed in the Court of Appeal in relation to the exercise of the discretion under s 266 was wrong.

Discussion

[18] Although the scope of the High Court's s 266 jurisdiction may give rise to a question of public importance and/or commercial significance,[6] the circumstances of this case are not such as to justify its ventilation here. Rather, we see this case as essentially factual and more properly located in the exercise of the Court's discretion at stage two of the analytical process referred to in *Finnigan v Ellis*.[7] We see no reason to depart from the assessment of the Courts below in that respect.

Result

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

[20] The applicant must pay the respondents costs of $2,500.

Solicitors:
Layburn Hodgins Ltd, Christchurch for Applicant
Martelli McKegg, Auckland for Respondents

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6 Senior Courts Act 2016, s 74(2).
7 *Finnigan v Ellis*, above n 5, at [47].