IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA419/2018
[2018] NZCA 433

BETWEEN	JIA WEN MAO Appellant
AND	INNO CAPITAL NO. 4 LIMITED First Respondent
	DAMIEN GRANT AND STEVEN KHOV AS LIQUIDATORS OF CHEN HONG CO LIMITED (IN LIQUIDATION) Second Respondents

Hearing:	4 October 2018
Court:	Gilbert, Venning and Dunningham JJ
Counsel:	L Ponniah for Appellant A S Botterill and S M T Chambers for Second Respondents
Judgment:	15 October 2018 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS OF THE COURT

(Given by Venning J)

[1] On 15 December 2017 Chen Hong Co Ltd (the company) was placed into liquidation by order of the Court. On 16 February 2018 Ms Mao, a director of the

company, applied under s 250 of the Companies Act 1993 (the Act) to terminate the liquidation.

[2] In a judgment delivered on 27 June 2018 Associate Judge Andrew dismissed the application.[1] Ms Mao now appeals to this Court from that decision.

Background

[3] The company was incorporated on 20 May 2016 primarily to carry out a property development at Fairburn Road, Otahuhu. Its registered office was 423 Ormiston Road, Flat Bush, Auckland. The company became indebted to Inno Capital No. 3 Ltd (Inno 3) when on 2 August 2017 it agreed to pay Inno 3 the outstanding balance owing to Inno 3 by Mangawhai Property Ltd (Mangawhai) under a facility agreement between those parties. Inno 3 held a first mortgage over properties owned by Mangawhai. The company held a second mortgage. The company agreed to pay Mangawhai's outstanding debt by 31 August 2017. It failed to do so. On 5 September 2017 Inno 3 served a statutory demand on the company demanding $548,242.55.

[4] Mangawhai subsequently made a repayment on account but, as at 4 October 2017, the amount still owing to Inno 3 by the company pursuant to the undertaking was $373,004.39. Inno 3 issued liquidation proceedings against the company based on its failure to satisfy the statutory demand in full.

[5] The liquidation proceedings were first called on 24 November 2017. Prior to that, on 21 November 2017 Inno 3 applied without notice for an order substituting Inno Capital No 4 Ltd (Inno 4) as the plaintiff in the proceeding on the grounds that the debt owing by the company to Inno 3 had been assigned to Inno 4 on 20 November 2017. The order was made on 24 November 2017 when the proceedings were before the Court.

[6] Prior to the call on 24 November 2017 the proceedings had been served at the company's registered office. They had also been advertised. There was no appearance

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1 *Mao v Inno Capital No. 4 Ltd* [2018] NZHC 1534.

for the company on 24 November 2017. After making the order for substitution, Associate Judge Doogue directed an amended statement of claim was to be filed and served, noting the next call of the proceeding was to be 10.45 am on 15 December 2017. The Judge also directed the notice of the next hearing date was to be served on the defendant with the amended statement of claim.

[7] Inno 4 filed an amended statement of claim which was served at the registered office of the company. When the matter was next before the Court on 15 December 2017 Lang J made an order placing the company into liquidation. Damien Grant and Steven Khov were appointed liquidators of the company.

[8] On 21 December 2017 a Mr Lau purported to make an application to the Court to terminate the liquidation. The application was defective in a number of respects. Notably, Mr Lau had no standing to make the application. He was neither a shareholder nor a director of the company. The amended application which was filed by Ms Mao, a director, followed almost two months later.

[9] The amended application sought orders terminating the liquidation, rescinding the order of 15 December 2017 and removing the liquidators. The application was pursued on the following grounds:

(a) the company is and was solvent at the time the liquidators were appointed and could pay its debts;

(b) the company was unaware of the statutory demand or the proceeding and had not been properly served with the amended statement of claim or the adjourned hearing date;

(c) the amended statement of claim had not been advertised;

(d) the amended statement of claim was defective as it was not verified by affidavit;

(e) Inno 4 had no standing to bring the proceedings; and

(f) Inno 4 had not made any demand under the assignment.

Judgment of Associate Judge Andrew

[10] Associate Judge Andrew noted that s 250 of the Act confers a discretion on the court to terminate the liquidation at any time after the appointment of a liquidator if satisfied it is just and equitable to do so.

[11] The Judge was satisfied there was evidence before the Court that the company was insolvent when it was placed into liquidation. The solicitor's certificate could properly be interpreted as referring to the debt described in the amended statement of claim. In addition, the circumstances giving rise to the debt owed to the substituted creditor, Inno 4, were set out in the affidavit of a Ms Mu in support of the application for change of party. Her firm were the solicitors for both Inno 3 and Inno 4. There was clear evidence of insolvency.

