

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA138/2024
[2024] NZCA 596**

BETWEEN SPENCER MCKENZIE GILLINGHAM BISHOP
First Appellant

AND RAYMOND VINCENT BISHOP
Second Appellant

AND LARISSA HELEN LOGAN AND RHYS JAMES
CAIN AS LIQUIDATORS OF BF7 TRADING
LIMITED (IN LIQUIDATION)
Respondents

Hearing: 10 October 2024

Court: Katz, Brewer, and Osborne JJ

Counsel: R B Hucker for Appellants
A J Steel for Respondent

Judgment: 18 November 2024 at 11.00 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellants must pay costs to the respondents for a standard appeal on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Osborne J)

Introduction

[1] The appellants appeal an order made in the High Court under s 266(2) of the Companies Act 1993 requiring them to produce documents and to attend before the Court for an examination (the s 266(2) order).¹ They seek orders quashing the s 266(2) order and dismissing the respondents' originating application.

Background

[2] The respondents are the liquidators of BF7 Trading Ltd (in liq) (BF7).

[3] The appellants (brothers) are shareholders of BF7. The first appellant is also a director of BF7.

[4] In 2019 (before BF7 was put into liquidation), current account debts owed by the appellants totalling \$314,933 were journalled to become a debt owed by the Bishop Family Trust.

[5] In 2021, the liquidators identified the claim BF7 has against the Trust. Through to 2022, the liquidators sought repayment of the debt from the first appellant. When that did not occur, they required the appellants under s 261 of the Companies Act to identify the trustees of the Trust. When the appellants did not comply with that demand, the liquidators applied to the High Court for an order under s 266(2) of the Companies Act. The appellants recorded 19 grounds of opposition.

The s 266(2) order

[6] Following the hearing, Associate Judge Sussock ordered:²

- (a) the [appellants] are to produce to the [liquidators] and the Court by **15 March 2024** any books, records or documents in their possession or control relating to:
 - (i) the indebtedness of the trustees of the Trust to BF7; and
 - (ii) the trustees' names and contact details;

¹ *Logan v Bishop* [2024] NZHC 46 [judgment under appeal].

² At [97] (emphasis in original).

- (b) the [appellants] are to attend before the Court and be examined on oath or affirmation by the court, the liquidators, or a barrister or solicitor acting for the liquidators, relating to the trustees' names and indebtedness to BF7 at a time to be confirmed by the Registry but no earlier than **19 April 2024**;
- (c) the orders in (a) and (b) do not require the [appellants] to produce documents or information that BF7 would not have been aware of if all proper steps had been taken to document any loans or other indebtedness owed by the trustees of the Trust to BF7; and
- (d) leave is reserved to apply for clarification or amendment of the orders or to seek a determination in respect of particular documents.

The High Court judgment

[7] The Judge identified as the central issues:³

- (a) Do the documents and information sought relate to the business, accounts or affairs of BF7?
- (b) If so, should the Court exercise its discretion to order examination or production or both?

[8] The Judge referred to s 266 of the Companies Act which relevantly provides:

266 Powers of court

- (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.
- (2) The court may, on the application of the liquidator, order a person to whom section 261 applies to—
 - (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:
 - (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.

...

³ At [8].

[9] The Judge referred to the discussion of the equivalent English and Welsh provision in *Re Rolls Razor Ltd (No 2)*, where Megarry J said:⁴

The [s 266(2) equivalent] process ... is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up.

The jurisdictional requirements

[10] The Judge identified that the application was made by the liquidators as people to whom s 261 applies and that, as the loan is an asset of BF7, the names of the trustees and the terms of the loan clearly relate to BF7's "business, accounts or affairs".⁵

[11] The Judge found that it is not a prerequisite to an order under s 266 that the liquidators establish that the information or documents are in the possession or control of the proposed examinee before orders can be made.⁶ She identified that s 266(2) of the Companies Act limits the documents that may be ordered to be provided to those in the examinee's possession or control — to require the liquidators to establish that documents exist would defeat the broad scope of the provision.⁷ The Judge referred to the observation of this Court in *Finnigan v Ellis* that:⁸

[t]he plain purpose of the examination powers is to enable the liquidator to determine whether there is a sufficient evidential basis for a claim to recover assets of the company from a third party or parties.

