IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1732
[2021] NZHC 2314

UNDER	Part 16 of the Companies Act 1993
BETWEEN	WARKWORTH RETAIL LIMITED Plaintiff
AND	WARKWORTH HOLDINGS LIMITED Defendant

Hearing:	2 September 2021
Appearances:	R J Hollyman QC, RKP Stewart and A Steel for the Plaintiff D Bennington for Foundation Developments Ltd in support S Gollin for Defendant's Receivers J Caird for Arena Global SPV, LLC
Judgment:	6 September 2021

JUDGMENT OF GAULT J

This judgment was delivered by me on 6 September 2021 at 10:30 am pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr R J Hollyman QC, Mr RKP Stewart and Mr A Steel, Barristers, Auckland
Mr M Morrison (plaintiff's instructing solicitor), Morrison Mallett, Auckland
Ms D Bennington, Duncan Cotterill, Auckland
Mr S Gollin, MinterEllisonRuddWatts, Auckland
Mr J Caird, Simpson Grierson, Auckland

[1] The plaintiff filed a without notice interlocutory application for appointment of interim liquidator on 1 September 2021, together with its statement of claim seeking to put the defendant company (WHL) into liquidation. Mr Hollyman QC, for the plaintiff, appropriately advised that the plaintiff was content to proceed on a *Pickwick* basis. That evening, I directed service and for the application to be heard via VMR on a *Pickwick* basis at the first available opportunity.

[2] A *Pickwick* hearing took place via VMR the next afternoon. Given developments, I reserved my decision. In particular, I had not received one of the affidavits in support and there was a suggestion that WHL could be put into liquidation by majority shareholder resolution in lieu of a meeting under s 122 of the Companies Act 1993, in which case an interim liquidator would not be required. On Friday 3 September 2021, Mr Hollyman advised that discussions between counsel regarding s 122 were inconclusive and the application remained on foot.

The plaintiff's case

[3] In summary, the plaintiff's case is as follows. It is one of three shareholders of WHL. The others are the majority shareholder, Foundation Developments Ltd (FDL), and Arena Global SPV, LLC (Arena). There is a shareholders agreement.

[4] The current directors of WHL are Messrs Guest, Hitchcock, Jacobson and Strathdee.

[5] WHL is the registered proprietor of bare land at Falls Road, Warkworth. The land is WHL's only material asset and is said to be worth significantly in excess of $42 million. It was the subject of a conditional offer to purchase for $50 million on or about 27 August 2021.

[6] WHL's purchase of the land was funded by Arena and the plaintiff. Security by way of a first mortgage and general security agreement is held by a security trustee in trust for both Arena and the plaintiff, but the plaintiff cannot instruct the security trustee until Arena is fully repaid.

[7] WHL is in default on approximately $47 million of loans including interest, including approximately $14.2 million due and owing to the plaintiff. Despite demand, WHL has failed to repay the plaintiff. WHL has also failed to comply with a Property Law Act notice issued by Arena in May 2021 in respect of $36 million due and owing to it. Interest continues to accrue. The plaintiff says that WHL is insolvent.

[8] In or about early August 2021 the directors of WHL resolved to sell the land to The Neighbourhood Stubbs Farm Ltd (TNSF) for $42 million. TNSF is ultimately owned by Mr Strathdee, who is associated with Arena. Messrs Strathdee and Guest are also directors of TNSF.

[9] On or about 9 August 2021 the WHL directors resolved to issue a buy-back notice under the shareholders agreement to require the plaintiff to transfer its shares in WHL for nil consideration, on the basis that there were changes to the directors or shareholders of the plaintiff. At the time, Mr Guest was also a director of the plaintiff, but the buy-back notice was not provided to the plaintiff's board or shareholders. Mr Guest also subsequently signed a transfer of the plaintiff's shares to WHL.

[10] On or about 20 August 2021 Arena issued a notice to FDL under the shareholders agreement requiring FDL to transfer 10,000 shares in WHL to Arena for nil consideration.

