IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA68/2018
[2019] NZCA 352

BETWEEN	MICHAEL DAVID KIDD Appellant
AND	ALEXANDER PIETER VAN HEEREN First Respondent
AND	WORLDWIDE LEISURE LIMITED Second Respondent
AND	SARACENO HOLDING BV Third Respondent
AND	STICHTING ADMINISTRATIEKANTOOR SARACENO HOLDING Fourth Respondent
AND	BANK OF NEW ZEALAND Fifth Respondent

Court: French, Brown and Gilbert JJ

Counsel: S J Mills QC and B O'Callahan for Appellant
M D O'Brien QC and S D Williams for First Respondent
T B Fitzgerald and B J Ward for Second Respondent
No appearance for Third to Fifth Respondents

Judgment: (On the papers) 1 August 2019 at 10 am

JUDGMENT OF THE COURT

A The application by the first and second respondents to vary or stay the Court's judgment delivered on 2 July 2019 is declined.

B The first and second respondents must pay costs on the application as for a complex appeal on a band B basis and any usual disbursements.

C We make further orders in terms of schedule 1 of the joint memorandum of counsel for the first and second respondents dated 23 July 2019 as modified in terms of this judgment.

D To align with the 30-day period in our principal judgment, this judgment will be delivered in the first instance only to the parties, the receivers and counsel. The judgment is not to be published further until tomorrow, 2 August 2019.

REASONS OF THE COURT

(Given by Gilbert J)

[1] In our judgment delivered on 2 July 2019 we made an order appointing receivers of the shares of Worldwide Leisure Ltd for the purpose of realising as soon as reasonably practicable sufficient of that company's assets found to be partnership assets, being Huka Lodge and (if necessary) Dolphin Island, to enable USD25 million to be paid into the High Court on account of Mr van Heeren's obligations under an interim payment order made by Fogarty J on 14 June 2015.[1] At the request of all parties, this judgment was released in the first instance only to the parties, the receivers and counsel and was to lie in Court and not become operative for a period of 30 days following delivery. This was to facilitate the prospect of resolution without the need for receivers to be appointed. We also directed the parties to file memoranda setting out the precise terms of the orders needed to give effect to the judgment.

[2] We have now received memoranda setting out the parties' respective positions on the form of the orders that should be made. While there is substantial agreement, there are four points of disagreement. We resolve those in this judgment.

[3] On 29 July 2019, Mr van Heeren and Worldwide Leisure Ltd applied for an order extending the 30-day period to 90 days. Alternatively, they sought an order staying the appointment of receivers and extending the non-publication restriction until further order of the Court. Mr Kidd opposes this application. We deal with it first.

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1 *Kidd v van Heeren* [2019] NZCA 275.

Application to vary

[4] We left open the prospect of a variation to the 30-day period, both in terms of the date of commencement of the order appointing receivers and in terms of the associated non-publication period. Accordingly, we are not *functus officio* on these issues and retain jurisdiction to grant the application if persuaded this would be appropriate.

[5] The variation is sought on the basis that Mr van Heeren and Worldwide Leisure are committed to selling sufficient assets of Worldwide Leisure to enable USD25 million to be paid into the High Court in satisfaction of the interim payment order. To this end, Worldwide Leisure has been conducting a sale process in respect of Huka Lodge since January 2019. The respondents anticipated the 30-day period would be sufficient for the sale agreement to be finalised, presented to Mr Kidd and the Court, "and the matter resolved by agreement". However, the agreement for sale and purchase was not concluded until Saturday, 27 July 2019. It was given to Mr Kidd that day. Mr van Heeren and Worldwide Leisure contend the last resort remedy of the appointment of receivers is no longer necessary and could jeopardise the sale. In the circumstances, they submit it is in the interests of the parties and in the interests of justice that the Court's orders should lie in Court for a further 60 days "to facilitate a resolution of the matter without the need for the appointment of receivers".

[6] Mr Kidd is opposed to any further extension of time. He notes that the agreement for sale and purchase is conditional, including on all consents required under the Overseas Investment Act 2005 being obtained on terms acceptable to the purchaser and on the purchaser being entirely satisfied with a due diligence investigation in its sole and unfettered discretion. These conditions could take months to satisfy. The agreement is also collateral to, and interdependent with, a contemporaneous agreement for sale and purchase of the owner's cottage. Mr Kidd has not been given a copy of this agreement and is therefore unable to assess the risk of the entire transaction not settling because of the terms of that agreement. Mr Kidd is also concerned that the purchaser appears to be a company recently formed to undertake the purchase and there is no guarantee from its parent company. In any event, Mr Kidd submits that if the purchaser's interest is genuine, it is unlikely

the appointment of receivers to the shares of Worldwide Leisure would have any material effect on its willingness to proceed with the transaction. Counsel for Mr Kidd submit the principles of open justice require that the judgment should now be published, particularly given that the case is progressing in the High Court and any extension of the existing non-publication order could impede that process.

