

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

**CIV 2017-404-773
[2017] NZHC 2120**

UNDER Section 284 of the Companies Act 1993

IN THE MATTER OF the liquidation of ELT RECYCLING
(NZ) LIMITED (IN LIQUIDATION)

BETWEEN JUN ZHANG AND ORS
Applicants

AND IMRAN MOHAMMED KAMAL
First Respondent

PETER GEORGE ADAMS
Second Respondent

CORPORATE & PRESTIGE LTD
Third Respondent

ROD OTTER
Fourth Respondent

Hearing: (on the papers)

Counsel: S W Greer for Applicants
P G Adams, in person, Second Respondent
P G Adams, as director, and with leave, for Third Respondent
No appearance by or on behalf of First and Fourth Respondents

Judgment: 1 September 2017

JUDGMENT (NO. 2) OF HEATH J

*This judgment was delivered by me on 1 September 2017 at 2.00pm
pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

The applications

[1] Mr Adams and Corporate & Prestige Ltd each apply for an order recalling my judgment of 15 August 2017,¹ or for a stay of that judgment pending appeal. The application is opposed by those in whose favour the judgment was given (whom I shall call the Zhang interests).

Background

[2] On 15 August 2017, I resolved an application brought by the Zhang interests for leave to apply under s 284(1)(g) of the Companies Act 1993 for an order declaring that Mr Kamal's appointment as liquidator of ELT Recycling NZ Ltd was invalid. Mr Kamal had been appointed as a result of a series of steps taken by Mr Adams, on behalf of himself and his company, Corporate & Prestige Ltd. A number of ancillary orders were sought to restore the *status quo* that existed before those steps were undertaken.

[3] Without going into the detail (all of which is set out fully in my judgment of 15 August 2017), for the reasons given in that judgment I made the following orders:²

[57] ...

- (a) I grant leave for the Zhang interests to apply for an order under s 284(1)(g) of the Act, and make an order declaring that Mr Imran Kamal was invalidly appointed as the liquidator of ELT Recycling on 11 April 2017.
- (b) I make an order terminating the liquidation of ELT Recycling, with immediate effect.
- (c) I make orders:
 - (i) Declaring that all resolutions of ELT Recycling and documents registered with the Registrar of Companies during the period 5 to 25 August 2016 are invalid and shall be removed from the Register of Companies.

¹ *Zhang v Kamal* [2017] NZHC 1943.

² Ibid, at paras [57] and [58].

- (ii) Declaring that the appointment of Mr Otter as administrator of ELT Recycling was invalid and of no effect.
 - (iii) Rectifying the Register of Shares for ELT Recycling by removing the issue of 225 new shares on 5 August 2016 to Corporate & Prestige.
 - (iv) Declaring that Corporate & Prestige holds no shares in ELT Recycling.
 - (v) Declaring that Corporate & Prestige is not a secured creditor of ELT Recycling.
 - (vi) Declaring that Mr Zhang has not been removed as a director of ELT Recycling.
 - (vii) Directing that Mr Imran Kamal return all property or company records belonging to ELT Recycling that are in his possession to the solicitors for the Zhang interests.
- (d) I reserve leave for the Zhang interests to apply in the event that the Registrar of Companies requires any more formal declarations or orders in relation to the way in which that Register should be amended.

[58] From a practical perspective, the rights to property of ELT Recycling is now to be determined by Mr Adams and Mr Zhang as its directors. The validity of the debt claimed by Corporate & Prestige and/or Mr Adams from ELT Recycling shall be determined by the directors of ELT Recycling.

(footnotes retained)

[4] In addition, I ordered that Mr Adams and Corporate & Prestige were jointly and severally liable to pay costs to the Zhang interests on a 2B basis, together with reasonable disbursements.³

The recall application

[5] It is now well settled that a judgment may only be recalled if unsealed at the time of the application and at least one of three relevant criteria have been met. In *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd (No 2)*,⁴ the Supreme Court said:⁵

³ Ibid, at para [59].

⁴ *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2010] 1 NZLR 76 (SC).

⁵ Ibid, para [2]. The judgment of Wild CJ to which the Court referred is reported as *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633. See also *Rainbow Corporation Ltd v Ryde Holdings Ltd* (1992) 5 PRNZ 493 (CA) and *Unison Networks Ltd v Commerce Commission*

[2] Three categories of case have been recognised by the New Zealand courts in which a judgment may be recalled if not already perfected. They are conveniently set out in the judgment of Wild CJ in *Horowhenua County v Nash (No 2)*:

“[F]irst, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court’s attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.”

...