⁴ At [29], citing *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 591–592.

⁵ Judgment under appeal, above n 1, at [35] and [39].

⁶ At [51].

⁷ At [51], citing *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [36].

⁸ Judgment under appeal, above n 1, at [64], citing *Finnigan v Ellis* [2017] NZCA 488, [2018] 2 NZLR 123 at [41].

[12] The Judge summarised submissions made by Mr Hucker for the appellants to the effect that the Trusts Act 2019 (and, before its enactment, the inherent jurisdiction of the Court) regulates access to records or documents of trusts and that s 266 was not intended to override those jurisdictions. The Judge held in particular (we summarise):

- (a) Matters relating to the business, accounts, or affairs of the company: The orders sought relate to the identity of the debtor and the terms of any loan or indebtedness owed by the trustees of the Trust to BF7. The liquidators' application was therefore not affected by the limitation recognised by this Court in *Hunt v Muollo* whereby the examination sought in that case, relating to the *means* of the examinee, was impermissible.⁹
- (b) Documents not possessed or controlled by the appellants: In the event a s 266(2) order was made, the appellants would be entitled — if they did not have relevant documents in their possession or control — to simply say so in response to the orders or in the examination.¹⁰ This was a matter clarified by the Judge in the order she made.¹¹
- (c) Does the Trusts Act prevent the orders sought? The appellants, if they are beneficiaries of the Trust, are likely to have been provided with the identities of the trustees, because the Trusts Act provides a presumption that the trustees will provide “basic trust information” to the beneficiaries.¹² The basis on which the liquidators sought to examine the appellants is the likelihood the appellants know the information or hold documents, not that they will obtain the information from others.¹³ Nothing in the factors trustees must consider under s 53 of the Trusts Act prevents orders under s 266 of the Companies Act being made in

⁹ Judgment under appeal, above n 1, at [48]–[49], citing *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11].

¹⁰ Judgment under appeal, above n 1, at [51].

¹¹ At [51] and [97(a)].

¹² At [53], citing Trusts Act 2019, s 51(1).

¹³ At [41].

respect of documents or information that relate to the affairs of BF7 that may also fall within the definition of “trust information”.¹⁴

- (d) Capacity in which information is held: The appellants, whether or not they happen to be trustees (as well as persons within a s 261 category), are permitted subjects of a s 266 order.¹⁵ The Judge referred to *Concrete Structures Ltd v NMHB Ltd (in liq)* in which a similar submission was made by solicitors against which s 266 orders were sought — the submission was then rejected because the test was not ownership of the document in issue but possession and control. In any event, the first appellant had stated in correspondence with the liquidators’ solicitor that he had requested his lawyers send through a copy of the trust deed. There is therefore an inference that the first appellant knows the identities of the trustees. Section 267 of the Companies Act deals with the admissibility of answers in ss 261 and 266 examinations in criminal proceedings and cannot be relied on in the present civil proceeding to exclude evidence of the first appellant’s (implicit) acknowledgement in relation to the trust deed.¹⁶
- (e) Breadth of orders: Legitimate concerns about the breadth of orders sought, to the extent they exist, may properly be controlled by the Court in the exercise of its discretion.¹⁷

The discretion

[13] The Judge identified that, once a court has determined it has jurisdiction to make an order under s 266(2) of the Companies Act, factors which will be taken into account when deciding to exercise the discretion include:¹⁸

- (a) whether the requirement of the liquidator is reasonably necessary for the discharge of his or her functions and duties;

¹⁴ At [54]–[56].

¹⁵ At [59]–[62], citing *Concrete Structures Ltd v NMHB Ltd (in liq)* [2020] NZHC 1218 at [5] and [34], where solicitors who asserted the requested documents (in their possession) were the property of another client, but were held to be the proper subject of s 266(2) order.