[7] We were previously prepared to suspend the appointment of receivers for a limited period and make a similarly temporary non-publication order only because all parties requested this. The approach we took was exceptional. In our view, it would be wholly inappropriate to grant the 60-day extension now sought, particularly considering the extraordinary history of this dispute which we summarised in our principal judgment. We very much doubt that a further 60-day period will result in resolution. Moreover, the appointment of receivers to the shares in Worldwide Leisure should not deter a committed purchaser. As we emphasised in our principal judgment, the appointment of receivers in this case carries no indication that there are any solvency issues or concerns about the management of the company. This is demonstrably not the case. The principles of open justice require that the judgment should now be published without further delay.

Terms of the orders

[8] Counsel for Mr Kidd and Worldwide Leisure filed a joint memorandum dated 23 July 2019 setting out proposed orders to give effect to our judgment. These are identified as A–M in schedule 1. Mr Kidd takes issue with four of these — D, E, G and M.

Proposed order D

[9] The parties are agreed this proposed order should confer on the receivers all the powers of a shareholder controlling 100 per cent of the shares in Worldwide Leisure. The disagreement is whether such powers should be qualified in various ways including by being exercisable in accordance with standards of reasonableness and only on reasonable notice to the directors in defined circumstances. We consider these qualifications are unnecessary and likely to give rise to disputes. The receivers are professionals of good standing. They are appointed by the Court and will be held

accountable by the Court if they fail to discharge their obligations properly and competently.

Proposed order E

[10] The parties are agreed that this proposed order should require the board of Worldwide Leisure to comply with any written directions the receivers consider it necessary or appropriate to give to fulfil the appointment purpose. Again, the dispute concerns whether a reasonableness qualification should be expressed and whether any such directions should be on reasonable notice. For the same reasons, we consider these qualifications are unnecessary.

Proposed order G

[11] The parties agree that proposed order G should provide that once the appointment purpose has been realised, the receivers shall arrange for USD25 million to be paid into Court in satisfaction of the appointment purpose, at which point the receivers' appointment shall end. The dispute is whether this order should add that the receivers may, in the interim, call for funds from Worldwide Leisure to pay into Court in partial satisfaction of the appointment purpose. The appointment purpose is set out in proposed order C which accords with order D in the principal judgment. The additional wording proposed by Mr Kidd in proposed order G does not reflect the order we have made and is unnecessary.

Proposed order M

[12] This proposed order makes provision for payment of the receivers' costs. The dispute concerns whether the scope of the costs ordered in the principal judgment includes costs incurred in preparing for the receivership and undertaking an artwork inspection following orders made by Fogarty J on 14 June 2017. We agree with the respondents on this issue. Our judgment refers to "all costs reasonably incurred in the receivership including costs of the sale". It cannot be said that the costs associated with the artwork inspection fall into this category. Any claim for those costs should be pursued in the High Court as should any claim for other costs falling outside the formulation used in our judgment.

Respondents' further memorandum dated 31 July 2019

[13] After this judgment was prepared and counsel were advised that it would be delivered today, counsel for the first and second respondents filed a further memorandum late yesterday seeking urgency and advising that applications for leave to appeal to the Supreme Court were filed that afternoon. They seek to rely on the prospect of this appeal as a further ground in support of their application for a variation or stay. No formal application for a stay pending any appeal by the respondents to the Supreme Court has been made to this Court. The appellant has not had any opportunity to respond. It is premature for us to consider any such application. In all the circumstances it may be more appropriate for any such application to be pursued in the Supreme Court. However, that is for the respondents to consider.

Result

[14] The application by the first and second respondents to vary or stay the Court's judgment delivered on 2 July 2019 is declined.

[15] The first and second respondents must pay costs on the application as for a complex appeal on a band B basis and any usual disbursements.

[16] We make further orders in terms of schedule 1 of the joint memorandum of counsel for the first and second respondents dated 23 July 2019 as modified in terms of this judgment.

[17] To align with the 30-day period in our principal judgment, this judgment will be delivered in the first instance only to the parties, the receivers and counsel. The judgment is not to be published further until tomorrow, 2 August 2019.

Solicitors:
K3 Legal Ltd, Auckland for Appellant
Fee Langstone, Auckland for First Respondent
Bell Gully, Auckland for Second Respondent