[12] Despite Mr Ponniah's submissions to the contrary, the Judge concluded the liquidation proceedings were not a nullity. While accepting that the High Court Rules required a fresh notice of proceeding to be served when an order for substitution had been made under r 31.24 the Judge did not regard the failure to serve a fresh notice of proceeding as fatal or decisive as the Court still retained a discretion under s 250 and/or r 1.5. The Judge noted that even if there had been some error tainting the order which led to the company being placed into liquidation, it was not necessarily decisive.[2]

[13] Next, despite Ms Mao's affidavit, the Judge was satisfied that all relevant documents were served at the address bearing the number 423 Ormiston Road, Flat Bush which remained the registered office of the company. The Judge found it difficult to accept that Mr Lau and Ms Mao were not aware of the assignment and the proceedings. The applicant had failed to discharge the burden of establishing the facts to support the application to terminate the liquidation under s 250.

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2 *Foundation Securities (NZ) Ltd v Direct Labour Services Ltd (in liq)* [2008] NZCCLR 1 at [25].

[14] The Judge next noted that while the debt to Inno 4 had been paid, the evidence of Mr Grant, the liquidator, was that as at 6 June 2018 at least $1,050,870.50 was still owing by the company to other creditors.

[15] Despite Ms Mao's contention in her evidence that if the company was permitted to continue with its plans to develop the Fairburn Road property it would then be in a position to pay all its creditors, the Judge concluded that it would not be just and equitable to terminate the liquidation. The company remained, in his view, insolvent and unable to pay its debts. It would be contrary to the public interest to terminate the liquidation. For those reasons he declined the application.

The appeal

[16] In support of the appeal Mr Ponniah repeated the submissions he had made to the Associate Judge. While he referred to the current position of the company the focus of his submissions was on his challenge to the validity of the liquidation order made on 15 December 2017. Mr Ponniah again submitted the order was a nullity and that the Associate Judge was wrong to effectively provide a retrospective remedy in respect of the various procedural failings he identified.

[17] For the reasons that follow we agree with the Associate Judge's conclusion that the original liquidation proceedings were not a nullity and that it was not just and equitable to terminate the liquidation of the company.

Grounds for the liquidation

[18] The issue for the Court on 15 December 2017 was whether there was sufficient evidence before it to conclude the company was unable to pay its debts. Under s 241(4) of the Act the Court may appoint a liquidator to a company on a number of grounds, including that the company is unable to pay its debts.

[19] As at 15 December 2017 there was evidence before the Court that a statutory demand had been served at the registered office of the company and it remained unsatisfied. Unless the contrary was proved the failure to satisfy the demand was

evidence that the company was unable to pay its debts.[3] In addition, the Court had before it the affidavit evidence of Ms Mu explaining the background to the debt claimed in the statutory demand (which had not been met) and confirming the assignment and notice of the assignment. Ms Mu's affidavit may not have been referred to in the sealed order, but it was before the Judge. Even putting Ms Mu's evidence to one side, the solicitor's certificate confirmed the debt was still owing. The debt on which the liquidation proceeding was based had not changed and remained owing. There was sufficient evidence for the Court to conclude the company was unable to pay its debts and to place it in liquidation.

The nullity argument

[20] Mr Ponniah is correct that r 31.24 requires a person substituted as plaintiff under that rule to file and serve a statement of claim, a notice of proceeding and an affidavit. But that submission overlooks that Inno 4 was substituted as plaintiff under r 4.52, not r 31.24. The order substituting Inno 4 as plaintiff was properly made under r 4.52 as the debt in issue had been assigned to it.

[21] Rule 31.24 applies where the original creditor's claim has been satisfied and the substituted creditor relies on a separate debt. In such a case, the basis for the new debt claimed should be deposed to. But in this case the debt Inno 4 relied on remained the same debt that Inno 3 had relied on to commence the proceedings. It had been assigned from Inno 3 to Inno 4. Inno 4 had standing to pursue the proceeding. The evidence of failure to comply with Inno 3's demand for payment of the debt remained relevant to the issue of the company's inability to pay its debts. While Associate Judge Doogue directed the service of an amended statement of claim, that may have been unnecessary and notably, he did not direct the filing and service of an amended notice of proceeding and affidavit. In the circumstances, neither were required. In any event, to the extent there was any defect in the way the substitution was dealt with procedurally, it was of a nature which the Court would readily excuse under r 1.5.

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3 Companies Act 1993, s 287(a).

[22] Rule 1.5 is broad in its application. It enables the court in an appropriate case to allow any amendments and to make any order dealing with the proceeding generally as it thinks just. Importantly it confirms that a failure to comply with the rules is to be treated as an irregularity and does not nullify any order in the proceeding. There is no reason to read the operation of r 1.5 down, particularly in the context of this case.

Service

[23] Ms Mao also raised an issue about the service of the amended statement of claim. From Ms Mao's evidence it seems that as a result of a redevelopment, there are two properties with the same address of 423 Ormiston Road, Flat Bush, Auckland or that Ms Mao's address changed. Ms Mao says the process servers did not serve the documents at her address. However, the obligation was on the company directors to ensure the records of the company were kept updated. The registered office of the company remained 423 Ormiston Road, Flat Bush, Auckland where the documents were served. Notably, Ms Mao makes no reference to the service of the original proceedings. The evidence before the Court confirmed they were served at the company's registered office by affixing them to the front door at the address. There was no appearance on behalf of the company when the original application was before the Court. Ms Mao fails to explain that.