¹⁶ Judgment under appeal, above n 1, at [71]–[72].

¹⁷ At [76], citing *Concrete Structures*, above n 15, at [31].

¹⁸ Judgment under appeal, above n 1, at [34], citing *Concrete Structures*, above n 15, at [42].

- (b) whether the requirement of the liquidator would impose unnecessary and unreasonable burdens on the person the subject of the liquidator’s notice (mere inconvenience or additional work is not however sufficient reason to validly oppose the liquidator’s application);
- (c) the alternative legal procedures which are available to the liquidator (bearing in mind that pre-trial discovery is now firmly part of the litigation process);
- (d) the nature of the proposed proceedings (if any are contemplated) and whether the person concerned would be made more vulnerable to future claims as a result;
- (e) whether the person the subject of the notice or the proposed order is a former officer or employee of the company or someone else who has provided services to the company; and
- (f) the nature and significance of the information sought and the public interest in the information.

[14] We summarise the Judge’s conclusions in relation to the identified discretionary factors, in the same order:

- (a) Reasonable necessity — the orders appear reasonably necessary to enable the liquidators to file any proceedings to recover the substantial loan that is shown in BF7’s financial accounts as owing by the Trust to BF7.¹⁹
- (b) The burden on the appellants — the orders made (adapted to protect “internal trust documents”) would require limited information and would not be oppressive or impose unnecessary unreasonable burdens on the appellants.²⁰
- (c) Alternative legal procedures — in circumstances where the liquidators have not been able to obtain the requested information from other sources or under the s 261 notice procedure, the remaining procedural steps available under the High Court Rules 2016 (r 8.20 for pre-commencement discovery and r 4.3(4) enabling the joinder of multiple defendants) are not a sufficient substitute for a s 266(2) order.²¹

¹⁹ Judgment under appeal, above n 1, at [78]–[79].

²⁰ At [80]–[81].

²¹ At [82]–[86].

- (d) Exposure to future claims — as the primary focus of the liquidators’ draft proceeding is simply to recover the loan allegedly owed by the Trust through its trustees, and the liquidators are not seeking access to information BF7 is not entitled to, any vulnerability the appellants face to future claims arises primarily because of the current information and balance between the liquidators and the appellants. The fact the documents may indirectly lead to the liquidators taking action on behalf of BF7 against the appellants may be “exactly in step with the legislative intent”.²²
- (e) Former officers/employees/service providers — given the appellants’ statuses (both) as shareholders and the first appellant’s status as a director, it is more appropriate the information sought be obtained from the appellants rather than more distant parties.²³
- (f) Significance of the information sought — the liquidators, without knowing at least the identities of the trustees, will be unable to take steps to recover the loan. There is also a public interest in the ability of the Commissioner of Inland Revenue to recover tax owed by BF7 and in the exercise of the Court’s power under s 266 to prevent the easy avoidance of shareholders’ obligations to a company by transferring shareholders’ current account obligations to trusts prior to liquidation without sufficient details.²⁴

[15] The Judge, taking those factors into consideration, concluded it was appropriate to exercise her discretion to make s 266(2) orders. The s 266(2) order was two-staged, allowing for production of the documents first, prior to any examination, as examination might prove unnecessary if documents were provided.

²² At [87]–[89], citing *Dalton v Hong* [2018] NZHC 2266 at [64].

²³ Judgment under appeal, above n 1, at [90].

²⁴ At [91]–[93].

The appeal

[16] By their notice of appeal, the appellants identified eight specific grounds of appeal. In his submissions, Mr Hucker has reformulated and added to those grounds.

[17] In essence, the appellants pursue two propositions. First, the High Court had no jurisdiction to make a s 266(2) order, by reason of restrictions applying to trust information and the private nature of the information on which the appellants were ordered to be examined. Secondly, if jurisdiction does exist, the Court erred in the exercise of its discretion for the same reasons.

Submissions — the s 266(2) jurisdiction

[18] Mr Hucker, in submitting the jurisdiction to make a s 266(2) order did not arise in this case, utilised five headings which we adopt.