[11] On or about 22 August 2021 the directors of FDL resolved not to approve the sale to TNSF.

[12] On or about 23 August 2021, purportedly pursuant to the buy-back notice issued to the plaintiff, WHL cancelled the plaintiff's 30,000 shares in WHL. If valid (which the plaintiff denies), this creates a deadlock by reducing the number of shareholders in WHL to two, such that the composition of the board of WHL cannot be changed in accordance with the shareholders agreement.

[13] The plaintiff says that the buy-back notice and the purported cancellation of its shares were invalid and perpetrated for an improper purpose. A buy-back notice could not be issued in respect of a change to the directors or shareholders of the plaintiff

where the changes merely related to the beneficial ownership of the shares in the plaintiff. Further, WHL failed to obtain a solvency certificate, and was insolvent. Also, as indicated, the buy-back notice was not provided to the plaintiff's board or shareholders. The effect of the buy-back notice and cancellation of the plaintiff's shares was to achieve deadlock in circumstances where FDL had not approved the sale of the land and was thereafter unable to appoint a director to the board of WHL, and WHL had failed to repay the plaintiff.

[14] The plaintiff says the board of WHL has not been acting in the best interests of the company or its shareholders and it is just and equitable that WHL be placed into liquidation.

Developments before the hearing

[15] Mr Hollyman filed a supplementary memorandum advising – and providing supporting documentation – that:

(a) Early on 2 September 2021, the security trustee under Arena's general security deed, Quaestor Advisors LLC, appointed Andrew McKay and Rees Logan of BDO as receivers of all of WHL's assets.

(b) FDL has filed a notice of intention to appear and affidavit in support of both the application for liquidation, and for the appointment of interim liquidators. FDL holds 78.57 per cent of the shares in WHL (assuming the share transfers and cancellation are valid – FDL accepts that Arena had a right under the shareholders agreement to issue the transfer notice to FDL but supports the plaintiff in relation to Arena's purpose).

(c) At around 10:00 pm on 1 September 2021, WHL's solicitors disclosed copies of two agreements recently entered into by WHL:

(i) A deed of co-operation, between WHL and The Neighbourhood Middle Hill Limited (TN Middle Hill),[1] under which WHL is to

[1] Messrs Guest, Strathdee and van Der Meijden are the directors of TN Middle Hill.

procure construction of infrastructure for the joint development of the land and adjoining property owned by TN Middle Hill.

(ii) A conditional agreement under which WHL is to grant an easement to TN Middle Hill.

(d) WHL's board has resolved, at the request of FDL, to call a special meeting on 16 September 2021 to consider liquidation of WHL. This meeting date is said to be outside the period allowed for a liquidation resolution given the application to the Court.[2]

Submissions

[16] The plaintiff seeks orders appointing an interim liquidator to WHL to preserve WHL's assets pending the resolution of its substantive application. Mr Hollyman submitted there is a need for interim control of WHL.

[17] Section 246 of the Companies Act 1993 provides that the Court may, if it is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint an interim liquidator. The alternative "expedient" is a relatively low threshold.[3]

[18] Mr Hollyman submitted that the applicable principles were summarised in *Truck and Trailer Holdings Ltd v Skelly Holdings Ltd*:[4]

> [7] Beyond the statutory criteria it has been recognised that there are three main pre-conditions to an interim liquidation:
>
> (i) There must be a valid winding-up application under way.
>
> (ii) The application will in all probability succeed.
>
> (iii) The circumstances must be not merely urgent, but also justify the appointment of an interim liquidator.

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2 Companies Act 1993, s 241AA.
3 *Carter Holt Harvey Ltd v Timbalok New Zealand Ltd* (1997) 11 PRNZ 435 (HC) at 438.
4 *Truck and Trailer Holdings Ltd v Skelly Holdings Ltd* HC Christchurch CIV-2012-409-541, 11 May 2012.

[8] The Court has recognised as three important factors:

(a) Whether the company assets are in jeopardy.

