

BERNARD TERENCE WHIMP

v

THE QUEEN

Court: Elias CJ, Blanchard and Wilson JJ

Counsel: P B McMenamin for Applicant
G H Allan for Crown

Judgment: 4 February 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

[1] A company controlled by the applicant was put into liquidation. The liquidator required the applicant to leave the premises. He returned that evening and removed property belonging to the company. Two days later the applicant was given a notice under s 261 of the Companies Act 1993 requiring him to deliver up that property. The notice as drafted required delivery by 9.00am the following day but, at the request of the applicant, the time was extended to midday that day.

[2] Following trial by jury, the applicant was convicted on counts of burglary, removing documents of a company in liquidation and failing to comply with the

notice to deliver up. Having appealed unsuccessfully to the Court of Appeal,¹ he now seeks leave to appeal to this Court. As best we can understand the submissions made on his behalf and distil from them possible grounds of appeal, there are three such grounds.

[3] The first proposed question is whether the liquidator, on behalf of the company, was entitled to exclude the applicant from the premises. That depended on whether the company was the lessee. The applicant wishes to argue that this was not proved. However, his case at trial proceeded on the basis of an acceptance that a lease of some kind existed. The evidence included a letter apparently signed by the applicant (with the provenance of the signature not being challenged) asserting that there was a lease to the company. In these circumstances, the Court of Appeal was plainly correct to conclude that the existence of a lease was sufficiently proved.

[4] Secondly, the applicant wishes to argue that he was given insufficient time to leave the premises and was therefore entitled to re-enter them. There is no substance to this point. His entitlement to be on the premises was as an employee of the company and as such the liquidator was entitled to require him to vacate immediately, giving him only such time as was needed to remove his property, including material belonging to other companies under his control which were not at that time in liquidation. The jury was properly instructed that it should not find the applicant guilty unless it was of the view that he was given a reasonable opportunity of doing so.

[5] Finally, the applicant wishes to argue that the liquidator's notice under s 261 did not give the applicant a reasonable time in which to return the company's property. Unsurprisingly, given that the time for return had been extended at the request of the applicant, there seems to have been no challenge at trial to the length of the notice. In any event, in the circumstances the time was reasonable.

[6] In summary, the applicant seeks leave to advance three grounds, all of which are untenable. There is no appearance of a miscarriage. The application is therefore dismissed.

¹ [2008] NZCA 405.

Solicitors:
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