

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA609/2021
[2022] NZCA 483**

BETWEEN DAMIEN MITCHELL GRANT AS
 RECEIVER OF BASSETT 43 LIMITED
 (IN RECEIVERSHIP)
 Appellant

AND ANDREW LAURIE MONTGOMERIE
 Respondent

Hearing: 13 September 2022

Court: Gilbert, Goddard, Simon France JJ

Counsel: A S Botterill and K A Cocks for Appellant
 R M N Marsich for Respondent

Judgment: 17 October 2022 at 10.00 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The respondent must provide to the appellant all books, records and documents of Bassett 43 Ltd in his possession or control.**
- C The respondent must pay costs to the appellant for a standard appeal on a band A basis with usual disbursements.**
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REASONS OF THE COURT

(Given by Goddard J)

The issue before this Court

[1] The appellant (the Receiver) was appointed receiver of Bassett 43 Ltd (the Company). Mr Montgomerie, the respondent, was at that time the sole director of the Company. The Receiver wrote to Mr Montgomerie on a number of occasions seeking information about the property and affairs of the Company. The requests variously referred to ss 12 and 14 of the Receiverships Act 1993.

[2] Section 12 of the Receiverships Act, which is at the heart of this appeal, reads as follows:

12 Obligations of grantor

- (1) A grantor and, in the case of a grantor that is a body corporate, every director of the grantor, must—
 - (a) make available to the receiver all books, documents, and information relating to the property in receivership in the grantor's possession or under the grantor's control:
 - (b) if required to do so by the receiver, verify, by statutory declaration, that the books, documents, and information are complete and correct:
 - (c) give the receiver such assistance as he or she may reasonably require:
 - (d) if the grantor is a body corporate that has a common seal, make the common seal available for use by the receiver.
- (2) On the application of the receiver, the court may make an order requiring the grantor, or if the grantor is a body corporate, a director of the grantor to comply with subsection (1).

[3] Mr Montgomerie did not respond to those requests. The Receiver then applied to the High Court for an order under s 12(2) of the Receiverships Act requiring Mr Montgomerie to produce books, records and documents of the Company.

[4] Before that application was made, Mr Montgomerie had been adjudicated bankrupt. That meant he was disqualified from holding office as a director of the Company, and automatically ceased to hold that office.¹

[5] The High Court accepted Mr Montgomerie's submission that in those circumstances, it had no jurisdiction to grant the application.² Powell J held that an order could be made under s 12 only if Mr Montgomerie was, at the time the order was made, a director of the Company for the purposes of the Receiverships Act. However when he was adjudicated bankrupt, Mr Montgomerie ceased to hold office as a director.³ The Judge also dismissed an argument that the Court had jurisdiction to make the orders sought under s 34 of the Receiverships Act, which provides for receivers to seek directions from the High Court in relation to performance of their functions.⁴

[6] The Receiver appeals to this Court, arguing that the High Court had jurisdiction to make the order sought under one or more of ss 12, 14 and 34 of the Receiverships Act. The Receiver asks that such an order be made.

[7] Mr Montgomerie says the High Court was right to find that there was no jurisdiction to make the order, and that even if there is jurisdiction no order should be made as he has given evidence that he no longer has any relevant documents.

Receivership Act provisions

[8] Section 2(1) of the Receiverships Act contains a definition of the term "director":

In this Act, *unless the context otherwise requires*,—

...

director, in relation to—

- (a) a company within the meaning of section 2(1) of the Companies Act 1993, *includes*—

¹ Companies Act 1993, ss 151(2)(b) and 157(1)(c).

² *Grant v Montgomerie* [2021] NZHC 2389 [High Court judgment].

³ At [7]–[8].

⁴ At [12]–[13].

- (i) any person occupying the position of director of the company by whatever name called; and
- (ii) a person in accordance with whose directions or instructions a person referred to in subparagraph (i) may be required or is accustomed to act; and
- (iii) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act:

...

(Emphasis added.)

[9] Section 12 of the Receiverships Act is set out at [2] above. It imposes obligations to provide information to a receiver on the grantor of the instrument under which the receiver is appointed, and on each director of a grantor that is a body corporate.