(b) Whether the status quo should be maintained.

(c) Whether the interests of creditors are safeguarded.

[9] These various formulations are ways of measuring whether necessity or expediency are established. They are a "litmus test", not exhaustive.

[19] Mr Hollyman submitted that the appointment of receivers is no impediment to the appointment of interim liquidators, relying on *Raph Engle Concepts Ltd v SCL Industries Limited Partnership*.[5]

[20] He submitted that there are serious and obvious concerns about the validity of the recently disclosed transactions that have been entered into by WHL, prior to receivership, through the agency of Messrs Guest and Strathdee:

(a) The correspondence from WHL's solicitors referred to above discloses an agreement to grant an easement and a cooperation agreement with TN Middle Hill. TN Middle Hill is a related entity also controlled by two of the current directors of WHL (Mr Strathdee and Mr Guest).

(b) Given the insolvency of WHL, and the various conflicts at play, there are serious concerns about the preservation of WHL's assets. WHL's grant of an extremely valuable easement comes in the wake of the failed attempt to sell the land to another related entity controlled by Messrs Guest and Strathdee.

(c) The receivers have been appointed by interests associated with those transactions.

(d) A normal liquidation is a 6-week to two-month process from filing (allows time for service, advertising etc). Without suggesting there are concerns as to the suitability of the receivers appointed, there remains

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5 *Raph Engle Concepts Ltd v SCL Industries Limited Partnership* [2013] NZHC 2732 at [36] - [39].

a possibility of the value of assets being reduced in that time, by a receiver acting without supervision.

(e) Appointment will not cause any detriment.

[21] Ms Bennington appeared for FDL in support of the plaintiff's application.

[22] Mr Gollin appeared for the receivers to oppose the application. He did not dispute the applicable principles nor contest that the substantive application is likely to succeed. He submitted that the appointment of receivers obviates any need for an interim liquidator also to be appointed. With receivers in place and given their function, appointment of an interim liquidator is not necessary or expedient in order to maintain the value of the assets nor are those assets in jeopardy, particularly since the primary asset is the land and the concern is an alleged sale at an undervalue. The receivers have been appointed under a security over all the assets and they have authority and control over all the assets, which effectively displaces the control of the directors. The directors remain in place technically, but their authority has been supplanted by the receivers. The receivers are constrained by their duties under the Receiverships Act 1993, most relevantly the duty under s 19 to obtain the best price reasonably obtainable, which is owed to others including those with an interest in the land and unsecured creditors. The receivers are accountable. They are also subject to the scrutiny of the Court, and they owe professional obligations. No question is being raised about Mr McKay or Mr Logan. There is no need for the additional cost of an interim liquidator.

[23] Mr Gollin also submitted that *Raph Engle* is materially different. The relationship between the secured creditor and the company was not the determining factor. The determining factor was that there was a prima facie cause for concern as to the validity of the receivers' appointment.[6] The security was put in place some time after the lending. Here, there is no validity issue. Although the security was entered into within the two year voidable period,[7] it was entered into at the same time as the lending.

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6 *Raph Engle Concepts Ltd v SCL Industries Limited Partnership* [2013] NZHC 2732 at [36].
7 Companies Act 1993, s 293.

[24] Mr Gollin accepted that the receivers' remit did not extend to other matters such as investigating the disputed cancellation of shares, but he submitted that these matters could be investigated in due course by a liquidator. He submitted that nothing is going to change what has already happened.

[25] Mr Caird, for Arena, indicated that Arena did not accept a number of factual matters raised by the plaintiff, but was not in a position to deal with them on this application. He submitted there is a real question whether they are capable of determination in a liquidation proceeding. Also, he submitted these are sophisticated shareholders who have other remedies. He endorsed Mr Gollin's submission that the directors have minimal powers now that the receivers have been appointed.