[24] Next, as the Associate Judge observed, on 30 October 2017 Ms Mu emailed Mr Lau a copy of the proceedings and in early December 2017 there was email correspondence between Mr Lau and the solicitors for Inno 3 and Inno 4 in relation to the liquidation proceedings. Mr Lau's purported involvement on behalf of the company including his misconceived application to terminate the liquidation suggests that while he was not a director or shareholder, he played a role in the company.

[25] The Judge was entitled to conclude that the company had been served and was aware of the orders for substitution and of the hearing date of 15 December 2017.

[26] Mr Ponniah also submitted the company had not received notice of the adjourned December hearing date.

[27] The email correspondence from the process servers relating to the affidavit for service suggests a letter confirming the new hearing date was served with the amended statement of claim, again by leaving it at the registered office of 423 Ormiston Road, Flat Bush, Auckland.

[28] Like the Associate Judge we are satisfied that both the original application for a liquidation, and the amended statement of claim and notice of hearing date were served at the registered office of the company and that it was, or should have been, aware of the hearing dates.

Just and equitable

[29] The Court is then required to consider whether it is just and equitable to terminate the liquidation. Ms Mao says there is a reasonable prospect that, given time, the company could obtain a fresh resource consent and continue with its plan to develop the Fairburn Road property. It would then be able to pay off its all creditors. She refers to an email from her sister, Ms Jialing Mao, who is a substantial creditor (for approximately $1 million) who has a second mortgage security. Ms Jialing Mao supports the application to set the liquidation order aside.

[30] Ms Mao also referred to money owned by Mangawhai to the company, which she suggested could be as much as $1.9 million. However, as Mr Grant deposed, a caveat lodged by Mr Lau on behalf of another entity, Niu Niu Bi Co Ltd claims an equitable interest in all loan agreements between Mangawhai and the company on the basis the company assigned such rights to Niu Niu Bi Co Ltd in late 2017. During the course of the hearing there was some further discussion between counsel as to the position of Mangawhai, Niu Niu Bi Co Ltd and the company's interest in the Mangawhai property. None of that was in direct evidence before the Court. To the extent we can take it into account, the discussion simply confirmed to the Court that the best parties to explore the issue and advance the interests of the creditors overall are the liquidators.

[31] The ultimate issue remains whether it is just and equitable to terminate the liquidation of the company. In some cases it has been suggested that the court will only exercise the discretion if:[4]

(a) all creditors have been paid in full or satisfactory provision has been made or they consent; and

(b) the liquidators' costs have been paid; and

(c) the shareholders, having given their consent, would be in no worse position than if the liquidation proceed to its conclusion.

[32] In *Canterbury Squid Company Ltd v South West Fishery Ltd* Gallen J also suggested public interest is relevant.[5]

[33] We agree with the observation of Cooper J in *Foundation Securities NZ Ltd v Direct Labour Services Ltd (in liq)* that the jurisdiction is a broadly expressed one, and the Court should not attempt to define an exclusive set of criteria.

[34] On the information before Associate Judge Andrew and before this Court it is plain the company has substantial creditors and remains insolvent. While some time after its liquidation the company paid the debt assigned to Inno 4, it still has significant other creditors, in particular the Auckland City Council.

[35] The liquidator's evidence is that the company has at least the following debts:

(a) $437,135.17 (including GST) owing to Auckland Council for costs of remedial works (the sum expected to increase);

(b) $127,000.00 owed to Auckland Council for costs pursuant to enforcement orders granted by the Environment Court;

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4 *Re Bell Block Lumber Ltd (in liquidation)* (1992) 6 NZCLC 67,690.

5 *Canterbury Squid Company Ltd v South West Fishery Ltd* HC Whanganui M31/93, 24 August 1993.

(c) $1,227.99 (including GST) owed to Auckland Council, being rates for 384 instalments at the property; and

(d) $485,507.34 owed to Best Capital Ltd, pursuant to a first registered mortgage on a Fairburn Road property.

[36] There were other creditors yet to file proofs of debt.

[37] In addition there is the debt to Ms Jialing Mao of approximately $1 million.

[38] The debt to Auckland Council arose because of the company's actions during the course of the development. The debt follows work undertaken by the Council to implement enforcement orders the Council obtained in the Environment Court against the company and costs.

Summary

[39] On the evidence before the Court, despite Mr Ponniah's valiant attempts to argue otherwise, the company is insolvent. Its liabilities exceed its assets. It has no ready ability to pay the debts it owes on demand. It is not enough to suggest that the debts owing to the Auckland City Council will be secured by statutory land charge. The debts are due and payable now and the company is not, on the information before the Court, able to pay that debt or its other debts.

[40] We are satisfied it would not be in the public interest to terminate the liquidation and enable the company to recommence trading. The Associate Judge was correct to conclude it would not be just and equitable to terminate the liquidation.

Result

[41] The appeal is dismissed.

Costs

[42] At the request of counsel for the liquidators, we reserve the issue of costs.

Solicitors:
Aaron Kashyap, Auckland for Appellant
Adam Stevenson Botterill, Auckland for Second Respondents