[10] Before us, the Receiver also relied on s 14 of the Receiverships Act:

14 Powers of receivers

- (1) A receiver has the powers and authorities expressly or impliedly conferred by the deed or agreement or the order of the court by or under which the appointment was made.
- (2) Subject to the deed or agreement or the order of the court by or under which the appointment was made, a receiver may—
 - (a) demand and recover, by action or otherwise, income of the property in receivership:
 - (b) issue receipts for income recovered:
 - (c) manage the property in receivership:
 - (d) insure the property in receivership:
 - (e) repair and maintain the property in receivership:
 - (f) *inspect at any reasonable time books or documents that relate to the property in receivership and that are in the possession or under the control of the grantor:*
 - (g) *exercise, on behalf of the grantor, a right to inspect books or documents that relate to the property in receivership and that are in the possession or under the control of a person other than the grantor:*

- (h) in a case where the receiver is appointed in respect of all or substantially all of the assets and undertaking of a grantor that is a body corporate, change the registered office or address for service of the body corporate.

(Emphasis added.)

[11] Mr Botterill, who appeared for the Receiver, argued in the alternative that the power of the Court to give directions under s 34 of the Receiverships Act is sufficiently broad to enable the Court to make the orders sought against Mr Montgomerie. Section 34 provides:

34 Court supervision of receivers

- (1) The court may, on the application of a receiver,—
 - (a) give directions in relation to any matter arising in connection with the performance of the functions of the receiver:
 - (b) revoke or vary any such directions.
- (2) The court may, on the application of a person referred to in subsection (3),—
 - (a) in respect of any period, review or fix the remuneration of a receiver at a level which is reasonable in the circumstances:
 - (b) to the extent that an amount retained by a receiver as remuneration is found by the court to be unreasonable in the circumstances, order the receiver to refund the amount:
 - (c) declare whether or not a receiver was validly appointed in respect of any property or validly entered into possession or assumed control of any property.
- (3) Any of the following persons may apply to the court under subsection (2):
 - (a) the receiver:
 - (b) the grantor:
 - (c) a creditor of the grantor:
 - (d) a person claiming, through the grantor, an interest in the property in receivership:
 - (e) the board of directors of the grantor or, in the case of a grantor that is in liquidation, the board of the grantor at the time the liquidator was appointed:
 - (f) if the grantor is a company, a liquidator:

- (g) if the grantor is a person who has been adjudged bankrupt, the Official Assignee of the estate of the grantor.
- (4) The powers given by subsections (1) and (2)—
 - (a) are in addition to any other powers the court may exercise under this Act, any other Act, or in its inherent jurisdiction; and
 - (b) may be exercised in relation to a matter occurring either before or after the commencement of this Act and whether or not the receiver has ceased to act as receiver when the application is made.
- (5) The court may, on the application of a person referred to in subsection (3), revoke or vary an order made under subsection (2).
- (6) Subject to subsection (7), it is a defence to a claim against a receiver in relation to any act or omission by the receiver that he or she acted or omitted to act in accordance with a direction given under subsection (1).
- (7) The court may, on the application of a person referred to in subsection (3), order that, by reason of the circumstances in which a direction was obtained under subsection (1), a receiver is not entitled to the protection given by subsection (6).

Discussion

Jurisdiction to make the order under s 12 Receiverships Act

[12] It is in our view clear that the High Court had jurisdiction under s 12 of the Receiverships Act to make the order sought by the Receiver against Mr Montgomerie. In the context of that provision, the term “director” includes both current and former directors. If it did not include former directors, that would undermine the purpose of s 12 and of the Receiverships Act more generally.

[13] The meaning of legislation must be ascertained from its text and in the light of its purpose and context.⁵

[14] Mr Marsich, who appeared for Mr Montgomerie, emphasised that the definition of the term “director” in s 2(1) of the Receiverships Act appears on its face to be confined to persons who currently occupy the office of director. At the time the

⁵ Legislation Act 2019, s 10(1). See also *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

order was sought against Mr Montgomerie, he submitted, Mr Montgomerie was not a director of the Company. So no order could be made against him.

[15] However the text of s 2(1) provides only limited support for Mr Montgomerie's position, as:

- (a) the definition is inclusive, not exhaustive. The term director *includes* the various categories of person listed in the limbs of the definition. But the definition expressly contemplates that the term may be wider. Whether it should be read more broadly, to include other persons, will depend on context; and
- (b) the definition is (as usual) expressed to apply "unless the context otherwise requires". The term may thus have different meanings for the purpose of different provisions, depending on context.

