IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA531/2021
[2023] NZCA 607

BETWEEN	ADAM DAVID BANKS Appellant
AND	WILLIAM ROBERT FARMER First Respondent
	SIMON MATHEW GAMBLE Second Respondent
	CHRISTOPHER JAMES MASSAM Third Respondent
	DOUGLAS LEROY FREDERICK Fourth Respondent

Court:	Cooper P, Gilbert and Katz JJ
Counsel:	J W A Johnson and G D Simms for Appellant R J Hollyman KC and A J Steel for First Respondent A J Peat for Second to Fourth Respondents
Judgment: (On the papers)	30 November 2023 at 2.30 pm

JUDGMENT OF THE COURT

A The application for recall is declined.

B The appellant must pay costs to the respondents for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Banks applies for recall of this Court's judgment delivered on 23 August 2023.[1] He contends that the judgment should be recalled because this Court allegedly failed to address one aspect of his appeal. The application is opposed.

[2] In his comprehensive judgment (686 paragraphs), Moore J gave his reasons for rejecting Mr Banks' claims for recovery in respect of investments he made in Mako Networks Holdings Ltd (Mako) from 4 February 2011 to 24 April 2014. Mr Banks pursued four causes of action variously alleging: breaches of s 37 of the Securities Act 1978 (prohibiting offers of securities to the public without a registered prospectus), breaches of s 9 of the Fair Trading Act 1986 (53 alleged misrepresentations), breaches of directors' duties under ss 131, 135, 136 and 137 of the Companies Act 1993, and breaches of s 55G of the Securities Act (subscriptions to securities on the faith of advertisements containing untrue statements).[2] In summary, the Judge found that the Securities Act did not apply, no misleading or deceptive representations were made, and the directors did not breach their duties as directors except that they ought to have appointed liquidators in or around mid-May 2014 rather than trading on until August 2015.[3] The Judge found that Mr Banks was not entitled to relief for this breach because he made no further advances after late-April 2014 and "was not at risk of further loss resulting from Mako continuing to trade beyond the end of April to mid-May 2014".[4]

[3] The Judge also considered that Mr Banks was unable to recover directly under s 301(1)(c) of the Companies Act in any event and no recovery could be ordered under s 301(1)(b) because Mako had been removed from the Companies Register:[5] Section 301(1) relevantly reads:

> **301 Power of court to require persons to repay money or return property**
>
> (1) If, in the course of the liquidation of a company, it appears to the court that a … director … has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the

1 *Banks v Farmer* [2023] NZCA 383 [Court of Appeal judgment].
2 *Banks v Farmer* [2021] NZHC 1922 [High Court judgment].
3 At [680]–[684].
4 At [455].
5 At [585].

company, the court may, on the application of the liquidator or a creditor or shareholder,—

…

(b) order that person—

(i) to repay or restore the money or property or any part of it with interest at a rate the court thinks just; or

(ii) to contribute such sum to the assets of the company by way of compensation as the court thinks just; or

(c) where the application is made by a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the court thinks just to the creditor.

[4] Although Mr Banks confined his appeal to his first three causes of action, his grounds of appeal were extensive. His notice of appeal listed 24 grounds (numbered 1(a) to (x)). Many of these contained numerous subparagraphs setting out particulars. Mr Banks' overarching submission on appeal was that the Judge "erred on the entirety of [his] reasoning: fact, law and procedure". This explains why this Court's judgment was also lengthy (358 paragraphs).

[5] Mr Banks' application for recall is founded on his contention that this Court failed to decide all necessary issues arising on his appeal. In particular, he complains that the Court "did not decide all the necessary issues in relation to paragraphs 1(c)(viii) and 1(i)-(k) of the Notice of Appeal". These grounds read:[6]

Third cause of action – breach of directors' duties

...

Application of s 135

(c) Consequently, and generally, by misapplying the test in s 135 in not finding that the [respondents] had breached s 135 prior to April/May 2014. In particular:

…

(viii) The Court erred by finding that relief was not available because Mr Banks' investments were made prior to the end of April to mid-May 2014.

