IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA483/2021
[2022] NZCA 21

BETWEEN	EVAN KERRY STEWART Appellant
AND	VIVIAN JUDITH FATUPAITO AND ELIZABETH HELEN KEENE Respondents

Hearing:	10 November 2021
Court:	Collins, Duffy and Dunningham JJ
Counsel:	D K Quirk and K W Clay for Appellant M J Tingey and B Gambrill for Respondents
Judgment:	18 February 2022 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Duffy J)

[1] Eversons International Ltd (Eversons) is a company in liquidation. The respondents are its liquidators. The appellant, Mr Stewart, is the company's sole director and shareholder.

[2] The respondents have obtained a judgment from Associate Judge Paulsen granting orders under s 266(2)(a) and (b) of the Companies Act 1993 (Act) for Mr Stewart to:[1]

(a) attend the High Court and be examined on oath or affirmation before a Judge or Associate Judge of that Court by counsel for the liquidators on any matter relating to the business, accounts or affairs of Eversons; and

(b) produce to the liquidators any books, records or documents in his possession or under his control that relate to the company's business, accounts or affairs.

[3] Mr Stewart appeals against this judgment on the grounds there are circumstances relevant to him and the company which place him outside the scope of the power to make such orders. In the alternative, he submits the Associate Judge has failed to lawfully exercise those powers. The relevant facts are helpfully set out in the judgment of Associate Judge Paulsen.

Background

[4] Eversons was a profitable company importing and selling synthetic legal high products until these were banned on 7 May 2014, at which time it ceased trading.

[5] In 2015, the Commissioner of Inland Revenue (the Commissioner) undertook an income tax audit for unpaid taxes and demanded payment of the assessed arrears, which were in excess of $3,700,000. Eversons could not pay the arrears; Mr Stewart placed the company in liquidation and appointed Andrew Oorschot as liquidator.[2] The Commissioner appears to be Eversons' only creditor.

[6] Eversons' accounts include reference to "Overseas Investments totalling $6,592k". Nothing else is said about those assets. Mr Oorschot subsequently

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1 *Fatupaito v Stewart* [2021] NZHC 1679 at [97].

2 The company was placed into liquidation by special resolution pursuant to s 241(2)(a) of the Companies Act 1993.

identified 19 payments by cheque or transfer totalling $3,154,918 (the funds) from Eversons' bank account to Bionutrient Customs Ltd (Bionutrient).

[7] Mr Stewart is also a director of Bionutrient. Mr Oorschot wrote to Mr Stewart as director of Bionutrient demanding repayment of the funds, which was not forthcoming. Instead Mr Stewart advised that Bionutrient was used as a vehicle to facilitate transfer of funds to Australia, and he could not pay the demand. He did not explain why the funds were transferred.

[8] Mr Oorschot subsequently resigned as liquidator and was replaced by the respondents on 30 January 2020. They say Mr Oorschot has provided them with limited material. They issued Mr Stewart with a notice under s 261 of the Act, which required him to meet and provide them with documents and information about Eversons' assets. There was no response from Mr Stewart.

[9] The respondents' solicitors wrote to Bionutrient demanding repayment of $2,999,418. Mr Stewart, on behalf of Bionutrient, disputed the demand on the basis Bionutrient was only the conduit through which the funds were transferred to Australia. The respondents' solicitors then issued Bionutrient with a notice under s 261 of the Act for information, including documents showing the transfer from Bionutrient to the ultimate recipient as well as details of what the funds were used for. In response, Mr Stewart asserted that the respondents had all relevant documents.

[10] The respondents then issued a statutory demand to Bionutrient for $2,999,418. There was no response. Liquidation proceedings were commenced against Bionutrient. The company took no steps within time to defend itself. Later it was given leave to file a statement of defence out of time. The respondents did not continue with this litigation.

[11] Next, the respondents issued Mr Stewart with a demand for payment of $2,074,876 relating to his Eversons' shareholders current account (the current account debt). This was followed by Eversons and the respondents issuing a claim against Mr Stewart for recovery of this alleged debt and a claim under s 310 of the Act for mutual credit and set-off. The company and the respondents sought summary

judgment against Mr Stewart in relation to the current account debt. Mr Stewart opposed summary judgment; he argued that the disputed sum of $2,000,000 was transferred from Eversons' bank account to Mr Stewart's solicitor in Australia for investing on behalf of Eversons.

