

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 65/2019
[2020] NZSC 65**

BETWEEN PETER BRENT HOME HUBBARD AND
 HARLEY HAYNES
 Applicants

AND KIWIRAIL LIMITED
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicants in person
 M L Campbell and A J W O Lomas for Respondent

Judgment: 14 July 2020

JUDGMENT OF THE COURT

- A The application by the applicants for a further extension of time to file submissions is dismissed.**
- B The application for leave to appeal is dismissed.**
- C There is no order as to costs.**
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REASONS

Introduction

[1] The applicants, Mr Hubbard and Mr Haynes, seek leave to appeal to this Court from a decision of the Court of Appeal declining to grant an extension of time to enable the applicants to pursue an appeal in that Court.¹ The proposed appeal to the Court of Appeal would have challenged a decision of Associate Judge Smith ordering the

¹ *Hubbard v KiwiRail Ltd* [2019] NZCA 244 (Miller and Collins JJ) [CA judgment].

liquidation of a company called Oceanic Palms Ltd (Oceanic Palms) and refusing to stay the decision pending other litigation.²

[2] The applicants are directors of Oceanic Palms.³ The application for an order of liquidation was made by the respondent, KiwiRail Ltd (KiwiRail). The applicants' challenge to the liquidation was brought primarily on the basis that Oceanic Palms was solvent and they disputed KiwiRail's claim for back rent which formed the substantial part of the claim for liquidation.

The proposed appeal

[3] The applicants say that the Court of Appeal erred because it did not recognise the obligation of KiwiRail as a State-owned enterprise to exercise consideration of the social good in its decisions.⁴ They wish to argue that the order for liquidation of Oceanic Palms was made contrary to that legal obligation and that, as a result, justice has not been done to Oceanic Palms and its directors, nor to other concerns who were tenants of KiwiRail. They also say that, in evicting Oceanic Palms, KiwiRail has not acted properly.

[4] In opposing leave to appeal, KiwiRail says that the liquidation has concluded and that what is now a moot challenge to the liquidation of a company described by Associate Judge Smith as “[o]n any view of it, ... insolvent”⁵ does not meet the criteria for leave to appeal.⁶

Our assessment

[5] The Court of Appeal in declining to grant an extension of time to file the case on appeal applied settled principles. No question of general or public importance or general commercial significance accordingly arises. The proposed appeal would

² *KiwiRail Ltd v Oceanic Palms Ltd* [2018] NZHC 1164 [HC judgment].

³ The applicants bring the application in their personal capacity.

⁴ The applicants refer to s 4(1)(c) of the State-Owned Enterprises Act 1986.

⁵ HC judgment, above n 2, at [77].

⁶ Senior Courts Act 2016, s 74(2).

reprise the argument in the Court of Appeal. In determining that the proposed appeal to that Court had no merit, the Court made the following four points:⁷

- (a) [The applicants] 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 [other] proceedings.
- (b) The applicants wish to argue that the rent calculations relied upon by KiwiRail were corrupt. The valuation relied upon [by] KiwiRail was, however, found to be reasonable by [the Court of Appeal in a previous decision].
- (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 [were] 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.

[6] That assessment does not give rise to the appearance of a miscarriage of justice as that test is applied in a civil case.⁸

[7] As the Court of Appeal noted, the dispute between the applicants and KiwiRail had its genesis in KiwiRail's decision to increase the rent that Oceanic Palms was to pay. Oceanic Palms refused to pay the increased rent and then unsuccessfully sought relief against forfeiture in the High Court.⁹ Oceanic Palms appealed unsuccessfully against that decision to the Court of Appeal.¹⁰ This Court declined to grant an application for leave to appeal from that decision.¹¹ Oceanic Palms then made an unsuccessful application for interim relief under the Judicial Review Procedure Act 2016.¹² After that, KiwiRail served a notice of statutory demand on Oceanic Palms. KiwiRail's successful application for liquidation was made after Oceanic Palms failed to comply with the notice of demand. As this narrative shows, the main point the applicants wish to pursue has been dealt with in these other

⁷ CA judgment, above n 1, at [9] (footnote omitted).

⁸ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

⁹ *Hubbard v KiwiRail Ltd* [2016] NZHC 1061.

¹⁰ *Hubbard v KiwiRail Ltd* [2017] NZCA 282, (2017) 18 NZCPR 620.

¹¹ *Hubbard v KiwiRail Ltd* [2017] NZSC 153.

¹² *Oceanic Palms Ltd v Kiwi Rail Ltd* [2018] NZHC 679.

proceedings. The proposed appeal is not an appropriate vehicle through which to seek to re-litigate that matter.

[8] The application for leave to appeal is accordingly dismissed. In the circumstances there is no order as to costs.

Postscript

[9] We have determined the application for leave to appeal on the basis of the material filed by the parties to date. That material does not include submissions from the parties for the reasons we now briefly explain.

[10] The applicants filed their application for leave in this Court on 22 July 2019. Since then they sought and were granted extensions of time to file their submissions on seven occasions. These extensions of time were primarily to allow for a response to be provided to a request for information from KiwiRail made under the Official Information Act 1982. The applicants said this further information was necessary to enable them to advance the application for leave. The applicants also sought additional time to accommodate the difficulties they say they faced as lay litigants and to ensure, consistently with the principles of natural justice, that they are able to fully present their case before the Court.

[11] When the applicants sought their seventh extension of time to allow them to prepare their submissions properly and to seek discovery from KiwiRail, we issued a minute dated 5 June 2020 which stated that we considered sufficient allowances had been made by that point to accommodate any difficulties that might arise for the applicants as lay litigants in preparing their submissions.¹³ The minute recorded that the applicants would need to file their submissions in support of the application for leave by 29 June 2020. If submissions were not filed by that date, the parties were advised that the Court would deal with the application for leave on the material before the Court and that no further extensions of time would be granted.

¹³ *Hubbard v KiwiRail Ltd* SC 65/2019, 5 June 2020.

[12] The applicants' response dated 29 June 2020 was to seek a further extension of time of four months for various reasons including to await work that the Office of the Ombudsman is conducting in relation to the Official Information Act request.¹⁴ We formally decline that application.¹⁵ The applicants have been given considerable leeway to date. The central point the applicants wish to make in the proposed appeal is clear from the material we have and it is a point that has been well-ventilated. In addition, as was set out in our minute, we accept the submission from KiwiRail that the further material the applicants say they still need to obtain from KiwiRail is not relevant to whether the criteria for leave are met or to the underlying issue of whether Oceanic Palms was insolvent.

Solicitors:
Russell McVeagh, Wellington for Respondent

¹⁴ In their most recent memorandum, filed on 13 July 2020, the applicants suggested the Ombudsman's inquiry is a broader one.

¹⁵ The applicants also sought a direction that KiwiRail disclose the documents relating to the valuation. We see no need to deal with that aspect.