The statutory context of s 266(2) of the Companies Act

[19] Mr Hucker submitted as a matter both of statutory interpretation and of policy, s 266(2) does not operate to remove the ability of third parties to keep their affairs and information confidential.

[20] Mr Hucker drew support from the decision in *Finnigan v Ellis* for the proposition that the Trust record and documents “remain separate from the affairs of the liquidated company”. He submitted the “jurisdictional boundaries” intended by Parliament must exclude demands for the confidential and private information of the Trust.²⁵

[21] Mr Hucker referred to an affidavit of the first appellant who had deposed “I can only make requests to appropriate persons for the provision of documents I do not hold”. Mr Hucker submitted, absent a loan agreement or other document, there is no basis for the appellants to be examined in relation to the documents.

²⁵ Citing *Finnigan v Ellis*, above n 8, at [40].

The Trust context

[22] Mr Hucker identified that the confidentiality of trust affairs and the expectation of privacy has been stressed through case law, including in *Erceg v Erceg* and ultimately through the enactment of ss 45 and 53 of the Trusts Act.²⁶ Parliament, by providing for beneficiaries to access certain types of information (and giving trustees discretion to decline access), made it clear that wide public access to Court trust documents and information was not to be provided for by beneficiaries being compelled to request release of such information from the trustees. The entitlement of beneficiaries to access information, in Mr Hucker's submission, is solely for the purpose stated in s 50(1) of the Trusts Act — that is, to enable the terms of the trust and the trustees' duties to be enforced. Beneficiaries are precluded from making information received available to anyone else for any different purpose.

The capacity in which the information is held

[23] Mr Hucker submitted the capacity in which the information is held is an "important consideration". He submitted the Judge erred in holding the appellants could be examined in relation to documents in whatever capacity they held such documents. If documents were held in their capacity as trustee and on a confidential basis, the Court should recognise a "jurisdictional boundary" precluding a s 266(2) examination in relation to the documents or information owned by the non-party.

An enforceable ability to obtain documents?

[24] Mr Hucker submitted that, if a person does hold documents, that person must have a legally enforceable right to obtain the relevant information if there is to be a s 266(2) order. Here, the beneficiaries of the Trust have only a right to *request* disclosure of certain trust information. Mr Hucker submitted the Judge erred in referring to a "presumption that a beneficiary could ask a trustee to exercise the power".

²⁶ *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

The limited request — for names and contact details of trustees

[25] Mr Hucker repeated his assertion that there is no loan document. He implicitly accepted that, if such a document exists, a s 266(2) order could be made in relation to it. He submitted that, even with the requested information being limited to the names and contact details of the trustees, there is a need for the courts to be vigilant to ensure that there is no overreach of liquidators' powers and that administrative convenience does not encroach on third party rights of privacy and confidentiality.

Submissions — the s 266(2) discretion

[26] Mr Hucker submitted the Judge in any event erred in the exercise of her discretion. He submitted the Judge had no or insufficient regard to five matters in particular:

- (a) the liquidators had alternative means of obtaining the relevant information;
- (b) the expectations of confidentiality of basic trust information, which is the subject of the provisions of the Trusts Act, may be breached if the examinees are required to disclose the information;
- (c) BF7 itself, as a creditor, is not entitled to trust information;
- (d) an assessment of the merits of the proposed debt claim is not appropriate in the context of the right to trust information or documentation; and
- (e) liquidators should not be treated differently to other creditors simply because the Inland Revenue Department (IRD) is a major creditor in the liquidation.

Approach on appeal

[27] Because of the nature of s 266 of the Companies Act under which the Judge made her decision, we approach this appeal under two heads. The first is a question

of jurisdiction, being whether the Judge had jurisdiction to make an order under s 266. The standard is that of a general appeal whereby the appellants must satisfy the appeal court that the appealed decision is in error.²⁷

[28] The second aspect is an appeal against the Judge’s discretion for which the criteria for a successful appeal are stricter than for a general appeal. The appellants must show the Court made an error of law or principle, took account of irrelevant considerations, failed to take account of a relevant consideration, or was plainly wrong.²⁸

Analysis

Jurisdiction

[29] The appellants have not established there was any material error in the High Court judgment. In our view, the Judge’s reasons comprehensively reviewed the issues raised and correctly concluded both that the jurisdiction to make a s 266(2) order existed and the discretion was appropriately exercised in favour of the liquidators.

