IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA601/2021
[2023] NZCA 196

BETWEEN	SHEARING SERVICES KAMUPENE LIMITED (IN LIQUIDATION) Appellant
AND	TARAHAU FARMING LIMITED First Respondent
	RIO GREENING Second Respondent

Court:	Cooper P, Gilbert and Courtney JJ
Counsel:	G A D Neil and R M G Hindriksen for Appellant No appearance for First or Second Respondents
Judgment: (On the papers)	26 May 2023 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside.

C We make an order declaring that the First Respondent is not in voluntary administration under the Companies Act 1993.

D The First Respondent must pay costs to the Appellant for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] The question on this appeal is whether the First Respondent has been validly placed in voluntary administration pursuant to the terms of the Companies Act 1993 (the Act). We have concluded that the answer is "no" because this is not what the directors of the First Respondent intended and none of the requirements for a voluntary administration as set out in pt 15A of the Act have been complied with.

Background

[2] This matter has a somewhat complicated background, the detail of which has been set out in various judgments of the High Court and of this Court. It is not necessary for the purposes of this judgment to repeat this background in any detail. The following summary is sufficient for present purposes.

[3] Tarahau Farming Ltd (Tarahau) was incorporated in July 2003. The directors are Pessiman Te Whata (Mr Te Whata) and his brother Tokikapu Te Whata. When Shearing Services Kamupene Ltd (in liquidation) (Shearing Services) initiated these proceedings, the Companies Office records showed the ultimate shareholder as being Maunga Hikurangi Inc, which also appears to be referred to as Maunga Hikurangi Koporeihana Māori (MHKM). MHKM is an unincorporated group of individuals who represent, amongst others, the Te Whata whānau and hapū. They have ancestral connections to Tarahau's principal asset, a dry stock farm at Tautoro, south of Kaikohe. The farm is general land held in two freehold titles. Tarahau was incorporated to acquire the farm from Pat Te Whata & Sons Ltd when it was placed in liquidation on the application of the Commissioner of Inland Revenue. The ANZ Bank provided funding for this purchase secured by way of a mortgage over the titles to the land.

[4] Shearing Services was incorporated in January 1996 and was originally called Te Whata Shearing Ltd. Mr Te Whata, himself a shearer, is the sole director and shareholder of the company. Shearing Services was placed in liquidation on 23 June 2016 on the application of the Commissioner of Inland Revenue in respect of unpaid taxes, penalties, and interest in the sum of $4,373,780.59, calculated as at 25 November 2015.[1]

1 *Commissioner of Inland Revenue v Shearing Services Kamupene Ltd* [2016] NZHC 1379.

[5] The liquidators of Shearing Services brought proceedings in the High Court seeking recovery from Tarahau of the sum of $149,704.33 said to have been advanced by Shearing Services in the period between 2013 and 2016. The claim was not contested. On 6 June 2019, following formal proof, Downs J gave judgment against Tarahau in the total sum of $205,091.66 including interest and costs.[2]

[6] Tarahau sought to appeal against Downs J's judgment out of time, but it failed to comply with the Court of Appeal of Appeal (Civil) Rules 2005.[3] This Court granted a conditional extension of time to rectify the non-compliance.[4] However, because Tarahau did not comply with the conditions by the stipulated date, the extension of time was declined.[5] Tarahau was ordered to pay costs to Shearing Services in respect of the appeal in the total sum of $12,050 including disbursements.[6]

[7] Tarahau separately applied to the High Court to set aside the judgment of Downs J. This application was ultimately struck out by van Bohemen J for reasons set out in his judgment delivered on 16 December 2020.[7] Tarahau was ordered to pay costs of $15,415.50 in respect of that application.

[8] The result is that Shearing Services is a judgment creditor of Tarahau in the total sum of $232,557.16 (the judgment debts). These debts remain unpaid. In response to Shearing Services' demand for payment, Mr Te Whata advised that Tarahau had resolved to go into voluntary administration and had appointed Mr Rio Greening as administrator. Mr Greening sent a notice to creditors stating, among other things:

> 5. [Tarahau] claims outstanding accounts yet unrealised against the COMMISSIONER OF INLAND REVENUE (IRD) after a retrospective audit by our accountant from 2004-2021. The audit has found expense accounts unaccounted by previous accountants of historical accounts now brought forward by bad debts, idle capacity, unaccounted labour costs and depreciations.

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2 *Shearing Services Kamupene Ltd (in liq) (formerly Shearing Services Ltd and Te Whata Shearing Ltd) v Tarahau Farming Ltd* [2019] NZHC 1280.

