7/6 NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

AP16/89

330

BETWEEN PAUL TRISTRAM HARPER

Appellant

A N D THE DISTRICT REGISTRAR OF COMPANIES

Respondent

Hearing: 11 May 1989

Counsel: A.S. Carlyle for the Appellant
B.D. Vanderkolk for the Respondent

ORAL JUDGMENT OF ELLIS J

This is a general appeal by Mr Harper against his conviction in respect of three charges brought against him under the Companies Act for being a director of three separate companies, he failed to take all reasonable steps to ensure the compliance by the company in question with the requirements of the Companies Act 1955. The situation is most unusual.

The informations relate to periods in 1985 and 1986, but did not come to hearing until 1988. It appears from the judgment of the District Court Judge that I will refer to again shortly, that there was a sorry chapter of adjournments and delays in bringing the matter to hearing. I expressly refrain from laying the blame for these adjournments. They are fully covered in the decision I have referred to.

However, when the matter came on for hearing before the Judge at Palmerston North on 18 and 21 April and 2 May 1988, it was not possible to complete the prosecution case. The hearing was then adjourned to continue before the Judge at Hastings, notwithstanding the inconvenience that this caused counsel and witnesses. It was difficult to obtain a hearing date to accommodate the anticipated time the case would take to complete, but eventually a date was given for 29 September 1988. The situation by then had been reached where it was unlikely that the Judge would grant a further adjournment. Notwithstanding this, the Appellant left New Zealand on business, hoping to return before the hearing date, but it appears from an affidavit he filed that his business commitments overseas tarried and prevented his return in time. While overseas, he conferred with his solicitor, who explained to him the possible consequences of his failure to appear on 29 September and it now appears from a reporting letter from the solicitor to the appellant dated 17 October 1988 that certain things were discussed, and in particular the possibility of his arrest when he returned to New Zealand for failure to appear on the 29th of September. It also appears that the solicitor indicated to Mr Harper that there was a presumption of guilt against the Appellant for reasons which I can not fully comprehend on the limited material before me. When I say limited, I do not mean it is not extensive.

The alternative was put to the Appellant by his solicitor of continuing the case in the Appellant's absence. It is plain that the Appellant accepted his solicitor's advice to plead guilty and instructed him to do so. The guilty plea was accordingly entered before another Judge on 29 September 1988, who adjourned the sentencing so that the Judge who heard the matter could pass sentence.

On his return to New Zealand, the Appellant filed an application for re-hearing which was heard by the Judge who presided at the hearing and who correctly assessed it as in fact an application to withdraw the guilty pleas. The Appellant filed affidavits in support of his application, but among them was not an affidavit from his solicitor. This must be observed against the fact that he must have had the solicitor's letter of 17 October 1988 that I have already referred to. The Judge gave a full reasoned decision and refused the Appellant's application to change his plea. In particular, he said:

> Whilst the record sheets on the informations is inadequate it seems quite clear from the defendant applicant's Affidavit that when he went overseas early in September 1988 he did so in the knowledge that after a very large number of adjournments these prosecutions were to continue by way of a defended hearing during the last week of September 1988. That much is clear from the Affidavits. The charges before the court do not carry a penalty of imprisonment. Thus it would have been possible for the proceedings to have continued during the last week in September by way of defended hearing even in the absence of the defendant, if the defendant so wished. This was a matter for the defendant, if the defendant so wished. This was a matter for the defendant. Nonetheless, as I say in his absence, pleas of guilty were entered by his counsel."

The penalty in respect of the charges depends on whether or not the allegation is of wilful conduct or negligent conduct and Mr Vanderkolk informs me from the bar that it was made plain from the commencement of the hearing in the District Court that it was negligent conduct alleged and accordingly the Appellant was not liable on conviction of a term of imprisonment. Notwithstanding this, it is possible nevertheless to see how the solicitor acting for the Appellant made what now appears to be an error when advising his client of the possibilities of his non-appearance at the resumed hearing.

As the Judge correctly observes, it would have been possible for the case to proceed in the absence of the Defendant and while his absence may not have had great effect on the cross-examination of the last witness to be called for the prosecution, it is obvious the Defendant would not have been able to give evidence himself and from the Judge's own assessment of the evidence he had heard to date, plainly much would depend on the Appellant's evidence.

It will be seen from the above that it appears that the full facts regarding the instructions received by the Appellant's solicitors were not fully before the Judge on 25 November 1988. If that is to be considered anyone's fault, it must be the fault of the Appellant, who I said was fully informed of his solicitor's understanding by virtue of the letter of 17 October 1988.

It is easy to be of the view obviously reached by the Judge that the Appellant at that late stage deserved little sympathy. Nevertheless I am concerned that the primary principle that all persons prosecuted for criminal offences should receive a fair hearing, however they may mismanage their own affairs. That mismanagement of course can be reflected in the punishment that will result from a guilty finding.

Because of the importance of this principle in my view, it is appropriate to allow the appeal and direct a re-hearing in the District Court, which effectively sets aside the Judge's refusal to accept a change of plea. I am guided by the approach of the Full Court in Walsh [1948] NZLR937.

I am indebted to the efforts made by Mr Carlyle on behalf of the Appellant at short notice and to his suggestions as to how the re-hearing is to be conducted. First, he advises me that the Appellant will accept the evidence to date as recorded in the notes that have now been transcribed and accordingly it will only be necessary for the prosecution to complete the prosecution evidence and then allow the defence evidence to be called in the usual way. The Appellant raises no objection to the Judge who heard the case concluding it, if this is acceptable to the Judge and is possible within practical arrangements available in the District Court. The Appellant will also accept that the hearing can be concluded in Hawkes Bay at Hastings or Napier.

Finally, Mr Carlyle suggests that a conference with the Judge before the hearing would be to advantage as it may be possible to settle what is actually in issue and thus reducing the outstanding hearing timing to be contained within one day.

In this case I have considered the question of awarding costs against the Appellant for the reasons that I have already averted to and for the reasons that appear in the decision of the Judge. Under the circumstances however I feel I am insufficiently informed as to the overall merits of the case and of the conduct of it to date. I therefore refrain from making an order as to costs one way or the other. Accordingly, the appeal will be allowed and I direct that the matter be re-heard in the District Court.

This subsumes the appeal against sentence. The Appellant will be released on bail on his own recognizance of $5,000. There will be a special condition of his bail that he does not leave New Zealand without the prior approval of the Crown Prosecutor, Palmerston North. If any difficulties should arise, he is to apply to this Court for a variation of terms of bail.

It is plain from the file that difficulties in the past have arisen on matters of legal aid. Mr Carlyle should forthwith take all outstanding matters of legal aid up with the Registrar of the District Court Palmerston North and if any difficulties arise, he will have to apply to the District Court Judge. It is plainly to the Appellant's advantage to clarify his entitlement to aid. If a fresh application must be made, then the Registrar will naturally review the matter and will bear in mind the comments of the Judge in his decision that I have already referred to, but for the avoidance of doubt being the written decision of 25 November 1988.