IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA145/2023
[2023] NZCA 627

BETWEEN	ANDREW GRIFFITHS Appellant
AND	ISLAND GRACE (FIJI) LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Respondent

Hearing:	3 October 2023 (further submissions received 18 October 2023)
Court:	Katz, Palmer and Jagose JJ
Counsel:	R B Hucker, M W Swan and A L McMillan for Appellant A S Olney and B E Marriner for Respondent
Judgment:	7 December 2023 at 10.30 am

JUDGMENT OF THE COURT

A The application for interim relief is declined.

B The applications for leave to adduce further evidence are declined.

C The appeal is dismissed.

D The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Jagose J)

[1] Andrew Griffiths brings this appeal against the 17 February 2023 decision of Associate Judge Andrew (as he then was) in the High Court at Hamilton.[1] The Judge dismissed Mr Griffiths' protest to jurisdiction and opposition to the liquidation of Satori Holdings Ltd (Satori), and declined to grant him leave to file a statement of defence out of time.[2] The Judge then put Satori into liquidation,[3] on the orthodox grounds it was unable to pay its debts and its liquidation was just and equitable.[4] In so doing, the Judge had regard for Mr Griffiths' opposition to Satori's liquidation, notwithstanding the Judge's finding Mr Griffiths should be refused leave to join the proceeding.[5]

Background

[2] Satori is a New Zealand company, Mr Griffiths its sole director and shareholder. Satori is trustee for the Satori Family Trust, a foreign trust registered in New Zealand. Indemnification from the Satori Family Trust is Satori's sole asset. In that capacity, Satori holds a 24 per cent interest in the Island Grace joint venture in terms of a joint venture agreement dated 14 March 2019. The joint venture agreement provides it is subject to New Zealand law, and the parties submit to the jurisdiction of the New Zealand courts.

[3] The joint venture's assets are held by the respondent (Island Grace), also a New Zealand company (registered as a foreign company in Fiji). The joint venture agreement includes a self-executing process by which "Events of Default" disentitle defaulters to participation in joint venture decision-making.

[4] Sequitur Hotels Pty Ltd (Sequitur) has a 52 per cent interest in the joint venture. Other entities respectively hold the 16.75 per cent and 7.25 per cent balance of interests in the joint venture. In 2019, Sequitur issued proceedings in the High Court of Fiji against Mr Griffiths, Satori and others, alleging various wrongdoing in relation to the joint venture's formation. The proceeding is yet to be determined.

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1 *Island Grace (Fiji) Ltd (in rec and in liq) v Satori Holdings Ltd (in interim liq)* [2023] NZHC 219 [Judgment under appeal].
2 At [116]–[117].
3 At [118].
4 At [113].
5 At [113].

[5] The joint venture's principal asset was a Fijian resort, Six Senses Fiji, on land subleased from Vunabaka Bay Fiji Ltd, also a New Zealand company. The resort was planned to form part of a larger development to be undertaken by another joint venture, the Vunabaka Bay joint venture, of which Satori as trustee also holds a 31.66 per cent interest (and shareholding in Vunabaka Bay Fiji Ltd, which is the trustee company for the Vunabaka Bay joint venture). In matrimonial proceedings between Mr and Mrs Griffiths, on 1 April 2022, consent orders substituted Mrs Griffiths for Satori in those interests.

[6] The Island Grace joint venture was the recipient of a substantial loan from the Fiji Development Bank. Satori did not meet its share of the loan's debt or respond to a number of capital calls made by the joint venture. By final and binding expert determination of the Hon Paul Heath KC dated 1 April 2022, Satori was found to be liable, among other things, to respond to the capital calls (and for costs). In another proceeding,[6] stayed pending the outcome of the present proceeding in the High Court, Satori sought to set aside Island Grace's statutory demand for the capital call debt.

[7] After Island Grace's directors resolved in December 2021 the company was or was likely to become insolvent, Island Grace was put into receivership by Sequitur. The receivers obtained a stay of the consent orders in the Fiji Magistrates Court, and sold the resort to Sequitur in May 2022 for FJD 24.0 million. The sale left FJD 29.8 million owing to creditors, of which Satori is contended liable for its pro rata share. In June 2022, Satori issued proceedings in the High Court of Fiji disputing the validity of the receivers' appointment.