3 *Tarahau Farming Ltd v Shearing Services Kamupene Ltd (in liq)* [2020] NZCA 238.

4 *Tarahau Farming Ltd v Shearing Services Kamupene Ltd (in liq)* [2019] NZCA 601.

5 *Tarahau Farming Ltd v Shearing Services Kamupene Ltd (in liq)*, above n 3, at [5].

6 At [9].

7 *Shearing Services Kamupene Ltd (in liq) (formerly Shearing Services Ltd and Te Whata Shearing Ltd) v Tarahau Farming Ltd* [2020] NZHC 3352.

…

> 7. [Tarahau] is nearing the completion of the audit and to date [Tarahau] has accounted [for] over $2 million tax credit over the 17 years audited. The historical debt incurred from the previous IRD liquidation of PAT TE WHATA & SONS LIMITED in 2004 was rolled by the SBS Bank mortgagee default to the purchase by [Tarahau] after … 9 years of penalty accruals while idle depreciation through decreases of land value and stocking rates from a 250-cow dairy platform of high-qualify grass paddocks to gorse and manuka.
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> 10. [Tarahau] was elected as a M[ā]ori authority in accordance with Te Ture Whenua M[ā]ori Land Act 1993 for the direct benefit of nga hap[ū] owners. The non-acceptance of IRD regarding the Māori authority tikanga M[ā]ori customary laws, values and practices has caused so much angst and rejection [from] the legal fraternity to date. Such tikanga is impeded by European values only which continues to play out in the court.
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> 11. [Tarahau] has identified a solution in the legal structure to change to enhance the cultural, commercial and longevity succession which the company structure does not provide. The landowners have applied to the M[ā]ori Land Court to incorporate the land in accordance with section 247 of Part XIII of Te Ture Whenua 1993.

[9] Shearing Services applied to the High Court for various orders including an order declaring that Tarahau is not in administration, or, alternatively, that the administration had not commenced. It also sought a ruling that the appointment of Mr Greening as administrator was invalid because he is not a licensed insolvency practitioner and is therefore not permitted to act in this capacity. If the Court found that Tarahau is in administration and that the administration had commenced, Shearing Services sought an order terminating the administration or, alternatively, appointment of a licensed insolvency practitioner as administrator.

[10] Mr Te Whata filed a notice of opposition relying on the principles of te Tiriti o Waitangi | the Treaty of Waitangi and various provisions of Te Ture Whenua Māori Act 1993. He stated that MHKM had given notice putting Tarahau into voluntary administration for purposes including honouring commitments to all creditors, keeping the farm and the land in the hands of whānau and hapū, and giving effect to the wishes of the owners in facilitating settlement of the dispute (presumably with the liquidators of Shearing Services) in accordance with s 17 of Te Ture Whenua Māori Act (which sets out the primary objective of the Māori Land Court).

[11] In the judgment under appeal, Whata J accepted that there was no resolution by the directors of Tarahau complying with s 239I(1) of the Act to the effect that, in the opinion of the directors voting for the resolution to appoint an administrator, the company was insolvent or may become insolvent and that an administrator should be appointed. Further, because Mr Greening is not a licensed insolvency practitioner, he was not permitted to act as an administrator in terms of s 239F of the Act.[8] However, the Judge considered that neither of these defects was fatal or incapable of remedy.[9] The Judge considered that the lack of a valid resolution was a defect of form only and Tarahau should be treated as being in voluntary administration.[10] While the appointment of Mr Greening was a defect of substance, the obvious remedy was to appoint someone who was properly qualified.[11]

[12] The Judge acknowledged the force in Shearing Services' claim that the administration was an abuse of process, having been initiated by Mr Te Whata with the ulterior motive of compromising Shearing Services' ability to enforce the judgment debts. It was consistent with the tactics of delay and obfuscation that Mr Te Whata and Tarahau had employed in earlier proceedings and with Tarahau having made little attempt to initiate a genuine administration complying with pt 15A of the Act.[12] The Judge also accepted that the voluntary administration as presently framed was not sustainable and the administration would need to instead be directed to achieving a result that "overtly seeks to provide for creditors' interests, not look to subvert them".[13] Nevertheless, at the core of the dispute was a legitimate concern about the potential alienation of ancestral lands to satisfy the judgment debts and the Judge was not prepared to terminate the voluntary administration at this stage.[14]

[13] The Judge therefore made a mixture of interim and final orders as follows:[15]

(a) An order removing Mr Greening as administrator.

