

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2013-409-001779
[2014] NZHC 165**

UNDER Section 284 of the Companies Act 1993

IN THE MATTER OF an application by Rhys James Cain and
Bruce Donald Gemmell, as Liquidators of
Splendide Structures Limited (In
Liquidation)

AND Rhys James Cain and Bruce Donald
Gemmell as Liquidators of Splendide
Structures Limited (In Liquidation)
Applicants

Hearing: 12 February 2014

Appearances: B M Russell and K J Graham for Applicants

Judgment: 14 February 2014

JUDGMENT OF DUNNINGHAM J

[1] This is an originating application by the liquidators of Splendide Structures Limited (Splendide) seeking orders and directions pursuant to s 284 of the Companies Act 1993 (the Act).

[2] In particular, the applicants seek orders:

- (a) confirming that a registered mortgage over land belonging to Splendide, has been surrendered to them by operation of s 305(9) of the Act, and

- (b) as a consequence, pursuant to s 99A of the Land Transfer Act 1952, the Registrar-General of Land can make such entries in the register to give full effect to that vesting, in order to facilitate transfer of the title following sale.

Background facts

[3] Splendide is the registered proprietor of a property at 163 Maces Road, Bromley, Christchurch (the Maces Road property) and there is a mortgage interest (instrument 8879815.2) registered on the title to David Young Limited (DYL). DYL is related to Splendide as both companies have the same director, Mr David Young.

[4] On 31 July 2013 the applicants were appointed joint and several liquidators of Splendide by order of the High Court, on the application of a creditor, Mr Barltrop, who owns the neighbouring property. Mr Barltrop obtained judgment in the District Court on 19 April 2013 in the sum of \$91,013.79 for damages sustained to the party wall between the two properties when Mr Young attempted to repair earthquake damage to the property at 163 Maces Road.

[5] Some 3,000 old tyres are stored on the Maces Road property which constitute a fire hazard creating risk to adjoining property owners. The building is uninsured because of the fire risk but there are insufficient funds in the liquidation to meet the significant cost of disposal of the tyres. There is an unpaid council rates demand issued to the mortgagee, which has been copied to the liquidators. In addition, proceedings have been commenced by the Christchurch City Council against Mr Young, and his company Goodman Investment Nominee Limited (which was the previous owner of the property), for failure to comply with a Notice to Fix the party wall, under the Building Act 2004.

[6] Since their appointment, the applicants have endeavoured to communicate with Mr David Young, as the sole director of DYL, in particular to request he provide further information in relation to the mortgage, as the Maces Road property is the only asset of value in the liquidation.

[7] The affidavit of Mr Cain, one of the liquidators, attaches copies of email correspondence, with Mr Young. It is sufficient to say of that correspondence that Mr Young has refused to cooperate in any way with the liquidators or provide them with any of the information they have requested.

[8] Eventually the liquidators made a formal request of Mr Young under s 261 of the Act, by email dated 1 August 2013, to see the underlying loan and security documents as between Splendide and DYL, supporting the registered mortgage. While the loan and security documents were eventually obtained from the solicitors who were engaged for DYL at the time of registering the mortgage, the liquidators remain unable to determine whether funds were in fact advanced to support the mortgage.

[9] Since 1 August, Mr Young has continued to correspond with the liquidators expressing his dissatisfaction over the lawfulness of the District Court judgment and the process of the liquidation generally, but none of those emails advanced the issue of realisation of the mortgagee security. By 14 October 2013 DYL had taken no steps to enter into possession of, or realise, the Maces Road property.

[10] By email on Monday 14 October the liquidators made a request as to whether they could effect service on the company by email and on Mr Young at his email address: youngdavid116@yahoo.co.nz. Mr Young responded on 16 October 2013 saying “no, I will not consent to your request”.

[11] On 15 October 2013 the liquidators issued a notice pursuant to s 305 of the Act and arranged for it to be served at 163 Maces Road, Christchurch, being the registered office of DYL.

[12] The notice required DYL to make a formal election in respect of its mortgage security over the property within 20 working days and explained that failure to comply with the notice would be taken to mean DYL has surrendered its security for the benefit of unsecured creditors of Splendide by operation s 305(9) of the Act. No response was received to the notice within the required 20 working days following service.

[13] After the 20 working day period expired the applicants' solicitors sent a letter to Mr Young by delivery to the registered office and by email. The letter advised DYL of the effect of the non-compliance with the notice and that DYL is taken as having surrendered its mortgage. It was recommended that DYL take legal advice in respect of this matter.