[8] Also in June 2022, on Island Grace's application, interim liquidators were appointed to Satori.[7] The liquidators identified Satori's assets as its interests in the two joint ventures (and a miniscule sum of FJD in a bank account), and its liabilities as the capital calls and loan debt together in the amount of some FJD 8.2 million (as well as costs of NZD 73,000 which Satori was ordered to pay following the expert

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6 *Satori Holdings Ltd (in interim liq) v Island Grace (Fiji) Ltd (in rec and in liq)* HC Auckland CIV-2022-404-836.

7 *Island Grace (Fiji) Ltd (in rec and in liq) v Satori Holdings Ltd* HC Hamilton CIV-2022-419-145, 21 June 2022 (Minute of Campbell J).

determination). These are the debts on which Island Grace's liquidation application primarily relies.

Judgment under appeal

[9] In the Judge's preliminary view, as Mr Griffiths had not filed a statement of defence in the proceeding, he lacked standing to oppose the proceeding.[8] In his capacity as shareholder, he required leave to apply to restrain advertising or stay the proceeding.[9] The Judge signalled he would address the company's disputed liability and solvency for the purposes of the leave criteria in connection with Island Grace's substantive application for liquidation.[10]

[10] The Judge turned to consider if Satori was unable to meet its liabilities. He noted Mr Griffiths' opposition was "based in a large part on the allegation that the sale of the resort was an unlawful/improper sale by the receivers to a related party at a 'gross under-value'".[11] He also noted Mr Griffiths' contention Sequitur and another joint venturer "combined to plan to ultimately buy the resort at an under-value".[12]

[11] The Judge observed that "there is little probative evidence to support these serious allegations".[13] Acknowledging that it was not possible to make an "informed assessment of the merits of [Satori's] potential claims based on untested affidavit evidence", the Judge considered the claims were nevertheless "at best a potential asset of Satori" and accepted the submission for Island Grace that "if there is merit to these claims and a proper economic basis for prosecuting them then the liquidators are best placed to make the relevant assessments and decisions".[14] Even so, Satori would be in no better position as it would remain liable for its share of the joint venture's

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8 Judgment under appeal, above n 1, at [50]–[51], [56] and [58]–[59].
9 At [62].
10 At [67] (following references at [64] to *Auckland City Council v Stonne Ltd* HC Auckland CIV-2007-404-4208, 30 November 2007 at [21]; and at [65] to *Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd* (2003) 21 NZTC 18,281 (HC) at [15]).
11 Judgment under appeal, above n 1, at [72].
12 At [81].
13 At [82].
14 At [83].

FJD 56 million liability.[15] And Mr Griffiths had not demonstrated any "substance or arguable merit" to his dispute as to Satori's liability for that share.[16]

[12] The Judge considered "Satori is deeply insolvent … [as] apparent from the recent report of the interim liquidators".[17] As Satori was a New Zealand company, the High Court of New Zealand had jurisdiction to determine Satori's liquidation.[18]

[13] So far as any connection with Fiji was concerned, Satori's only asset — its right to indemnification by the Satori Family Trust — was a New Zealand asset and Satori's creditors had "a right to be subrogated to that indemnity".[19] The trust owned shares in the New Zealand joint venture companies.[20] A judgment in another proceeding, accepting Fiji was the preferable forum for claims about Mr Griffiths' conduct as "main actor" while resident in Fiji, also held "New Zealand is the more natural forum in respect of the contractual claims against Satori".[21] New Zealand accordingly was the convenient forum for determination of Island Grace's application for Satori's liquidation.[22]

[14] Additionally, the circumstances of Mrs Griffiths' substitution for Satori in the Vunabaka Bay joint venture, and Island Grace's allegations of Satori's "profound insolvency" and continued incurring of obligations while insolvent, provided a proper basis for investigation of Satori's affairs on "just and equitable" grounds.[23]

[15] Ultimately, the Judge concluded:[24]

> Mr Griffiths has failed to establish to the arguable basis threshold that Satori is solvent and not liable for the debts at issue. There is no legitimate basis for staying the proceedings pending determination of the related proceedings in Fiji. That includes the proceedings in which there is a challenge to the appointment of the receivers.