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8 *Shearing Services Kamupene Ltd (in liq) v Tarahau Farming Ltd* [2021] NZHC 2376 [High Court judgment] at [30].
9 At [35].
10 At [34]–[35].
11 At [35].
12 At [37]–[38].
13 At [40].
14 At [39]–[40].
15 At [41].

(b) An order that no further steps may be taken pursuant to the voluntary administration until further order of the High Court and pending attendance by Shearing Services and Mr Te Whata at a court-directed settlement conference. (This has not occurred, in part because of the present appeal).

(c) An order that the matter be brought back to the High Court after the settlement conference for final consideration as to whether the voluntary administration should proceed or be terminated.

The appeal

Grounds of appeal

[14] Shearing Services appeals against the High Court judgment. It contends that the Court erred in finding that Tarahau was in voluntary administration under pt 15A of the Act. In particular, Shearing Services argues:

(a) there was no resolution of the Board of Directors of Tarahau complying with s 239I of the Act;

(b) Mr Greening is not a licensed consultancy practitioner permitted to act as an administrator under s 239F of the Act; and

(c) these failures are not mere defects capable of remedy. The directors of Tarahau neither agreed nor intended to place Tarahau in voluntary administration under pt 15A of the Act. Rather, Mr Te Whata advised the High Court that the voluntary administration had been implemented in accordance with the principles of tikanga for the purposes of resolving matters outside of the Act. He made it clear that he and Tarahau do not recognise or subscribe to the Act and informed the Judge that Shearing Services could have its order that Tarahau was not in voluntary administration under the Act, acknowledging that it was not.

Representation of Tarahau

[15] *Re G J Mannix* holds that as a general rule, laypersons, including directors, are not entitled to represent a company in court.[16] Mr Te Whata has consistently taken the position that he should be permitted to speak for Tarahau and represent its interests in these and other proceedings. On 1 February 2022, Goddard J directed Tarahau to file a memorandum applying for leave to be represented by Mr Te Whata, explaining why it is not able to instruct a lawyer to represent it, and stating why Mr Te Whata would be an appropriate representative.

[16] Tarahau did not comply with this direction. Instead, Mr Te Whata filed a "voluntary declaration for representation", stating that he and Mr Meo Mate Brown had been appointed by Te Kooti Marae Ki Tautoro to represent Tarahau on the appeal. He attached the Te Kooti Marae ruling in which the appointment was made. This states that this Court's decision in *Re G J Mannix* does not apply to Māori authority companies such as Tarahau which are owned by and for Māori purposes.

[17] No submissions have been filed on behalf of Tarahau. However, a "voluntary declaration affidavit of truth and statement of claim of right" has been filed. This document does not engage with the specific grounds of appeal. Mr Te Whata does not suggest that Tarahau was placed in voluntary administration in accordance with the terms of the Act, or even that this was intended. Rather, Mr Te Whata states that as chairman of Ngatimoerewa Māori Incorporation, he has obtained various orders from Te Kooti Rangatira Ateha ki Ngapuhi Marae. These are attached to his declaration and include orders: that the "Land Transfer Act 1952 - 2017 is was [sic] repealed in 1995 pursuant to Tikanga Regulations 1995 having no force or effect"; cancelling the previous status of general land owned by Tarahau and declaring it to be Māori customary land; and cancelling all tax liabilities of both Shearing Services and Tarahau. Damages claimed by MHKM and Ngatimoerewa Māori Incorporation are said to have been awarded in the sum of $22,205,290 against the Commissioner of Inland Revenue, and in the sum of $768,000 (comprising $480,000 together with 10 per cent shortfall penalties over six years) against the liquidators of Shearing Services. An order has also purportedly been made to the effect that the

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[16] *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA).

ANZ Bank has no encumbrance on the title to the land — this is said to have been "exposed and corrected".

[18] Mr Te Whata has also filed an affidavit stating that MHKM's shareholding in Tarahau was recently transferred to Ngatimoerewa Māori Inc, of which he is chairman. He states that the directors of Tarahau made tikanga resolutions to put Tarahau into administration subject to Te Ture Whenua Māori Incorporation Constitution Regulations 1994. He claims that the liquidators of Shearing Services have no authority to liquidate because "the statute" (presumably a reference to the Act) is "ultra vires". He seeks orders striking out the appeal and directing that the remaining questions of native title and legal status of MHKM be transferred to the Māori Land Court. Mr Te Whata concludes by giving notice to all parties concerned that an application will be made to the Governor General to confer jurisdiction on Te Kooti Marae of Ngatimoerewa Māori Inc to exercise the powers of the High Court of New Zealand in relation to this matter.

