

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

**CIV-2016-419-000049
[2016] NZHC 1680**

UNDER the District Courts Act 1947
IN THE MATTER of an appeal of the decision not to strike
out the proceedings
BETWEEN IAN CHARLES SCHULER
Appellant
AND INDEPENDENT LIVESTOCK AGENTS
LIMITED (IN LIQUIDATION)
Respondent

Hearing: 21 June 2016

Appearances: D Hayes for Appellant
B Norling and A Cherkashina for Respondent

Judgment: 22 July 2016

JUDGMENT OF WOOLFORD J

*This judgment was delivered by me on Friday, 22 July 2016 at 11:45 a.m.
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Counsel/Solicitors: Mr D Hayes (New Zealand Commercial Law Corp Limited), Hamilton
Hunwick Law Limited, Hamilton

And to: Mr BJ Norling and A Cherkashina, Auckland

Introduction

[1] This is an appeal against the decision of Judge D M Wilson QC in the Morrinsville District Court dated 14 December 2015 in which he refused to strike out proceedings taken by the liquidators of Independent Livestock Agents Limited (in liquidation) (the company) against Mr Schuler, who is a former director and shareholder of the company, his wife and the trustees of their family trust.

Present proceedings

[2] The present proceedings are quite straightforward. The liquidators allege that over a three year period between 2007 and 2010, Mr Schuler withdrew the sum of \$156,163.95 from the company's bank account for his personal use and benefit, his wife received the sum of \$4,100 from the company's bank account for her personal use and benefit and their family trust received the sum of \$24,641.22 from the company's bank account for its personal use and benefit. The liquidators say the defendants are liable to repay such sums because no resolution was passed to authorise any payment or remuneration for the services of Mr Schuler as a director or they were loans when received by his wife and their family trust.

Application to strike out

[3] Mr Schuler made application to strike out the proceedings on the basis that it was an abuse of process in that the liquidators had already obtained judgment against him in earlier proceedings and the sum paid in satisfaction of the judgment should be credited against the sum of \$156,163.95 sought in the present proceedings. Mr Schuler also asserts that judgment could not have been obtained in the earlier proceedings had the present claim been heard simultaneously with it. Finally, he also asserts that the cause of action in the present proceedings should have been raised in the earlier proceedings as the plaintiff was then aware of it.

Earlier proceedings

[4] In a decision dated 17 December 2012, Potter J ordered Mr Schuler to pay the liquidators the sum of \$70,601 plus interest pursuant to s 301(1)(b)(i) of the

Companies Act 1993 (the Act).¹ Section 301 allows a Court to require a director to repay money if it appears that the director has misapplied or retained or become liable or accountable for money of a company or has been guilty of negligence, default or breach of duty or trust in relation to the company.

[5] Mr Schuler's liability arose in the following way. As a director of the company he sold stock for a Mr and Mrs Mudge on three occasions in April 2007, June 2008 and July 2008. The sale proceeds totalling approximately \$90,000 were received by the company, but not paid out to Mr and Mrs Mudge.

[6] Mr and Mrs Mudge said that between May 2007 and June 2009, whenever they requested payment of the sale proceeds, Mr Schuler gave them a number of excuses for non-payment, but promised that they would be paid. Mr Schuler disputed that Mr and Mrs Mudge made repeated requests for payment.

[7] In June 2009, Mr Mudge issued an ultimatum to the company that unless the sale proceeds were paid he would refer the matter to a solicitor. Mr and Mrs Mudge said that within a few days of this ultimatum they received an invoice from the company claiming commission for facilitating the sale and purchase of their farm a year earlier. The commission claimed was two per cent on a purchase price of \$4,500,000, amounting to \$90,000 plus GST of \$11,250, a total of \$101,250. The invoice was issued by the company and dated 25 May 2008, although the Judge found that it was created in June 2009 when Mr Schuler realised that delaying factors would no longer be effective to forestall Mr and Mrs Mudge. Mr and Mrs Mudge had never agreed to pay Mr Schuler or the company commission in relation to the sale of their farm which settled on 4 July 2008, although Mr Schuler had introduced them to the purchaser.