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15 At [84].
16 At [93].
17 At [94].
18 At [98].
19 At [99].
20 At [100].
21 At [103], citing *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032 at [81]–[82].
22 Judgment under appeal, above n 1, at [105].
23 At [107]–[110] (following reference at [106] to *Loch v John Blackwood Ltd* [1924] AC 783 (PC); and *Re Senator Hanseatische Verwaltungsgesellschaft mbH* [1997] 1 WLR 515 (CA) at 523).
24 Judgment under appeal, above n 1, at [111].

The Judge therefore refused Mr Griffiths leave to oppose Satori's liquidation on any basis, and held "Satori is unable to pay its debts and that it would also be just and equitable to make the liquidation order sought".[25] Noting Mr Griffiths' failure to establish Satori even arguably was solvent, the Judge did not need to decide if Mr Griffiths had standing to oppose the liquidation.[26]

Submissions

[16] Seemingly accepting the onus fell on Mr Griffiths to demonstrate "an arguable basis that there is a defence to the liquidation proceeding", Robert Hucker argues the Judge's acknowledged inability to determine Mr Griffiths' claims of the resort's "under-value" sale "should have led to a dismissal of the liquidation proceedings".[27] Mr Hucker also argues the Judge erred in his assessment of Satori's continued liability even if the sale was set aside.[28] Then, he contends, the joint venture's assets would have exceeded its liabilities, meaning the liquidation proceeding against Satori also should have been dismissed. And he submits the Judge's acceptance issues remained in dispute after the expert determination undermines the Judge's conclusion there was no arguable case for Satori's liability or merit in its claim against Sequitur.[29] Rather, the question of Satori's liabilities should be left to the Fijian courts.

Approach on appeal

[17] Section 27(1) of the Senior Courts Act 2016 entitles any party to proceedings to appeal to this Court against any order or decision of an Associate Judge. Pursuant to s 27(2), s 56 of the Act applies to any such appeal. If Mr Griffiths has a right of appeal against the Judge's decision, he bears the onus of satisfying us the Judge was wrong — in other words, the Judge erred.[30]

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25 At [111] and [113].
26 At [115].
27 Referring to [83].
28 Referring to [84].
29 Referring to [88].
30 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4] and [13].

Analysis

[18] Section 241(4)(a) of the Companies Act 1993 entitles the High Court of New Zealand to appoint a liquidator if it is satisfied a company registered under that Act is unable to pay its debts.[31]

[19] As such a company, there is no other forum for determination of Island Grace's application for Satori's liquidation. Mr Griffiths' purported protest to jurisdiction and plea that Fiji is the more convenient forum are misconceived. The High Court, and only that court, has original jurisdiction to appoint a liquidator to a New Zealand-registered company.

[20] As noted, the court may do so if satisfied the company is unable to pay its debts. As this Court stated in *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)*, "[t]he test is one of solvency, not liquidity"; of ready availability of funds to meet liabilities as they fall due.[32] Where a company is insolvent, a creditor "prima facie" is entitled to an order putting the company into liquidation.[33] It is well-established courts are to take "a commercially realistic approach" under s 241.[34]

[21] Mr Griffiths seeks to refocus issues on the joint venture's or particular venturers' prospects in Fiji, and especially if then having assets exceeding liabilities (being a liquidity, not solvency, assessment). His effort misses the point. The point is Satori's lack of solvency now *within* the joint venture has given rise to its liquidation. Satori inarguably has failed to pay its capital call debt, and has not established even an arguable case it was not so liable.

[22] Presuming Satori's success in various as yet undetermined Fijian proceedings, Mr Griffiths instead contends for counterfactuals in which such liability may not have arisen on a "proper" accounting between the joint venture parties or otherwise may be

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31 Companies Act 1993, s 2 definitions of "company" and "court".

32 *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)* [2014] NZCA 190 at [59], citing *Sandell v Porter* (1966) 115 CLR 666 at 670.

33 *Commissioner of Inland Revenue v Newmarket Trustees Ltd* [2012] NZCA 351, [2012] 3 NZLR 207 at [65], quoting *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [3].

34 *Cummins v Body Corporate 172108* [2021] NZCA 145, [2021] 3 NZLR 17 at [42(d)], referring to *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)*, above n 32, at [60] (citing *Sandell v Porter*, above n 32).

offset. So characterised, the paucity of Mr Griffiths' opposition to Satori's liquidation in New Zealand is obvious. Satori has liabilities now in indemnification of the joint venture's funding. It is commercially unrealistic other joint venturers should bear those obligations while Satori seeks some more advantageous financial position for itself.