Assessment

[19] Mr Te Whata made it clear at the hearing in the High Court that a voluntary administration in terms of the Act was not intended, rather the object was to pursue a tikanga process outside of the Act:

> Now there would be no doubt that those hapū would continue with a tikanga Māori process and that's what this is, it's not a process in the Companies Act … the notice filed was not under the Companies Act and therefore the intention is to honour the list of creditors not to be subject to the Companies Act. … So this is where the law regarding the Companies Act is not actually being put in place with our tikanga.

[20] The matter was put beyond doubt in the following exchange:

> [The Court:]
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> Yes, well clearly with all due respect, Mr Te Whata, I think you know there are legal issues here which whether tikanga or otherwise need to be dealt with strictly on their terms. If you've made an application for voluntary administration under the Companies Act then you are subject to the Companies Act rules. If you haven't made an application for voluntary administration under the Companies Act, then this proceeding is going to end very quickly and I am going to set aside your voluntary administration to the extent it is under the Companies Act so you know you are sort of, there's two edges to your submission and I hope you are cognisant of both of them

because a pursuit to a logical conclusion, I will be granting the application. So is this a voluntary administration pursuant to the Companies Act or not?

[Mr Te Whata:]

Your Honour, it is in accordance with but it is not subject to, it's not under the Companies Act, it's under our tikanga regulations. We have instantly identified in the application to the Māori Land Court and what I'm saying is this is not a Companies Act voluntary administration, this is a tikanga Māori voluntary administration and I don't know whether there is a law saying that we do not have a right to a private administration of these creditors.

[The Court:]

Yes, but Mr Te Whata if it is not under the Companies Act then it's not a voluntary administration under the Companies Act, you can't then rely on the protections afforded to you by the Companies Act from the judgment debt[s] and the enforcement of it.

[Mr Te Whata:]

Your Honour, we do not deny payments to be made, we have stated in our list of creditors the proposals that we can pay by set off, by bill of exchange, by bond, by bonds we made and those things that need to be set off in the interim.

…

[The Court:]

Well I'm not here to talk about whether you've got set off or not, I'm here to talk about whether or not you've done a proper voluntary administration and what you're telling me is that you haven't done one pursuant to the Companies Act.

[Mr Te Whata:]

There's no way that our tikanga Māori allows for the Companies Act to rule over us …

[The Court:]

Then you cannot use the Companies Act provisions that protect you from enforcement in reliance, by relying on that voluntary administration.

[Mr Te Whata:]

I'm not using the Companies Act provisions to do that. We have our own tikanga-

[The Court:]

All right, well then this matter will end very quickly then Mr Te Whata. If you're not relying on the Companies Act then that's the end of the matter. You're not relying on it?

> [Mr Te Whata:]
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> We're not relying on the Companies Act.

[21] It is not contested that none of the formalities required for a voluntary administration under the Act have been complied with. This is not surprising given the directors of Tarahau did not intend to have recourse to the Act or the statutory form of voluntary administration available pursuant to it. In particular, there is no resolution of directors complying with s 239I of the Act:

> **239I Appointment by company**
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> (1) A company may appoint an administrator if the board of the company has resolved that,—
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> (a) in the opinion of the directors voting for the resolution, the company is insolvent or may become insolvent; and
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> (b) an administrator of the company should be appointed.
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> (2) The appointment must be in writing and must state the date of the appointment.
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> …

[22] It is fundamental to the initiation of a voluntary administration under the Act that a quorum of the board of directors reaches agreement as to the matters set out in s 239I and passes the requisite resolution. We do not consider the failure to comply with these basic requirements can be dismissed as one of form only, particularly where the evidence suggests that the directors did not consider the matters set out in s 239I and did not intend to subject Tarahau to the consequences of a voluntary administration under the Act.

[23] While we can readily understand what the Judge was endeavouring to achieve, we cannot agree with his conclusion that Tarahau was effectively placed in voluntary administration under the Act. The appeal must therefore be allowed.

Result

[24] The appeal is allowed.

[25] The judgment of the High Court is set aside.

[26] We make an order declaring that the First Respondent is not in voluntary administration under the Companies Act 1993.

[27] The First Respondent must pay costs to the Appellant for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Auckland for Appellant