(Footnotes omitted)

[6] The judgment was sealed on 15 August 2017. The application to recall was made on 18 August 2017. The fact that the judgment was sealed before a recall application was made is fatal. The recall application must be dismissed.

[7] For completeness, even if I had been satisfied there was jurisdiction to entertain the recall application, I would not have been satisfied that any of the three criteria identified by Wild CJ in *Horowhenua County v Nash (No 2)* had been met.

Stay pending appeal

[8] Any appeal from my judgment of 15 August 2017 is to the Court of Appeal. The jurisdiction for this Court to stay a judgment pending such an appeal is set out in r 12(3) of the Court of Appeal (Civil) Rules 2005. That provides:

12 Stay or proceedings and execution

...

(3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on application,—

- (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
- (b) grant any interim relief.

....

[9] In *Keung v GBR Investment Ltd*,⁶ Ellen France J, delivering the judgment of the Court of Appeal, explained the principles to be applied in determining whether or not to grant a stay. She said:

[11] The stay application is brought under r 12(3) of the Court of Appeal (Civil) Rules 2005. In determining whether or not to grant a stay, the Court must weigh the factors “in the 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”. Factors to be taken into account in this balancing exercise include:

- (a) whether the appeal may be rendered nugatory by the lack of a stay;
- (b) the bona fides of the applicant as to the prosecution of the appeal;
- (c) whether the successful party will be injuriously affected by the stay;
- (d) the effect on third parties;
- (e) the novelty and importance of questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

That list does not include the apparent strength of the appeal but that has been treated as an additional factor.

(Footnotes omitted)

[10] The first problem is that there is no evidence that an appeal has, in fact, been filed. However, because I regard the application as hopeless in any event, I explain why I would have dismissed it even if I had jurisdiction to consider it.

[11] Mr Adams complains that I failed to refer to various aspects of the evidence and did not take into account adequately the conduct of the Zhang interests in bringing about the events that led to my orders. While Mr Adams may consider the issues are relevant, I did not. There is nothing in the material to which he refers that suggest that an appeal has any prospect of success.

⁶ *Keung v GBR Investment Ltd* [2012] NZAR 17 (CA).

[12] With particular reference to my criticism of Mr Adams' reliance on a purported order of the Maori Land Court, he submits that as an adopted Maori he was entitled to rely on such "orders". Mr Adams deposes:

7. Justice Heath made numerous references to the orders of the Maori Land Court to which I believed had jurisdiction as this is a matter of tikanga. I have been adopted by Maori and believe I have certain rights under section 61 of Te Ture Whenua Maori Land Act 1993 and am told this matter should have been referred to Te Kooti Marae Maori pursuant to the preamble to the act/93/94 & section, 2(3), 5, 12 kawanatanga for the protection of Rangatiratanga.

[13] In my judgment of 15 August 2017, I made it clear that the body that purported to act as "the Maori Land Court" had no jurisdiction to act as such and any "order" that it may have made had no legal effect. Indeed, I was so concerned about the way in which those responsible for making the purported "orders" had acted that I directed the Registrar to forward a copy of the judgment to the Solicitor General for further investigation.⁷ I understand that investigation is being undertaken at present.

[14] In my view, none of the issues raised by Mr Adams would justify a stay.

Result

[15] For those reasons, the applications are dismissed. Costs are awarded in favour of the Zhang interests against both Mr Adams and Corporate & Prestige on a 1A basis, together with reasonable disbursements, both to be fixed by the Registrar.

[16] For completeness, I record that it remains open for Corporate & Prestige to make an application to set aside the statutory demand which has been served on it on behalf of the Zhang interests. Were that to be pursued, it would need to be made as a separate application under s 290(1) of the Companies Act 1993, if within time. I express no views on the merit of any application that may be made.

[17] Mr Adams has requested that certain documents made available to me at the hearing be returned to him. I make a direction to that effect. I have advised the Registrar of the documents that must be copied. Only copies shall be made available to Mr Adams. The original documents that Mr Adams provided to me at the hearing

⁷ *Zhang v Kamal* [2017] NZHC 1943, at paras [16]–[23].

will remain on the Court file, as the Solicitor General may wish to inspect them as part of her investigations.

[18] The Registrar has advised me that Mr Adams has requested a transcript of the hearing before me on 21 July 2017, at which time the applications were argued. No transcript has been made. I decline to order one as nothing was said at the hearing which could be relevant to the question whether an appeal could succeed.

P R Heath J

Delivered at 2.00pm on 1 September 2017

Solicitors:

Solv Law Ltd, Auckland

Norling Law Ltd, Albany

Copy to:

P Adams, Second Respondent