[23] If Satori's failure to pay also qualifies as an "Event of Default" (limiting Satori's participation under the joint venture agreement), the expert determination did not decide such and thus any such limitation is not material in assessing Satori's solvency by reference to its liability to Island Grace. Neither are Satori's prospects for liquidity arising from Fijian litigation any basis for dismissing the liquidation application in New Zealand.

[24] We consider the Judge did not err in his conclusion Satori was unable to pay its debts. It plainly has debts, as established by the final and binding expert determination in respect of its capital calls and costs liabilities, even leaving aside the loans. Given that lack of solvency, and Mr Griffiths' singular pursuit of alternative outcomes through Satori, we agree Satori's liquidation is just and equitable to ensure its effort is addressed to creditors' interests.

[25] Given those conclusions, the Judge also was right to refuse Mr Griffiths leave to apply to stay or restrain the liquidation proceeding.[35] Even as shareholder, without Satori's solvency, Mr Griffiths cannot demonstrate desirable legitimate interest in the relief sought as the outcome of the proceeding.[36] Rather Mr Griffiths seeks to avoid that outcome. We will dismiss his appeal partly on that basis.

Procedural issues

[26] We have addressed the appeal in that way because, had the appeal substantive merit, there are difficult procedural issues we would need first to determine in Mr Griffiths' favour. It is not at all clear he would there have succeeded. Given the

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35 Companies Act, s 247.

36 *Re CBL Insurance Ltd (in liq)* [2019] NZHC 2291 at [20]–[23], citing *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 (PC) at 1611 (approving *Re Corbenstoke Ltd (No 2)* [1990] BCLC 60 (Ch) at 61–62).

appeal's lack of merit, the uncertainty of Mr Griffiths' role in the court below and on appeal make this appeal an unsuitable vehicle for determining those issues.

[27] Mr Griffiths purports to have brought this appeal also as Satori, "on instruction through [him]". Satori is named the second appellant on the notice of appeal. Given Satori's liquidation, as director, Mr Griffiths has no powers, functions or duties other than those required or permitted to be exercised for liquidation.[37] If any entitled him to bring an appeal, as a party to the proceeding in the court appealed from, Satori then was required to be served with the notice of appeal.[38] If not, the appeal would not have been "brought",[39] and we would have lacked jurisdiction to determine it.

[28] After hearing the appeal, we drew the jurisdictional point to counsel's attention. Mr Hucker submits Satori's right of appeal was exercised in Mr Griffiths' residual discretion as director, and in any event Satori effectively had notice of Mr Griffiths' appeal. Otherwise he seeks an extension of time for "the appeal to be adjudicated on its merits".

[29] It may be the case, as much as a director may seek an order for the company's liquidation,[40] a director also should be able to oppose the making of such an order. But, from commencement of liquidation on the making of such an order, "the liquidator has custody and control of the company's assets" and directors "cease to have powers, functions, or duties other than those required or permitted to be exercised by [pt 16 of the Companies Act]".[41] Nothing in pt 16 makes any provision for appeal against the court's appointment of a liquidator. Rather, provision for appeal arises under the Senior Courts Act 2016, and — where, as here, the subject order or decision is one of an Associate Judge — the right of appeal is vested in "[a] party" to the proceeding.[42]

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37 Companies Act, s 248.
38 Court of Appeal (Civil) Rules 2005, r 31(1)(b).
39 See for example *Underhill v Coca-Cola Amatil (NZ) Ltd* [2019] NZCA 566 at [10]; and *Koroniadis v Bank of New Zealand* [2014] NZCA 197 at [2].
40 Companies Act, s 241(2)(c)(ii).
41 Section 248(1).
42 Senior Courts Act 2016, s 27(1).

[30] Mr Griffiths palpably was not a party to the proceeding in the High Court. His personal participation in the proceeding wholly was informal, only as shareholder without leave. His purported protest to jurisdiction and opposition to Satori's liquidation filed in the proceeding accordingly were nullities. If exercising powers as a director, his actions must be in Satori's name. It follows Mr Griffiths personally had no right of appeal against the Judge's substantive decision on Satori's liquidation. We will dismiss his appeal also on that basis.