…

6 Footnotes omitted.

Remedy – s 301

(i) Despite holding that [the respondents] had breached their directors' duties over a period of some 16 months, and notwithstanding the proceeding was filed while [Mako] was in liquidation, by finding that the Court did not have jurisdiction to make an award under s 301 given that the company had been removed from the Register. In particular:

(i) Section 326 provides that "[t]he removal of a company from the New Zealand register does not affect the liability of any former director … in respect of any act or omission that took place before the company was removed from the register and that liability continues *and may be enforced as if the company had not been removed from the register*." The Court's approach reads down the italicised words of the section.

(ii) Section 330, which confirms that a restored company is deemed to have carried on in existence as if it had not been removed, would make s 326 redundant unless the italicised words above were given effect.

(iii) In contrast to s 326, s 301 is a procedural section which allows for derivative-type claims to be brought. The purpose of the phrase "in the course of the liquidation of a company" is to make clear that creditors do not have standing to bring a claim *until* a company is in liquidation.

(iv) To the extent s 326 (the substantive section) and s 301 (the procedural section) are inconsistent, s 301 should have been read down.

(v) *McHugh v Austral Group Investment Management Ltd* was considered under the 1955 Act and is otherwise distinguishable. *Hampson v Registrar of Companies* did not consider the matters raised above and otherwise should not be followed.

(j) In the alternative, by not making an order under s 301 conditional on the successful restoration of [Mako] as had been suggested in [Mr Banks'] closing submissions. Such an approach would have addressed the instinctively "unjust and unfair" result that the Court earlier recognised.

(k) By finding that Mr Banks was not entitled to a direct award as a creditor under s 301 of the Act. In particular:

(i) *Mitchell v Hesketh* and the cases that follow it are incorrectly decided and the Court should not have followed them. The history and purpose of s 301 favour the view that an order may be made under s 301 to a creditor in respect of a breach of directors' duty.

(ii) The Court erred in distinguishing *Marshall Futures Ltd (in liq)* and *Sanders v Flay*, both of which allowed for direct recovery by creditors. As Davison J has recently held in

reliance on *Sanders*, where a creditor "has personally initiated proceedings against the errant director, in circumstances where the liquidator has elected not to", a direct award ought to be made. Acknowledging that this decision was released after the substantive trial in this proceeding, the same approach ought to have been adopted here.

(iii) In circumstances where a creditor has suffered identifiable loss, and where the liquidator(s) and other creditors (including secured creditors) have not brought and will not bring a claim, there is no policy reason for preventing direct recovery.

[6] Mr Banks says this Court was required to decide whether to grant relief in relation to the breach of s 135 of the Companies Act for continuing to trade from late-April or mid-May 2014 until August 2015. Mako was restored to the Register after the High Court judgment. Mr Banks says that this Court should therefore have considered whether to grant relief under s 301 for the confirmed breach of s 135.

[7] The general rule is that a judgment, once delivered, must stand for better or worse subject to appeal. Recall of a judgment (other than under the slip rule) will only be made in exceptional circumstances:[7]

(a) 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;

(b) where counsel have failed to direct the court's attention to a legislative provision or authoritative decision of plain relevance; or

(c) where for some other very special reason justice requires that the judgment be recalled.

[8] The third category is intended to be narrow.[8] It may include situations, likely to be rare, where a material issue properly put before the court is not addressed.[9] However, the court is not obliged to discuss every aspect of argument when giving its

---

7 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633 approved in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2].

8 *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at [23].

9 *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) at 456; and *Unison Networks Ltd v Commerce Commission*, above n 8, at [34].

reasons for judgment and a failure to do so does not engage the narrow recall jurisdiction.[10] Recall is not an appropriate means of correcting error.[11]

[9] We do not consider this is one of those rare cases where recall can be justified. Any error in the judgment can only be corrected on appeal. Our reasons for reaching this conclusion can be stated briefly.