[14] Since that date DYL has taken no steps to seek the leave of the Court to withdraw this surrender as it is entitled to do under s 305(10) of the Act. Instead, in an email of 27 November 2013, Mr Young stated that he required service of documents at 163 Maces Road and upon himself personally or his nominated agent, and stated his view that "no document had been served". He also stated:

However, for the sake of your requirement under the notice that you supposedly served, the mortgagee does intend to realise the property at 163 Maces Road, Christchurch.

[15] As at 12 February 2014 no steps have been taken by DYL in terms of s 305(10) of the Act, although Mr Young has sent weekly emails to the liquidators asserting that "The damages claim against you and your associates are escalating" and that they must "... cancel that unlawful and corrupt liquidation, forthwith".

Directions and orders sought

[16] The orders sought by the applicants were as follows:

- (a) Directions as to service of this application;
- (b) An order that the mortgage instrument number 8879815.2 registered on the title of CB18F/425 in favour of David Young Limited (DYL) has been surrendered to the applicants by operation of section 305(9) of the Companies Act 1993;
- (c) An order that the mortgage has vested in the applicants pursuant to section 99A of the Land Transfer Act 1952;
- (d) A direction that the sale of the property at 163 Maces Road, Christchurch shall be effected by the liquidators advertising the

property for sale and appointing real estate agents for that purpose with a minimum marketing period of three weeks;

- (e) A direction that the sale proceeds shall be distributed by the liquidators in accordance with the order of priority set out in the Seventh Schedule of the Companies Act 1993;
- (f) That a sealed copy of these orders and directions is to be served by delivery to the registered office of DYL and by email to David Young at the email address youngdavid116@yahoo.co.nz.

[17] When this matter was called before me on 12 February 2014, the applicants clarified that the directions sought in respect of service were to dispense with the requirement to serve the application pursuant to r 7.46 of the High Court Rules.

[18] After discussion it was also proposed that:

- (a) order (c) be amended to read:
 - (c) an order that by virtue of s 305(9) of the Companies Act 1993 the mortgage has vested in the liquidators and s 99 of the Land Transfer Act 1952 applies.
- (b) That direction (d) be amended by adding the words:

“but no such steps shall be taken until 10 working days have elapsed from the date of service of these orders and directions.
- (c) A further order be made granting leave to DYL to apply to the High Court within 10 working days of the service of the orders to apply to set the orders aside.

Discussion

[19] It is clear from the history of this matter, which is fully set out in the affidavits filed in support of the application, that:

- (i) The Maces Road property is the only asset of value in the liquidation.

- (ii) DYL has failed to provide any details regarding the funds still outstanding pursuant to the mortgage (if any), despite repeated requests.
- (iii) The property is currently uninsured because of the significant fire risk created by the large number of tyres stored at the property.
- (iv) The neighbouring property owner Mr Barltrop is anxious to buy the property, in particular to enable him to complete repair work on the damaged party wall.
- (v) Mr Young, the sole director of DYL has not cooperated with the liquidators in order to allow realisation of the property and distribution of the proceeds of sale to the company's creditors.
- (vi) Mr Young appears to dispute the lawfulness of the steps taken by the liquidators although he has taken no formal steps to challenge either the order placing Splendide in liquidation or any subsequent steps in the liquidation process.

[20] In these circumstances it is understandable that the liquidators have opted to use the procedure set out in s 305 of the Act to require DYL to make an election in respect of the secured property so that the liquidation can be advanced, and also to seek the Court's authority to proceed with the next steps they propose to take in the liquidation as a consequence of the effect of s 305(9).

[21] Section 305(1) of the Act provides:

- (1) A secured creditor may-
 - (a) realise property subject to a charge, if entitled to do so; or
 - (b) value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance due, if any; or

- (c) surrender the charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

[22] Section 305(8) provides:

- (8) The liquidator may at any time, by notice in writing, require a secured creditor, within 20 working days after receipt of the notice, to-
 - (a) elect which of the powers referred to in subsection (1) the creditor wishes to exercise; and
 - (b) if the creditor elects to exercise the power referred to in paragraph (b) or paragraph (c) of that subsection, exercise the power within that period.

[23] A secured creditor referred to in s 305 includes a person who holds the benefit of a mortgage.¹

[24] In accordance with s 388 of the Act, service of other documents on a company (other than the document in any legal proceedings) may be carried out in accordance with s 387(1)(c) of the Act. Section 387(1)(c) provides that:

- (1) A document, including a writ, summons, notice or order, in any legal proceedings may be served on a company as follows: ...
 - (c) by leaving it at the company's registered office or address for service.