[12] Summary judgment was declined. Associate Judge Paulsen was not satisfied Mr Stewart had no arguable defence.[3] However, relevantly for this appeal the Associate Judge also found Mr Stewart had not co-operated with the respondents, and they had not been able to identify any overseas investments belonging to Eversons nor had they seen any documents to prove the existence of these investments.[4] This proceeding remains live.

[13] The respondents issued Mr Stewart with a further s 261 notice which required him to provide them with all Eversons' books and records in his possession, including details of the company's assets — in particular, the overseas investments. Mr Stewart's response was: (a) he no longer had this information; (b) everything he had was now with Mr Oorschot; and (c) the overseas payments were made to his father in Australia and Eversons was "no longer the beneficial owner of these amounts."

[14] On 21 January 2021, Mr Stewart and his solicitor attended the respondents' offices for examination, but Mr Stewart failed to provide the respondents with "any meaningful information they could use to identify the overseas investments".[5] The examples given by the Associate Judge include that Mr Stewart: (a) denied knowledge or understanding of Eversons' accounts; (b) denied knowing who within Eversons managed its investments; (c) denied knowing what various large sums paid from Eversons' bank accounts were used for; and (d) despite denying knowledge of the overseas investments, said they had "flopped". The Associate Judge describes a further example where Mr Stewart said that he and his father built residential units in Australia as an investment, but he could not say in whose name the land titles were registered or how much was invested, give a street address for these units, or say when they were sold. Nonetheless, he could say they were sold at a loss. Further, during

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3 *Eversons International Ltd (in liq) v Stewart* [2020] NZHC 3188.
4 At [40].
5 *Fatupaito v Stewart*, above n 1, at [34].

this examination Mr Stewart referred to an Australian solicitor who had received Eversons' funds for investment but he could not remember her name or other details about her. When this solicitor was identified and approached by the respondents, she advised them she was unaware of and did not act for Eversons and had no authority to provide information to the respondents.

[15] Mr Stewart offered to find further information. Accordingly, the respondents adjourned the examination on the basis it would be resumed subsequently if no information was provided. The respondents also reserved their position regarding resort to an examination before the Court under s 266.

[16] The s 261 examination was set to resume on 24 March 2021. Mr Stewart's solicitors wrote to the respondents complaining about how the examination process had been conducted. He did not appear for examination at the resumption of the hearing. On 29 March 2021, the respondents wrote to his solicitors advising that they intended to apply under s 266 for him to be examined before the Court and the contested application then followed.

Relevant law

[17] Section 266 relevantly provides:

> **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:
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> (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.

[18] 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.

Discussion

[19] The scheduled meeting with the respondents on 21 January 2021 was adjourned to enable Mr Stewart to supply the respondents with further information. The failure to attend the rescheduled meeting on 24 January 2021 is evidence of a failure to comply with a request of a liquidator made under s 261 of the Act. In such circumstances and given the inadequacy of the available company records, it is understandable that the respondents have now resorted to seeking an order by the Court under s 266. Further, Mr Stewart's earlier conduct, which appears uncooperative to us, warrants resort to the s 266 power.

[20] However, Mr Stewart argues that the respondents' earlier engagement of legal processes against him means there is now no jurisdiction to makes orders under s 266. Alternatively, if there is still jurisdiction then those earlier processes tell against the discretionary exercise of this jurisdiction. For the reasons given below, we reject those arguments.

Jurisdiction

[21] There is no dispute that in principle Mr Stewart is a person against whom an order under s 266 may be made. The respondents have already commenced legal proceedings that involve him: (a) the proceeding to trace and recover Eversons' overseas investment, which was brought against Bionutrient and has now been discontinued; and (b) the proceeding to recover the alleged current account debt he owes to Eversons, in which the respondents were unsuccessful in obtaining summary judgment against him. Mr Stewart argues that, having elected to pursue those legal processes, the respondents can no longer bring an application against him under s 266.

[22] There is some support in the law of England and Wales for the notion that once alternative legal processes are commenced against a potential examinee, use of that jurisdiction's equivalent to the s 266 examination power is unavailable.[6] However, this is done by refusal to exercise the statutory discretion to order examination rather

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6 See *Finnigan v Ellis* [2017] NZCA 488, [2018] 2 NZLR 123 at [32]–[33].

than by confinement of the jurisdiction to order examination. Therefore, this case law is not helpful to Mr Stewart's argument based on lack of jurisdiction.