[10] First, ground 1(c) — that the High Court should have found that the respondents breached their duty as directors under s 135 of the Companies Act prior to April/May 2014 — was addressed fully and rejected.[12]

[11] Secondly, ground 1(i) — that the High Court erred in finding that it did not have jurisdiction to make an award under s 301 of the Companies Act because Mako had been removed from the Register — did not need to be determined, as Mr Banks confirmed in his submissions:[13]

> ***F Section 301 of the Act***
>
> …
>
> *(3)* *Relevance of Mako's removal*
>
> 147 Given Mako's restoration, Mr Banks says it is unnecessary to consider the issue of whether the Court erred on the separate jurisdiction point. Mr Banks considers that it did — principally on the basis the Court's conclusion is contrary to the specific words of s 326 of the Act, and that any order could have laid in Court pending restoration (as Mr Banks suggested at trial). Should the Court wish to consider this issue in addition to the other matters at issue in this appeal, Mr Banks is content to file a short supplement or address the point further orally.

[12] Thirdly, ground 1(j) — that the High Court erred by not making an order under s 301 conditional on restoration of Mako to the Register — did not require determination for the reason stated above and because this ground was advanced in the alternative.

---

10 *R v Nakhla (No 2)*, above n 9, at 456.
11 *Unison Networks Ltd v Commerce Commission*, above n 8, at [40].
12 See Court of Appeal judgment, above n 1, at [223]–[255].
13 Footnote omitted.

[13] Fourthly, ground 1(k) — that the High Court erred in finding (as a matter of law) that Mr Banks was not entitled to a direct award as a creditor under s 301 of the Companies Act — also did not need to be determined given Mako's restoration to the Register. This Court concluded:

> *Section 301 — court's power to require repayment of money*
>
> [301] Having rejected the appeal against the Judge's findings that the directors did not breach their duties under the Companies Act at the time Mako incurred its obligations under Agreements 1, 2 and 3, it is not necessary for us to consider what remedy ought to be given under s 301. Had we found that a breach was proved, we would have considered it appropriate to make an order under this section given that Mako has been restored to the register and in the light of the position taken by the liquidators and Spark [the secured creditor, owed approximately $27 million at the date of liquidation].

[14] Fifthly, Moore J's primary reason for finding that Mr Banks was not entitled to any relief for the breach of directors' duty under s 135 by continuing to trade from late-April or mid-May 2014 until August 2015 was that this breach did not cause him any loss.[14] None of Mr Banks' grounds of appeal (including those now relied on and quoted above) challenged this factual finding. A judgment cannot be recalled for failing to address a ground of appeal that was not advanced.

[15] We do not overlook that the particulars of ground 1(c) included the contention at sub-para (viii) that the Judge erred by finding that relief was not available because Mr Banks' investments were made prior to the end of April 2014. However, this is not a proper particular of ground three (of 24), which is directed to whether the Judge erred in not finding that the breach occurred prior to April 2014.

[16] Mr Banks' case included that the directors acted in breach of s 136 of the Companies Act in agreeing to Mako incurring obligations to him in connection with his investments from mid-2013 at the latest because by then they had no reasonable grounds to believe those obligations could be met. Mr Fisk, the principal expert called for Mr Banks on this topic, expressed the opinion that the directors should have ceased trading around July 2013. However his evidence was that Mr Banks was unlikely to recover anything even if they had done so. This was because of the extent of Mako's

---

[14] High Court judgment, above n **Error! Bookmark not defined.**, at [681(a)].

liability to the secured creditor, which was owed approximately $27 million at the date of liquidation in August 2015.

[17] That Mako was restored to the Register and the secured creditor has surrendered its security since the High Court judgment was delivered does not mean that there is any appealable error in the High Court judgment on this issue. Nor could it justify this Court invoking the narrow recall jurisdiction to address this further.

Result

[18] The application for recall is declined.

[19] The appellant must pay costs to the respondents for a standard application on a band A basis and usual disbursements.

Solicitors:
Wynn Williams, Auckland for Appellant
Lodder Law Ltd, Auckland for First Respondent
Maberly & Co, Auckland for Second to Fourth Respondent