[16] We therefore turn to purpose and context.

[17] The business and affairs of a company must be managed by, or under the direction or supervision of, the directors of the company.⁶ Section 189 of the Companies Act 1993 requires a company to keep certain documents at its registered office, or another location in New Zealand. If a company fails to do so both it and its directors commit an offence.⁷ And s 194 of the Companies Act requires the board of a company to ensure that there are kept at all times accounting records that (among other matters) correctly record the transactions of the company. If the board fails to do so, every director commits an offence.⁸

[18] In the case of closely held companies in particular, accounting records and other information relating to the business of the company will often be in the possession of the director(s). Indeed it is common for the registered office to be at the home of a sole director.

⁶ Companies Act, s 128(1).

⁷ Section 189(5).

⁸ Section 194(4).

[19] Where a grantee appoints a receiver in respect of the property of a company, the receiver will usually be an independent insolvency practitioner who has little or no pre-existing knowledge of, or information about, the business of that company. Often, especially in the case of closely held companies managed by a single shareholder director, a director will have possession of all the company's management and accounting records: the receiver will not have access to those records unless they can be obtained from the director. The receiver needs information about the property in respect of which they have been appointed in order to exercise their powers and perform their duties.⁹ And where, as is often the case, the receiver is appointed in respect of all of the assets and undertaking of a company, the receiver can only exercise their powers and perform their duties if they have access to comprehensive information in relation to the business of that company.

[20] The purpose of ss 12 and 14 of the Receiverships Act is to ensure that receivers can obtain the information that they require to carry out their functions. Under s 12, a receiver appointed in respect of a company is entitled to call on the company and every director of that company to make available books, documents and information relating to the property of the company in receivership. Directors may also be required to verify by statutory declaration that the books, documents and information are complete and correct and to give the receiver such assistance as he or she may reasonably require.

[21] Section 14(2)(f) complements s 12 by enabling the receiver to inspect books or documents relating to the property in receivership that are in the possession or under the control of the grantor, and to exercise the grantor's right to inspect books or documents relating to the property in receivership that are in the possession or under the control of a person other than the grantor. This provision is especially relevant where records are held by third parties such as lawyers or accountants: even if the third party has a right to possession of books or documents, either because they own that material or because they are entitled to exercise a lien over that material to secure unpaid fees, they must permit the receiver to inspect that material.

⁹ For the receiver's powers see Receiverships Act s 14; and for the receiver's duties see in particular ss 18 and 19.

[22] It would frustrate the purpose of s 12 of the Receiverships Act if the term “director” did not extend to former directors. If former directors were excluded, a sole director such as Mr Montgomerie could resign as a director upon appointment of a receiver, or when asked to provide information by a receiver. On Mr Montgomerie’s approach, that would deprive the High Court of jurisdiction to make an order under s 12 requiring that former director to provide information to the receiver, even in circumstances where all information relevant to the company was in the hands of that former director. That cannot be right. Similarly, it would be inconsistent with the purpose of s 12 to read the provision as not extending to former directors merely because they have been bankrupted. Their status as a bankrupt does not reduce the need for the receiver to access the company information, or provide any principled basis for the former director to refuse to provide that information.

[23] It is in our view very clear that the purpose and context of s 12 require a broader reading of the term “director” that extends to former directors.

[24] The Judge was concerned that making an order against Mr Montgomerie under s 12 would require Mr Montgomerie to act as a director in circumstances where he was forbidden to do so under the Companies Act and the Insolvency Act 2006.¹⁰ But surrendering these documents to the receiver is not an act done on behalf of the company, or in the course of managing the company. It is simply the delivery of those documents to the person now entitled to their possession, by a person who is no longer entitled to retain them. It is no different from the scenario where a former director who has been bankrupted delivers up any company documents that they hold to their successor director(s). Just as that would be lawful — and indeed, required by law — so too is the delivery of the company records to the receiver by a former (bankrupt) director in a case where s 12 of the Receiverships Act applies.

[25] Mr Marsich submitted that this reading of s 12 would impose obligations on all former directors, no matter how long ago they held office. That is true. But a director who ceased to act long before the appointment of a receiver can be expected to have passed on to their successor director(s) all company records and documents.