[8] On 10 March 2010, Mr and Mrs Mudge issued a statutory demand to the company for the proceeds of the stock sold in 2007 and 2008. On 31 March 2010 a new company with a similar name, Independent Livestock 2010 Ltd, was incorporated. Mr Schuler was the sole director. Independent Livestock 2010 Ltd took over the business of the company and continued to operate it. The liquidators

¹ *Grant & Khov v Independent Livestock 2010 Ltd & Schuler* [2012] NZHC 3458.

asserted that customers of the company were unaware for some time of any change in the ownership of the business, that invoices issued by the company were re-issued by the new company and funds received by the company were also transferred to the new company. Mr Schuler said that invoices were re-issued simply to correct errors when customers paid money into the incorrect bank account after Independent Livestock 2010 Ltd took over the business of the company. On 21 June 2010 an order was made for the liquidation of the company. Mr and Mrs Mudge were the only substantial creditors.

[9] In August 2011 the liquidators issued proceedings against Mr Schuler. After a three day hearing in the High Court, Potter J found that the actions of Mr Schuler were the sole and direct cause of Mr and Mrs Mudge's loss and the culpability for their loss rested solely with him. The Judge found that Mr Schuler deliberately misrepresented the reasons for non-payment and applied funds available to satisfy the debt due to Mr and Mrs Mudge to the ongoing business of the company so that they were no longer available to Mr and Mrs Mudge at the date of liquidation. She also found that his actions demonstrated deliberate and ongoing conduct that was designed to mislead and forestall the Mudges in pursuing recovery of their debt. An appeal to the Court of Appeal against Potter J's decision was dismissed.²

District Court decision

[10] After some introductory remarks, Judge Wilson referred to the District Court's inherent power to prevent abuse of its processes. Commencing a new proceeding is an abuse of process where the plaintiff seeks to rely on issues or facts which could and ought to have been raised in a previous proceeding. An abuse of process also arises where proceedings are being advanced unfairly or where there are multiple proceedings likely to cause improper vexation.

[11] Further, where an issue has already been determined in a case, a party is precluded from raising the issue in a new proceeding on the basis that it is a concluded matter or *res judicata*. If a claim also properly belonged in prior litigation it cannot be raised later except where there are special circumstances. Judge Wilson

² *Schuler & Independent Livestock 2010 Ltd v Grant & Khov* [2014] NZCA 91.

then noted that the onus is on a party alleging abuse of process to show that the proceeding was brought for an improper purpose. It has been previously held that it is a heavy onus and one to be exercised only in exceptional circumstances.

[12] Judge Wilson then reviewed the applicant's submissions and dismissed the application to strike out the present proceedings, saying:

[10] The starting point is the statement of claim which lists the items particularised as advances taken for personal expenses. I accept that there is some overlap of dates with the earlier proceeding as Mr Hayes pointed out. He may be right that some of the present claim may include "salary". There is no apparent unfairness or impropriety. Mere submissions about possibilities with no evidential basis do not satisfy the heavy onus appropriate to an intervention by the Court before trial. Mr Schuler has not demonstrated that this proceeding is an abuse of process and/or an attempt to circumvent the rules of res judicata.

[11] There are no exceptional circumstances which would justify intervention.

Appellant's case

[13] Mr Schuler challenges various findings in the decision of Judge Wilson, but in essence says Judge Wilson should have struck out the present proceedings because the liquidators are dishonestly trying to double-dip or obtain judgment for a total sum in excess of what they may be entitled to. He claims that they have misled both the High Court and the Court of Appeal in the earlier proceedings by claiming that he had taken all available profit as salary, whereas in the present proceedings the liquidators claim that there were no company resolutions which entitled him to take any profit as salary.

[14] Mr Schuler also submits that had the High Court hearing the earlier claim been aware of the claim made in the present proceedings, it would not have given judgment against him as on the position now taken by the liquidators, the company was not technically insolvent because the profit he had taken would have been characterised as a loan and would have been sufficient to meet any liability to Mr and Mrs Mudge. He says he would merely have been ordered to repay the loan.

Analysis

[15] Mr Schuler's appeal has proceeded on a mistaken premise and that is that Mr Schuler can only be liable to the extent of the debts proven in the liquidation. In fact he can be liable for a total sum well in excess of the debts proven in the liquidation.