[23] There are similarities between the relevant legislation of England and Wales and s 266 of the Act. Section 266 is based on earlier domestic legislation, which in turn was based on English legislation. These similarities extend to the equivalent Australian legislation as well. Yet each jurisdiction takes a somewhat different approach to the application of its legislation. This is discussed in some detail in *Finnigan v Ellis*.[7] Put shortly, in Australia and in England and Wales the legislative equivalents of s 266 are regarded by the courts as having a broad and untrammelled jurisdiction with control exercised through the powers' discretion. Comparatively, in New Zealand the use of s 266 requires a two-step process that looks first at jurisdiction and then at the exercise of the discretion.[8]

[24] Another difference is that in England and Wales, the courts now accept there is jurisdiction to make the equivalent orders to s 266 even though other proceedings have already been commenced against a proposed examinee, but generally in those circumstances the courts do not order examination.[9] On the other hand, in Australia the courts accept both jurisdiction to make examination orders in such circumstances and they rarely hesitate to exercise this power.[10]

[25] In the present case, the Associate Judge correctly commenced his decision by looking first at jurisdiction. He was right to find there was jurisdiction to make orders under s 266. The orders sought directly fall within the language of s 266: they relate directly to the affairs of the company, and they are sought against someone to whom that section clearly applies. Here, the overseas investments and the alleged current account debt are the two most valuable assets of the company. The respondents want to find out what has happened to those assets and whether they can be recovered. If either can be recovered, that will enable the respondents to pay the tax owed to the Inland Revenue Department, otherwise that debt will not be paid.

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7 At [19]–[36].
8 At [47].
9 At [33].
10 At [34].

[26] There is nothing in the language of s 266 that suggests Parliament intended it should be read down and restricted in scope by removing its jurisdiction on occasions when a liquidator had earlier embarked on alternative legal processes against the proposed examinee. Nor is there any policy reason for doing so. We accept the wide inquisitorial nature of the s 266 powers are not to be used oppressively, vexatiously or unfairly, and that liquidators should not use them to obtain an unfair or improper advantage in other litigation they may bring against an examinee.[11] However, when the subject matter falls squarely within the language of s 266, as is the case here, the above concerns are properly met by the exercise of the discretion. In this regard, the present case is quite different from *Finnigan v Ellis*, because in that case a proper reading of s 266 did not allow the statutory language to be expanded beyond its natural meaning.[12]

Exercise of discretion

[27] The next question is whether the Associate Judge was wrong to exercise the s 266 jurisdiction in the circumstances of this case. We see no error in his approach and agree with the decision he reached.

[28] The circumstances outlined in the judgment show Mr Stewart has not cooperated with the respondents. Further, given he was the sole director of Eversons it is reasonable to expect he would know about what has happened to the company's assets and how they might be recovered. Eversons could only act through its sole director. Accordingly, the lack of knowledge Mr Stewart professes to have about the present whereabouts of the overseas investments is not plausible. Similarly, he should be able to explain the current account debt he is alleged to owe. If as he contends those funds were used to acquire overseas investments for the company, he should be able to identify the investments and explain what has happened to them. It is only because the company's records in relation to the overseas investments are so sparse that the respondents need to make these enquires of him.

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11 At [35].
12 At [48].

[29] We see nothing oppressive in the fact there has been earlier litigation brought by the respondents. The first proceeding, now discontinued, was brought against Bionutrient. Mr Stewart was involved only because he is also a director of Bionutrient. Absent that connection, he would not have been involved in this litigation. His involvement through his directorship of a separate company cannot be used to support an argument that it would now be oppressive to make orders against him under s 266.

[30] As to the second proceeding, the failure to obtain summary judgment is related to the recoverability of the alleged current account debt. The arguable defence Mr Stewart put forward was that the funds were used for investment on behalf of Eversons. That being the case, we consider it is only reasonable Mr Stewart now be obliged to inform the respondents about how they might locate this investment. There is nothing oppressive in this. The explanations Mr Stewart has offered the respondents so far require elaboration. As Eversons' sole director he should know where funds from the company's bank account have gone. His reluctance to respond adequately to the respondents' requests under s 261 warrant his examination under s 266.

[31] Further, we consider that, unlike in *Finnigan v Ellis,* this is a case where an approach in line with that followed by Australian courts is appropriate. We acknowledge that where possible the insolvency legislation of this country should be read in a way that is consistent with Australian law, given the close commercial ties between the two countries.

[32] In short, we consider the Associate Judge paid proper regard to all relevant matters and he was plainly right to exercise the discretion in favour of making orders under s 266.

Result

[33] The appeal is dismissed.

[34] The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

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