[30] Contrary to the emphasis in Mr Hucker’s submissions, the liquidators did not seek an order that would require the appellants to compel trustees of the Trust to disclose documents to the appellants. The s 266(2) order requires only production of documents that are in the appellants’ possession and control. The subject matter is expressly limited to matters relating to the indebtedness of the trustees to BF7 and the trustees’ names and contact details. Given the focus of enquiry is upon the debt owed by the Trust to BF7, these are plainly matters relating to the “business, accounts, or affairs of the company” as specified as the appropriate subject-matter under s 266(2) of the Companies Act.

[31] There would appear to be three ways in which the appellants may have come to have documents in the relevant category. First, by being involved with BF7 in

²⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4] and [13].

²⁸ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

arranging the loan. Mr Hucker has not suggested, if the appellants acquired such documents in that way, that the documents may not be ordered to be provided. They clearly may be.

[32] A second alternative is that some or all such information (such as the names of the trustees) may have been given to the appellants in their capacities as beneficiaries. Nothing in the legislation or case law cited by Mr Hucker requires the breadth of the power under s 266 of the Companies Act to be read down or constrained in such a way as would exempt a person within one of the s 261 categories — in this case a director or shareholder of the liquidator company — from providing information on a s 266(2) examination, on the grounds they obtained the relevant information through some other capacity. The passage cited by the Judge from the judgment of Megarry J in *Re Rolls Razor Ltd (No 2)*, cogently explains why statutory provisions of this nature exist to cut across the information-gathering difficulties which liquidators of insolvent companies face, requiring such provisions to be interpreted liberally.²⁹

[33] The third alternative is that the appellants may hold the relevant information solely in their capacity as trustee. The Judge, in adopting the reasoning in *Concrete Structures*, correctly identified that the test under s 266 of the Companies Act is not ownership but rather possession or control of the documents in issue.³⁰

[34] The Judge therefore correctly found the Court had jurisdiction to make the s 266(2) order. The appellants have not satisfied us the appealed decision was wrong in relation to the jurisdiction to make the orders.

The exercise of the discretion

[35] We are further satisfied the Judge, having determined the jurisdiction existed, also correctly concluded the s 266(2) order should be made as a matter of her discretion. The Judge's careful assessment of factors going to the exercise of discretion was comprehensive and to the point. Contrary to Mr Hucker's submission,

²⁹ Judgment under appeal, above n 1, at [29], citing *Re Rolls Razor Ltd (No 2)*, above n 4, at 591–592.

³⁰ Judgment under appeal, above n 1, at [59], citing *Concrete Structures*, above n 15.

there were no satisfactory alternative legal procedures available to the liquidators for the reason the Judge identified.

[36] The focus of the appellants' stated concerns appears to lie in the privacy and/or confidentiality of trust matters insofar as they relate to the Trust's assumption of a debt to BF7. Those concerns cannot reasonably outweigh the liquidators' entitlement to seek s 266(2) orders which are reasonably required if the liquidators are to discharge their function and duties concerning the debt showing in BF7's books. The Judge was not making an assessment of the merits of the proposed debt claim but was, through the s 266(2) order, providing the means of its proper investigation. The identity of the IRD as a major creditor in the liquidation was also relevant as it represented a degree of public interest in the thorough investigation of the debt.

[37] The appellants have not established any error of the nature required to set aside the Judge's exercise of the discretion. Nor was the discretionary decision plainly wrong.

Result

[38] The appeal is dismissed.

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

Solicitors:
Molloy Hucker, Auckland for Appellants
Martelli Yaqub Lawyers, Auckland for Respondents