

IN THE SUPREME COURT OF NEW ZEALAND

**SC 49/2014
[2014] NZSC 82**

BETWEEN ALAN CANAVAN
Applicant

AND DAMIEN GRANT AND STEVEN KHOV
AS LIQUIDATORS OF QUANTUM
GROW LIMITED (IN LIQUIDATION)
Respondents

Court: William Young, Glazebrook and Arnold JJ

Counsel: S I Perese for Applicant
B J Norling for Respondents

Judgment: 4 July 2014

JUDGMENT OF THE COURT

A The applications for leave to appeal are dismissed.

B The applicant is to pay the respondents costs of \$2,500 and reasonable disbursements as fixed by the Registrar.

REASONS

[1] The respondents are the liquidators of Quantum Grow Ltd. They challenged as voidable transactions payments totalling \$25,576.88 made by Quantum Grow to Lotus Gardens Ltd. Both companies were under the control of the applicant, Mr Alan Canavan. Notice was given to Lotus Gardens under s 294 of the Companies Act 1993. Lotus Gardens did not respond in a timely way, with the result that the transactions were automatically set aside under s 294(3) of the Companies Act. The respondents subsequently issued a statutory demand under s 289 of the Companies Act against Lotus Gardens requiring payment of the \$25,576.88. There being no payment or any other response to the statutory demand, the respondents commenced liquidation proceedings.

[2] Lotus Gardens defended these proceedings on the basis that the setting aside of the transactions did not create an immediate debt of \$25,576.88. Associate Judge Bell agreed.¹ He held that no debt arose prior to the making of an order for payment under s 295. Because such an order had not been made, he dismissed the liquidation proceedings. The respondents' appeal to the Court of Appeal against that decision was successful.² The proceedings were remitted to the High Court for that Court to make "such orders as to the appointment of a liquidator and any other orders as are considered appropriate".³

[3] When the case came back before Associate Judge Bell, he placed Lotus Gardens into liquidation and appointed the Official Assignee as the liquidator (over the opposition of the respondents and despite the availability of private insolvency practitioners who were prepared to accept appointment).⁴ He also joined Mr Canavan as a party to enable an appeal to be taken to the Supreme Court against the Court of Appeal judgment.

[4] The liquidators have appealed to the Court of Appeal against the order joining Mr Canavan as a party and as to the appointment of the Official Assignee as liquidator and Mr Canavan has applied for leave to appeal to this Court against (a) the judgment of the Court of Appeal and (b) the order placing Lotus Gardens into liquidation.

[5] Lotus Gardens has not appealed against the Court of Appeal decision. This is unsurprising as it is now in liquidation and not under the control of Mr Canavan. Only a party to proceedings in the Court of Appeal can appeal to this Court against the resulting judgment.⁵ Mr Canavan was not such a party and the after-the fact order made by Judge Bell did not confer on him a status (that of being a party to the Court of Appeal proceedings) which he did not previously have. The only way in which Mr Canavan could now be made a party to these proceedings is if the Court of Appeal recalls its judgment, joins him as a party and then reissues the judgment.

¹ *Grant v Lotus Gardens Ltd* [2013] NZHC 1135, [2013] NZCCLR 16.

² *Grant v Lotus Gardens Ltd* [2014] NZCA 127.

³ The Court initially placed Lotus Gardens in liquidation but then reissued the judgment making orders as outlined in the text.

⁴ *Grant v Lotus Gardens Ltd* [2014] NZHC 829.

⁵ See s 7 of the Supreme Court Act 2003.

[6] On the other hand, if an appeal against the liquidation order made by Associate Judge Bell is allowed, this would result in Lotus Gardens no longer being in liquidation and it would revert to the control of Mr Canavan and it could then seek leave to appeal to this Court against the Court of Appeal decision. Mr Canavan's position is that the making of a liquidation order should have been deferred to permit Lotus Gardens to appeal against the Court of Appeal judgment. Associate Judge Bell plainly assumed his order as to party status would enable an appeal to be brought against the Court of Appeal judgment. An unintended and incidental effect of the order making Mr Canavan a party to the liquidation was to confer on him sufficient status to challenge in the Court of Appeal the liquidation order. So it would be open to Mr Canavan to either appeal to the Court of Appeal against the liquidation order or (b) seek leave to appeal to this Court against that order.

[7] We can understand why Mr Canavan would prefer to appeal direct to this Court rather than the Court of Appeal against the liquidation order. His underlying argument is that an appeal to this Court from the Court of Appeal judgment is appropriate and should be facilitated by setting aside the liquidation order.

[8] On the other hand, before the liquidation proceedings were heard, Mr Canavan declined an offer from Associate Judge Bell of party status so as to preserve appeal rights should a liquidation order be made. Presumably he wished to avoid a personal exposure to costs. This detracts from the merits of Mr Canavan's position. As well, the Court of Appeal is already seized of an appeal by the liquidators in relation to the liquidation order. It would not therefore be appropriate for this Court to hear Mr Canavan's appeal against that order. In those circumstances, the test in s 14 of the Supreme Court Act 2003 (for leap-frog appeals) has not been satisfied.

Solicitors:
Teei & Associates, Auckland for Applicant
Waterstone Insolvency, Auckland for Respondents