[16] There are a number of cases where the High Court or Court of Appeal has made orders that directors pay all debts proven in liquidation plus repay their overdrawn current accounts.³

[17] In *Shannon Agricultural Consulting Limited (in liquidation) & Anor v Shannon & Anor*, I specifically stated:⁴

[39] I am conscious that I have found Mr Shannon and Ms Moorhouse liable to pay considerably more in total than the loss suffered by the creditors. Funds are needed, however, to pay the liquidators. Further, if there is a surplus in the liquidation, it will be returned to Mr Shannon and Ms Moorhouse as the sole shareholders. All of the claims against Mr Shannon and Ms Moorhouse are conceptually different and all have been made out on the uncontradicted evidence.

[18] The amount that Potter J ordered Mr Schuler to pay was the money actually received by the company between June 2007 and July 2008 on account of the sale of stock from Mr and Mrs Mudge in 2007 and 2008, less GST and commission, which was held by company on trust. Mr Schuler was not ordered to pay all the debts proven in the liquidation on the basis of his conduct as a director generally. The judgment sum only related to the money received on behalf of Mr and Mrs Mudge and the specific actions of Mr Schuler as a director towards Mr and Mrs Mudge. Mr Schuler was found to have breached his duty to the company to act in good faith and in its best interests under s 131 of the Companies Act in his dealings with Mr and Mrs Mudge.

[19] The present proceedings are conceptually quite different. The liquidator's claim that from 2007 to 2010 Mr Schuler withdrew the net sum of \$156,163.95 from

³ *Central Tyres Waipukurau Ltd (in liq) v Pallesen* [2016] NZHC 146; *Morgenstern v Jeffreys* [2014] NZCA 449.

⁴ *Shannon Agricultural Consulting Limited (in liquidation) & Ors v Shannon & Anor* [2015] NZHC 1133 at [39].

the company's bank account for his personal use and benefit. Although most of the withdrawals were characterised as salary in the company's financial statements, the liquidators have been unable to find any company resolutions which would authorise any payment or remuneration for Mr Schuler's services, which were required because of Mr Schuler's status as a director.

[20] Section 161(1) of the Companies Act provides:

161 Remuneration and other benefits

- (1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise—
- (a) the payment of remuneration or the provision of other benefits by the company to a director for services as a director or in any other capacity;
 - (b) the payment by the company to a director or former director of compensation for loss of office;
 - (c) the making of loans by the company to a director;
 - (d) the giving of guarantees by the company for debts incurred by a director;
 - (e) the entering into of a contract to do any of the things set out in paragraphs (a), (b), (c), and (d),—

if the board is satisfied that to do so is fair to the company.

[21] If Mr Schuler wishes to justify the sums of money he took, he has the burden of proving that the payments were fair to company at the time they were taken. Otherwise he has a duty to repay the withdrawals.

[22] Section 161(5) provides:

- (5) Where a payment is made or other benefit provided or a guarantee is given to which subsection (1) applies and either—
- (a) the provisions of subsections (1) and (4) have not been complied with; or
 - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4),—

the director or former director to whom the payment is made or the benefit is provided, or in respect of whom the guarantee is given, as the case may be, is personally liable to the company for the amount

of the payment, or the monetary value of the benefit, or any amount paid by the company under the guarantee, except to the extent to which he or she proves that the payment or benefit or guarantee was fair to the company at the time it was made, provided, or given.

[23] At the time of the payments, however, the company already held money on trust for Mr and Mrs Mudge, which it chose not to pay to them. The extent of the company's insolvency may therefore render even modest payments to Mr Schuler unfair.

[24] Judge Wilson was quite correct to point out that there was some overlap of dates with the earlier proceedings. All the money received on behalf of Mr and Mrs Mudge was received by July 2008, whereas most of the money taken by Mr Schuler for his personal use and benefit was taken after July 2008. Nonetheless, there was some overlap.

[25] Judge Wilson was also quite correct to accept that some of the present claim may include salary. It does, but Mr Schuler has the burden of proving that such salary payments were fair to the company.

[26] I agree with Judge Wilson that there is no apparent unfairness or impropriety. The allegations of dishonesty or misconduct by the liquidators are not substantiated. While the present proceedings could have been taken with the earlier proceedings and there will be some added expense, that does not of itself make the present proceedings an abuse of process. There is certainly no res judicata with the two claims being taken under separate sections of the Companies Act and based upon separate facts.

[27] The appeal against the decision of Judge Wilson is dismissed. The liquidators are entitled to costs on a 2B basis for the appeal.

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Woolford J