IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 102/2023
[2024] NZSC 13

BETWEEN	MANAS DHARMENDRA KUMAR Applicant
AND	SMARTPAY LIMITED Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: Applicant in person
D J Chisholm KC and J D Ryan for Respondent

Judgment: 19 February 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

Introduction

[1] The applicant applies for leave to appeal against a decision of the Court of Appeal.[1] In that decision, the Court of Appeal dismissed the applicant's appeal against two judgments of the High Court under which the applicant was found liable to pay $850,427.00 to the liquidators of Optimizer Corporation Ltd (OCL)—a company of which he had been a director.[2] The High Court proceedings were brought by the respondent, Smartpay Ltd (Smartpay), which was a creditor of OCL.

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1 *Kumar v Smartpay Ltd* [2023] NZCA 410 (Collins, Lang and Woolford JJ) [CA judgment].

2 *Smartpay Ltd v Kumar* [2022] NZHC 997 (Downs J) [HC interim judgment]; and *Smartpay Ltd v Kumar* [2022] NZHC 2685 (Downs J) [HC quantum judgment]. OCL was renamed 4468440 Ltd, but we will use the former name, as the lower Courts did.

Facts

[2] An essential feature of this case is the fact that the applicant was a director of three companies which traded in a group structure (and the sole director at the times that are material to the proposed appeal). These were:

(a) OCL: incorporated on 5 June 2013 and placed into liquidation on 10 December 2015;

(b) Odev Ltd (Odev): incorporated on 21 January 2005 and placed into liquidation on 10 December 2015; and

(c) Optimizer HQ Ltd (OHQ): incorporated on 11 April 2013 and placed into liquidation on 27 November 2020.

[3] OHQ held all the shares in OCL (1,000 shares of $1.00 each) and Odev.

[4] Odev developed a product called Swipe HQ which, when allied with a mobile EFTPOS terminal, allowed businesses to process EFTPOS transactions wirelessly.

[5] OCL entered into two agreements that are material to the proceedings.

[6] The first was with Spark NZ Ltd (Spark) (the Spark agreement). It was entered into on 28 May 2014. Under this agreement, OCL conferred on Spark the right to market and sell Swipe HQ and agreed to supply Spark with mobile EFTPOS terminals. The term of the Spark agreement was one year. Spark made no payments to OCL—the arrangement contemplated that revenue would come from Spark's clients paying a fee for the use of the Swipe HQ system.

[7] The second was with Smartpay (the Smartpay agreement). It was entered into on 18 September 2014. Under this agreement, Smartpay rented EFTPOS terminals to OCL. The cost was a one-off payment of $48 per terminal, a rent of $18 per month and a share (0.35 per cent) of the transaction value from credit cards processed through the terminal. The term of the Smartpay agreement was two years.

[8] OCL also entered into other commitments, including a lease of premises at an annual rental of just over $100,000 for a five-year period commencing on 1 March 2015.

[9] As it transpired, the revenue from the Spark agreement was actually received by OHQ, not OCL, meaning OCL had no independent source of income. It depended on OHQ (or Odev) for funds to meet its obligations under the Smartpay agreement and other commitments.

[10] Spark terminated the Spark agreement on 22 May 2015. OCL defaulted on its obligations under the Smartpay agreement and Smartpay issued statutory demands for payment of amounts owing under the Smartpay agreement. Some of these demands were met by OHQ or Odev, but ultimately, OHQ placed OCL and Odev into liquidation on 10 December 2015.

[11] Smartpay claimed that the applicant breached his duties under ss 131, 135 and 136 of the Companies Act 1993 in relation to his position as a director of OCL. The High Court found breaches of all three sections. After a second hearing to deal with quantum, the applicant was found liable for $850,427 plus interest. As mentioned earlier, this was a liability to the liquidators of OCL, not to Smartpay itself. The Court of Appeal upheld these findings. There are, therefore, concurrent findings on the essential factual aspects of the case.

Proposed appeal

[12] The application for leave to appeal to this Court is advanced on the basis that a substantial miscarriage of justice will occur if this Court does not hear the proposed appeal.[3] That submission must be evaluated against the background of the approach to this leave criterion as set out in *Junior Farms Ltd v Hampton Securities Ltd (in liq)*:[4]

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3 Senior Courts Act 2016, s 74(2)(b).

4 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

> [5] Rather, the miscarriage ground must in civil appeals be taken to have been intended to enable the Court to review the decision of the Court of Appeal on questions of fact, or on questions of law which are not of general or public importance, in the rare case of a sufficiently apparent error, made or left uncorrected by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case.

[13] The applicant argues that there were procedural failings in both the High Court and the Court of Appeal which have caused a miscarriage. In the case of the High Court, this was the decision of the Court to hold a separate quantum hearing. The applicant was not represented at that hearing, having failed to obtain an adjournment. He did, however, make written submissions. In the case of the Court of Appeal, he argues his oral submissions were cut short because the Court dealt with the case in a half-day, rather than allowing a longer hearing time. We do not see either of these procedural matters as, themselves, causing a miscarriage. We turn therefore to the substantive arguments the applicant wishes to pursue if leave to appeal is granted.

[14] The Courts below focused on the fact that OCL had no assets (other than its $1,000 share capital) and no revenue, yet it had entered into both the Spark agreement and the Smartpay agreement. The applicant wishes to argue that this should not have been seen as problematic because the three companies (OCL, OHQ and Odev) operated as a group, with the particular identity of the contracting party being of little practical importance. We do not consider that argument has sufficient prospects of success to justify a further appeal. However, the applicant also wishes to argue that as a director of OCL he was entitled to rely on the likely support of OHQ to meet the liabilities of OCL. He concedes that there should have been some intra-group agreement to provide for this, but such an agreement was not essential because "money was circling back to meet OCL's needs one way or another". We do not see this argument as having sufficient prospects of success either.

[15] The applicant also wishes to argue that it was the problems that arose with the Smartpay terminals that led to the termination of the Spark agreement and OCL's ultimate failure, not its trading when, considered separately from OHQ and Odev, it had no assets to meet the liabilities it was incurring. This is essentially a factual issue

on which there are concurrent findings in the Courts below and we see no appearance of a miscarriage in the way the lower Courts addressed the issue.

[16] The applicant also wishes to contest the quantum of loss assessed by the High Court and upheld by the Court of Appeal. The same comment arises: there are concurrent findings of fact and no appearance of a miscarriage.

[17] We have also considered whether the points the applicant wishes to raise give rise to matters of general or public importance which justify the grant of leave.[5] We accept that the circumstances in which a director may rely on informal indications of support to a company from a parent company or third party may give rise to a matter of general or public importance.[6] However we do not see this case as an appropriate vehicle for considering that point.

[18] Similarly, it may be arguable that the question of how the duty in s 135 of the Companies Act should be applied in the case of a business that has a recognised risk of loss may also be a point of public importance worthy of consideration by this Court.[7] However, we again do not see this as an appropriate case for consideration of that point, given the applicant's acknowledgement that he never considered the position of OCL as a separate entity, but only the group as a whole.

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

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

Solicitors:
Claymore Partners Ltd, Auckland for Respondent

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5 Senior Courts Act, s 74(2)(a).
6 See *Yan v Mainzeal Property and Construction Ltd (in liq)* [2023] NZSC 113 at [272].
7 See *Mainzeal*, above n 6, at [199].