[25] The correct address for service is the registered office of DYL, which is at 163 Maces Road. Service of the notice has therefore been effected in accordance with the Act and is valid. As already discussed, the liquidators sought Mr Young's approval to effect service of the notice by email but he declined that request.

[26] Pursuant to s 305(8) of the Act, DYL had until 13 November 2013 to respond to the notice. No response was received and therefore s 305(9) of the Act applies. This provides:

¹ Section 2 of the Act.

- (9) A secured creditor on whom notice has been served under subsection (8) who fails to comply with the notice, is to be taken as having surrendered the charge to the liquidator under subsection (1)(c) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for the whole debt.

[27] As a result, the mortgage registered on the title in favour of DYL has been surrendered to the applicants.

Determination of application without notice

[28] While the originating application sought “directions as to service of this application”, it was clarified when this matter was called that the applicants sought directions dispensing with the need to serve the application on any party, meaning, in effect, it was to be dealt with as an application without notice.

[29] Pursuant to High Court Rule 7.46(3):

The Judge may determine if an application can be properly be dealt with without notice only if the Judge is satisfied that –

- (a) requiring the applicant to proceed on notice would cause undue delay or prejudice to the applicant; or
- (b) the application affects only the applicant; or
- (c) the application relates to a routine matter; or
- (d) an enactment expressly permits the application to be made without serving notice of the application; or
- (e) the interests of justice require the application to be determined without serving notice of the application.

[30] Mr Russell, for the applicants submitted that ground (a) applied because the building was currently uninsured and could not be insured until there were funds to deal with the fire hazard. There was some urgency to rectify this situation. Furthermore given the mortgagee’s lack of co-operation to date there could be no confidence that the mortgagee would assist in the realisation of the property in a timely way.

[31] He also suggested that ground (b) applied in that, as the application largely sought to declare the legal position reached by virtue of operation s 305 of the Act, the application could be said to affect only the applicant.

[32] Finally he said that ground (e) was relevant, because Mr Barltrop, the neighbour, who was prepared to purchase the property and deal with the party wall damage, insurance issues and fire risk, was adversely affected by the delay. On the other hand, the mortgagee had had ample opportunity to exercise his rights under the mortgage, and would not be prejudiced if the orders were made in the amended terms proposed, because it reserved to him the right to challenge the surrender of the security, albeit requiring him to do it in a timely way.

[33] Having considered these issues, I have determined that it is appropriate this application should proceed without notice. First, the orders are primarily sought to confirm the legal position as to the liquidators' rights which have arisen by operation of law and, in particular, the provisions of s 305.

[34] Importantly DYL retains rights under s 305(10) to seek to set the orders aside which it may choose to exercise on receipt of the orders. This right has already been drawn to DYL's attention, both in the notice itself and in subsequent correspondence with Mr Young, and it has taken no steps to date. I therefore consider it in the interests of justice to sanction the liquidators proceeding on the basis of s 305(9) being effective and putting the onus on DYL to take formal steps to challenge that in a timely way.

[35] I also consider it appropriate that the related directions and orders sought are made. They simply authorise the liquidators to take reasonable and sensible steps in the liquidation to realise property for the benefit of creditors of Splendide. If DYL can substantiate its status as a creditor, it will also be able to claim in the liquidation.

[36] Accordingly I direct and order as follows:

- (a) the originating application for directions pursuant to s 284 of the Companies Act 1993 dated 19 December 2013 be dealt with without notice, pursuant to High Court Rule 7.46;
- (b) the mortgage instrument number 8879815.2 registered on the title of CB18F/425 (the mortgage) in favour of David Young Limited (DYL) has been surrendered to the applicants by operation s 305(9) of the Companies Act 1993;
- (c) the mortgage has vested in the applicants pursuant to s 305(9) of the Companies Act 1993 and s 99 of the Land Transfer Act 1952 applies;
- (d) the sale of the property at 163 Maces Road, Christchurch shall be effected by the liquidators advertising the property for sale in appointing real estate agents for that purpose with a minimum marketing period of three weeks, but no such steps shall be taken until 10 working days have elapsed from the date of service of these orders and directions;
- (e) the sale proceeds shall be distributed by the liquidators in accordance with the order of priority set out in the seventh schedule of the Companies Act 1993;
- (f) a sealed copy of these orders and directions shall be served by delivery to the registered office of DYL and by email to David Young at the email address youngdavid116@yahoo.co.nz;
- (g) leave is reserved to DYL to apply to the High Court within 10 working days of the service of these orders to apply to set these orders aside.

Solicitors:
Lane Neave, Christchurch