[26] In reply, Mr Hollyman submitted that the issues raised by the plaintiff, including in relation to the dealings with TN Middle Hill that were only disclosed after proceedings were served, indicate that WHL may well have matters in train (rather than concluded) that the receivers may decide not to investigate given their remit whereas an interim liquidator would do so. He submitted that, rather than addressing whether the receivers have breached their duties after the event, it would be preferable to appoint an interim liquidator to act as a watchdog before liquidators are appointed. He submitted the cost will be relatively modest and likely borne by those seeking the appointment.

Discussion

[27] There is a valid winding up application for WHL under way. I consider it is very likely to succeed. WHL is in default owing approximately $47 million and receivers have now been appointed. As Mr Gollin acknowledged, the presumption of inability to pay debts in s 287 applies. Also, the application is supported by the majority shareholder, FDL.

[28] I also accept that the plaintiff has raised serious questions about the appropriateness of some dealings on behalf of WHL, including in relation to its shares and its recently disclosed dealings with TN Middle Hill. As Mr Caird submitted, some of the issues raised by the plaintiff may not be capable of determination in the liquidation proceeding, and the plaintiff may have other remedies. Nevertheless,

I consider that, at least until the appointment of receivers, the plaintiff had raised sufficient questions to indicate that WHL's assets were in jeopardy in the sense that some dealings may not be in WHL's best interests.

[29] The issue now that receivers have been appointed is whether it remains necessary or expedient to appoint an interim liquidator for the purpose of maintaining the value of assets owned or managed by WHL.

[30] I accept Mr Gollin's submissions about the function and duties of receivers appointed under a security over all of WHL's assets, albeit noting that the receivers' primary responsibility is to the person in whose interests they were appointed.[8] I also accept that, unlike *Raph Engle*, there is no question here about the validity of the receivers' appointment. Despite the party behind their appointment, there is no reason to doubt the receivers will comply with their obligations including under s 19. In that sense, WHL's assets should not be in jeopardy. I also accept that the receivers cannot change what has already happened.

[31] Mr Gollin acknowledged, however, that the receivers' remit is limited. Also, the distinction between transactions that have already happened and those in train but not concluded may be subtle, especially given the recent disclosure of the dealings with TN Middle Hill. An interim liquidator with a wider remit may take steps that the receivers would not necessarily take, including to investigate the disputed dealings. Such steps may go further to maximise the value of company assets. In that sense, the interests of creditors may be safeguarded and the appointment of an interim liquidator is justified.

Conclusion

[32] For these reasons, and in the absence of any consensus on the timing of the appointment of a liquidator or an undertaking to preserve the status quo for even a short period, on balance at this *Pickwick* stage I am satisfied that it is expedient for the

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[8] Receiverships Act 1993, s 18(2) and (3); *Raph Engle Concepts Ltd v SCL Industries Limited Partnership* [2013] NZHC 2732 at [38].

purpose of maintaining the value of assets owned or managed by WHL to appoint an interim liquidator.

[33] Consents to act as interim liquidator have been filed by Mr Grant and Mr Sheriff of Waterstone Insolvency. It is appropriate to appoint them as interim liquidators until further order of the Court.

[34] An issue arises as to the terms of the order given the appointment of receivers. Under s 31 of the Receiverships Act, the receivers can continue to exercise all the powers of a receiver in respect of the assets, but may act as the agent of the company only with the approval of the Court or with the written consent of the (interim) liquidator. Mr Gollin submitted that the appointment of an interim liquidator would need to be conditional on the provision of consent to the receivers to deal with the assets. Counsel should confer on appropriate terms to enable the receivers to continue to exercise their powers, with oversight from the interim liquidators, and file a joint memorandum later today. If necessary, I will convene a telephone conference before finalising the terms of the order.

[35] A further issue arises as to the need for an undertaking as to damages. This was not addressed at the hearing. While r 7.54 does not apply directly, I am minded to require that an undertaking as to damages be given, but I will also hear from counsel as to possible dispensation from this requirement (having regard to the specific terms of the order proposed).

[36] I will also reserve leave for any party to apply to vary or discharge the without notice order on 48 hours' notice.

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Gault J