

IN THE COURT OF APPEAL OF NEW ZEALAND

CA230/2014
[2014] NZCA 498

BETWEEN DAMIEN GRANT AND STEVEN
KHOV
Appellants

AND LOTUS GARDENS LIMITED
First Respondent

AND ALAN CANAVAN
Second Respondent

Hearing: 6 October 2014

Court: Harrison, Wild and Goddard JJ

Counsel: B J Norling and J K Boparoy for Appellants
No appearance for First Respondent
S I Perese for Second Respondent

Judgment: 9 October 2014 at 11.30 am

JUDGMENT OF THE COURT

A The application for an extension of time to cross-appeal is dismissed.

B The second respondent is to pay the appellants' costs for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

[1] By application filed on 14 July 2014 Mr Canavan seeks an extension of time to cross-appeal against a judgment of Associate Judge Bell delivered in the High

Court at Whangarei on 16 April 2014.¹ The application, which is about eight weeks out of time, is opposed by the appellants.

[2] Pertinent points in the complicated and lengthy procedural background to this application can be summarised as follows:

- (a) Mr Canavan was a shareholder and director of Lotus Gardens Ltd (Lotus) and Quantum Grow Ltd (Quantum). Quantum was put into liquidation on 20 March 2012. The appellants, Messrs Grant and Khov, are liquidators of Quantum.
- (b) Prior to its liquidation, Quantum transferred \$113,280.63 to Lotus, \$25,576.88 of that amount within the two year voidable preference period specified by s 292 of the Companies Act 1993.
- (c) The appellants took steps to recover the \$25,576.88, ultimately applying to put Lotus into liquidation. In a judgment he delivered on 17 May 2013, Associate Judge Bell dismissed the appellants' application, taking the view that:²
 - the liquidators had adopted the wrong procedure; and
 - Lotus anyway had a tenable defence to the liquidators' claim, that Lotus was a conduit (between Quantum and the two companies' bank) rather than the beneficial recipient of the \$25,576.88.
- (d) The appellants appealed successfully to this Court. In a judgment it delivered on 4 April 2014, this Court held:³
 - the liquidators had used a procedure which was open to them; and

¹ *Grant v Lotus Gardens Ltd* [2014] NZHC 829.

² *Grant v Lotus Gardens Ltd* [2013] NZHC 1135.

³ *Grant v Lotus Gardens Ltd* [2014] NZCA 127.

- Lotus had no arguable defence to the liquidators' claim and therefore the statutory demand should not be set aside.

This Court made an order putting Lotus into liquidation.

- (e) After the parties had filed memorandums, and after issuing a first minute, on 15 April this Court issued a second minute recalling and reissuing its judgment. The Court revoked the order it had made liquidating Lotus and remitted the matter back to the High Court “to make such orders as to the appointment of a liquidator and any other orders as are considered appropriate”.
- (f) In a further judgment – the one against which Mr Canavan seeks to cross-appeal – delivered on 16 April, Associate Judge Bell observed “[i]t is clear from the decision of the Court of Appeal that a liquidation order should be made”.⁴ He made an order putting Lotus into liquidation with effect from 4.34 pm on 16 April and appointed the Official Assignee as liquidator. Noting that the Official Assignee was unlikely to have any interest in appealing against this Court's 4 April judgment, the Associate Judge also joined Mr Canavan “as a second defendant to this proceeding so that he can apply to the Supreme Court for leave to appeal from the decision of the Court of Appeal”.⁵

[3] In his submissions supporting the application, Mr Perese confirmed the aim of the application is to enable Mr Canavan to challenge the High Court's order putting Lotus into liquidation on the grounds that this Court, in its 4 April judgment, erred in holding that:

- (a) the liquidators had used a procedure which was open to them; and that
- (b) Lotus had no arguable defence to the liquidators' statutory demand for \$25,576.88.

⁴ *Grant v Lotus Gardens Ltd*, above n 1, at [2].

⁵ At [10].

In other words, by way of cross-appeal against Associate Judge Bell's 16 April judgment, Mr Canavan was in fact seeking to challenge decisions this Court had made in its 4 April judgment. This was Mr Canavan's way of circumventing his lack of standing to appeal directly against this Court's 4 April judgment.

[4] In the course of argument, the Court pointed out to Mr Perese that the proposed cross-appeal effectively challenged this Court's judgment of 4 April. As that judgment had not been appealed, it was conclusive on the two points Mr Canavan wished to pursue on his proposed cross-appeal. There was an issue estoppel on each of those points.

[5] Mr Perese ultimately accepted this. He referred us to the judgment of the Supreme Court dismissing Mr Canavan's application for leave to appeal against both (a) this Court's judgment of 4 April and (b) the order of the High Court of 14 April putting Lotus into liquidation.⁶ As to (a), the Supreme Court held that Mr Canavan was not a party to that judgment and therefore lacked standing to seek leave to appeal to the Supreme Court.⁷ As to (b), the Supreme Court stated:⁸

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.

[6] The reference to the order making Mr Canavan a party is to Associate Judge Bell's 16 April judgment in which he joined Mr Canavan as a second defendant. We referred to this in [2](f) above.

[7] Mr Perese then sought from this Court leave for Mr Canavan to appeal to the Supreme Court, so he could pursue the two issues identified in [3] above. We pointed out to Mr Perese that this Court cannot give such leave – that the Supreme Court is its own gatekeeper.

⁶ *Canavan v Grant* [2014] NZSC 82.

⁷ At [5], referring to s 7 of the Supreme Court Act 2003.

⁸ At [6].

[8] Quite apart from the obstacles of standing and issue estoppel, we would not grant an extension of time on the established r 29A principles. Mr Canavan's failure, when directing and controlling Lotus, to take any of the several opportunities to oppose the liquidators' demand is chronicled in this Court's 4 April judgment.⁹ His last minute application for Lotus to file a statement of defence is similarly chronicled.¹⁰ Compounding this is the fact – confirmed to us by Mr Perese – that it is only the \$25,576.88 which is at stake, although we accept that Mr Canavan also – albeit misguidedly – seeks to challenge the bases of the order putting Lotus into liquidation.

Result

[9] The application for an extension of time to cross-appeal is dismissed.

[10] The second respondent is to pay the appellants' costs for a standard application on a band A basis with usual disbursements.

Solicitors:
Waterstone Insolvency, Auckland for Appellants
Teei & Associates, Auckland for Second Respondent

⁹ *Grant v Lotus Gardens Ltd*, above, n 3, in particular at [3]–[7] and [9].

¹⁰ At [11].