¹⁰ High Court judgment, above n 2, at [9], referring to ss 149(1)(a) and 436(1) of the Insolvency Act 2006.

If they have done so, then a simple response to the receiver to that effect will be sufficient to comply with s 12. If not, and if they still retain company information, the receiver is entitled to have it. We do not consider that any practical difficulty results from the inclusion of former directors within the scope of s 12.

[26] Having regard to the purpose of s 12, we also consider that the reference in s 12(1) to documents in the possession or control of the grantor must extend to documents that a director or former director has in their possession, or in respect of which they are able to exercise legal or practical control, and which they hold or previously held on behalf of the grantor. Any narrower reading would defeat the purpose of s 12.

Can the orders sought be made under s 14 Receiverships Act?

[27] We accept Mr Botterill's submission that a receiver may be able to inspect books and documents relating to property in receivership that are in the possession or under the control of a former director in reliance on s 14(2)(g). But in this case, the Receiver's requests to Mr Montgomerie were to provide information, not to permit inspection of it at Mr Montgomerie's home or workplace. And the order sought by the Receiver is an order for production of books, records and documents. So s 14 is not relevant to the application before the Court.

Can the orders sought be made under s 34 Receiverships Act?

[28] For the sake of completeness, we note that the High Court does not have jurisdiction under s 34 of the Receiverships Act to make an order against any person requiring that person to produce books, records and information of the company. Indeed s 34 does not confer any power to make orders binding any respondent party.¹¹ Rather, s 34 enables the High Court to provide directions to receivers to guide them in the performance of their functions. The purpose of s 34 is, as this Court said in *Simpson v Commissioner of Inland Revenue*, to enable receivers to seek guidance from

¹¹ Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at [10.27]. See also *Deputy Commissioner of Taxation v Best & Less (Wollongong) Pty Ltd* (1992) 7 ACSR 245 (FCA) at 246; and *Preston, Re Sandalwood Properties Ltd* [2018] FCA 547 at [43] and [47] for comments on the equivalent provision in Australia.

the Court.¹² It is not intended to enable a receiver to seek orders against some other person requiring them to do or refrain from doing any act.

[29] Mr Botterill drew our attention to one decision of the High Court in which orders were made under s 34 requiring the delivery of documents to a receiver.¹³ However in that case the respondent was not legally represented, and the Court does not appear to have been referred to any texts or authorities on s 34 or on the provision's overseas equivalents. The orders made in that case could and should have been made under s 12, rather than s 34.

Should an order be made under s 12 Receiverships Act?

[30] Finally, Mr Marsich submitted that if this Court were to find that it has jurisdiction to make the order sought against Mr Montgomerie, it should not do so as a matter of discretion because Mr Montgomerie has given evidence that he does not now have any relevant information in his possession or control.

[31] We are not persuaded by that submission. Mr Montgomerie, as the sole director of the Company, had an obligation to ensure that the Company kept proper records.¹⁴ The evidence establishes that he conducted extensive correspondence on behalf of the Company, and it appears that he controlled the Company's finances and must (as sole director) have had possession or control of all the Company's financial records. His claim that he does not have possession or control of any company records is difficult to reconcile with his duties under the Companies Act while he was a director, and with the evidence about his active involvement in the management of the Company. We do not consider that his claim that he no longer has any relevant material should preclude the making of an order under s 12. An order should be made requiring Mr Montgomerie to deliver up to the Receiver all books, records and documents of the Company that are in his possession or control. Mr Montgomerie will then be required to conduct a comprehensive search for any relevant material he might still hold in hard copy or electronic form, and to exercise any control (legal or practical) that he may have over

¹² *Simpson v Commissioner of Inland Revenue* [2012] NZCA 126, [2012] 2 NZLR 131 at [66].

¹³ *Whitley v Ribble Ltd* [2017] NZHC 1884 at [68]–[70].

¹⁴ See [17] above.

material in the hands of third parties, in order to comply with the order. It would be surprising if that produced nothing at all.

Result

[32] The appeal is allowed.

[33] We make an order requiring Mr Montgomerie to provide to the Receiver all books, records and documents of Bassett 43 Ltd in his possession or control.

[34] Mr Montgomerie must pay costs to the Receiver for a standard appeal on a band A basis with usual disbursements.

Solicitors:
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Douglas MA Burgess, Auckland for Respondent