[31] Any question of Satori's notice thus is redundant. For what it is worth, if we accepted Mr Griffiths personally had a right of appeal, we would not have accepted his knowledge of the appeal appropriately constituted notice to Satori. Mr Griffiths' failure to distinguish what hat he wore at any particular point is a significant source of procedural complexity in this proceeding.

[32] The question instead is if Satori, not Mr Griffiths, may or should be afforded an extension of time to appeal. As a contingent asset of the company, it is a decision now in the custody and control of the liquidators, and not Mr Griffiths. No extension of time is sought by the liquidators; we therefore have no basis on which to consider it. The slide in Mr Hucker's submissions — from Mr Griffiths as barely timely contended appellant "on instruction" to or from Satori, to Mr Griffiths as director seeking now belatedly to exercise Satori's appeal right — suggests he accepts the proper focus of the question. His submission relies on earlier English authority for such directors' residual power,[43] and necessarily presupposes such power survives pt 16's arguable codification of directors' powers on liquidation.

[33] Determination of the question involves complex factual, legal and policy assessments with potentially far-reaching consequences. It is an inappropriate determination to make here, especially on post-hearing submissions alone and without properly established factual foundations, in a comprehensively unmeritorious appeal. We therefore decline to consider this issue further.

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[43] *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640 (Ch).

[34] Only Island Grace as petitioning creditor, and Satori as subject company, were party to the substantive proceeding. Any right of appeal against it is limited to them. Neither exercised any such right. This judgment is intituled accordingly.

Interim relief

[35] By application filed only the day before the appeal hearing, and pending the determination of the appeal, Mr Griffiths (and nominally Satori) sought orders rescinding and staying Satori's liquidation. We declined the application at the hearing, with reasons to follow. These are those reasons.

[36] Applications for interim relief involve the overall balance between "the successful litigant's rights to the fruits of a judgment and 'the need to preserve the position in case the appeal is successful'";[44] this includes consideration of whether refusing interim relief would be harder on a prospectively successful appellant than granting it would be on a successful respondent.[45] Given our conclusion the appeal lacks substantive merit,[46] the balance fell solidly in Island Grace's favour.

[37] The application for interim relief also came nearly eight months after Satori formally was put into liquidation (and some 16 months after Satori was put into interim liquidation), with material steps being taken since in furtherance of creditors' interests. At least the liquidators needed to be heard on Mr Griffiths' applications for rescission and stay of Satori's liquidation, but they were not served and by reason of Mr Griffiths' unorthodox approach to parties effectively were excluded from the hearing of the appeal. The consequent delay and prejudice also weighed against any grant of interim relief.

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44 Court of Appeal (Civil) Rules, r 12(3); *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11], citing *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87; *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9]; and *Body Corporate No 188529 v North Shore City Council (No 6)* HC Auckland CIV-2004-404-3230, 11 February 2009.

45 Analogously with considerations for interim injunctions: *Air New Zealand Ltd v Wellington International Airport Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008 at [4], citing *Cayne v Global Natural Resources Plc* [1984] 1 All ER 225 (CA) at 237.

46 At [24] above.

Further evidence

[38] Both Mr Griffiths and Island Grace sought to adduce new evidence on the appeal.[47] It is well-understood such requires the prospective evidence to be "fresh, credible, and cogent",[48] and this requirement serves to balance the interests of the parties and ensure the just and efficient dispatch of litigation.[49]

[39] Mr Griffiths would put in evidence various documents relating to Fijian proceedings and Satori's claims of Sequitur's improprieties there. Island Grace would adduce the liquidators' most recent report. Admission of either is opposed, respectively as lacking cogency (even if fresh) or being incorrect.

[40] We admitted the evidence on a provisional basis. Given our view of the appeal, we have not required to consider any of the proposed evidence and will decline both applications.

Result

[41] The application for interim relief is declined.

[42] The applications for leave to adduce further evidence are declined.

[43] The appeal is dismissed.

Costs

[44] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

Solicitors:
Molloy Hucker, Auckland for Appellant
Buddle Findlay, Wellington for Respondent

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47 Court of Appeal (Civil) Rules, r 45.

48 *Lawyers for Climate Change Action NZ Inc v Climate Change Commission* [2023] NZCA 443 at [12], citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193, and *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

49 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, above n 48, at 192.