IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2022-419-000145
[2023] NZHC 219

UNDER	Companies Act 1993
BETWEEN	ISLAND GRACE (FIJI) LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Plaintiff
AND	SATORI HOLDINGS LIMITED (IN INTERIM LIQUIDATION Defendant

Hearing:	23 and 30 November 2022
Appearances:	A S Olney and B E Marriner for Plaintiff L A O'Gorman KC for Defendant
Judgment:	17 February 2023
Reissued:	17 February 2023 at 4.55 pm

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by Associate Judge Andrew
on 17 February 2023 at 4.55 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date …….

[1] This judgment is being re-issued to formally appoint and record the names and details of the liquidators as set out in [119].

Introduction

[2] These are liquidation proceedings. They follow the appointment of interim liquidators in June 2022. Interim orders were granted because of a concern that the director of the defendant company, Mr Andrew Griffiths, was dissipating company assets.

[3] The defendant, Satori Holdings Ltd,[1] is the corporate trustee of Mr Griffiths' family trust.[2] It is a New Zealand-registered company and registered as a foreign company in Fiji.

[4] The plaintiff, Island Grace Fiji Ltd (in receivership and liquidation),[3] is also a New Zealand company. It is a corporate trustee holding the assets of the Island Grace joint venture.[4] The main asset of the IGJV was a Fijian resort known as "Six Senses Fiji".[5] Satori was a 24 per cent joint venture partner.

[5] IGFL says that Satori is deeply insolvent; it has substantial unpaid debts arising from a failure to make capital calls issued by the IGJV and to meet its share of an indemnity debt (FJD 6,166,710) for a Fijian Development Bank loan.[6]

[6] Satori has not opposed the substantive liquidation proceedings. Mr Griffiths, as a shareholder, has filed a notice of appearance opposing liquidation and a protest to jurisdiction. He says that the Fijian courts are the *forum conveniens*. He has also filed the following interlocutory applications:

(a) An application to set aside the appointment of interim liquidators, to restrain advertising and to stay the proceedings; and

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1 Satori.
2 Satori Family Trust.
3 IGFL.
4 IGJV.
5 The resort.
6 FDB.

(b) Two applications under the High Court Rules 2016 r 9.75 for examination of Mr Rees Logan (former administrator and current liquidator of IGFL) and to obtain documents from Sustainable Luxury Holdings (BVI) Ltd (the manager of the resort).

[7] In response to the protest to jurisdiction and the interlocutory applications, IGFL says that the proceedings remain unopposed; Mr Griffiths lacks standing, as a shareholder, to protest the jurisdiction. It also says that Mr Griffiths cannot appear on the substantive liquidation application without special leave of the Court and that Mr Griffiths has failed to establish on the evidence a proper basis for the grant of special leave. There is no evidence, IGFL claims, establishing an arguable case that Satori is in fact solvent.

[8] The critical issues I must determine are:

(a) Does Mr Griffiths have standing to protest the jurisdiction and to bring the interlocutory applications?

(b) Should special leave be granted to allow him to file a statement of defence out of time, and/or to seek a stay of proceedings and an order restraining advertising?

(c) Is Satori unable to pay its debts?

(d) Is Fiji *forum conveniens*?

(e) Is it just and equitable to make orders for liquidation?

[9] In accordance with the directions of Associate Judge Gardiner of 6 September 2022 and 10 November 2022, Mr Griffiths' interlocutory applications, his protest to jurisdiction and his opposition to the substantive liquidation proceedings were all heard together on 23 and 30 November 2022. Mr Griffiths filed substantial evidence and submissions in opposition to the liquidation application. He was heard in

opposition to that application, and I have taken into account and considered his evidence and submissions in coming to my conclusions.[7]

Factual background

The Island Grace joint venture

[10] As noted, Satori is a limited liability company incorporated in New Zealand. Mr Griffiths, resident in New Zealand, is its sole director and shareholder.

[11] The IGJV is an unincorporated joint venture governed by the Amended and Restated Joint Venture Agreement dated 14 March 2019.[8]

[12] The affairs of the IGJV were conducted through its Management Committee pursuant to the terms of the ARJVA and its assets were held by IGFL as trustees. IGFL is also a New Zealand company and is registered in Fiji as a foreign company.

[13] The joint venture partners in the IGJV[9] and their respective participating interests are:

(a) Sequitur Hotels Pty Ltd[10] – 52 per cent;

(b) Satori (as trustee for the Satori Family Trust) – 24 per cent;

(c) NJA Resorts Pty Ltd[11] – 16.75 per cent;

(d) Sustainable Luxury Holdings (BVI) Ltd[12] – 7.25 per cent.

[14] As noted, the main asset of the IGJV was the resort known as "Six Senses Fiji". The resort is part of a larger development planned to comprise three marinas and up

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7 See [11] of the minute of Associate Judge Gardiner dated 10 November 2022 where it is noted that Mr Griffiths has filed a notice of appearance indicating his opposition to the substantive application (High Court Rules 2016, r 31.18).
8 ARJVA.
9 IGJV parties.
10 Sequitur Hotels.
11 NJA.
12 SLH.

to 60 private residences, to be undertaken by another unincorporated joint venture known as Vunabaka Bay joint venture,[13] in which Satori is also a joint venture party.

[15] The resort is located on land subleased from Vunabaka Bay Fiji Ltd.[14] There are three separate subleases, each with a 99-year term.

[16] The resort opened in April 2018. Shortly afterwards, Sequitur Hotels completed its FJD 20m investment in the IGJV, to which it had committed to in December 2017. The debt and security arrangements in place were registered in New Zealand and Fiji.

Funding for the IGJV between November 2019 and November 2021

[17] In late 2019, in response to financial pressures and to meet its funding requirements, the Management Committee of the IGJV resolved to make a series of 10 capital calls.

[18] Between November 2019 and June 2020, there were four capital calls. Between July 2020 and January 2021, there were a further six capital calls.

[19] The resort closed in March 2020, following the COVID-19 pandemic. It has since re-opened.

[20] By January 2021, Sequitur Hotels and SLH had met their respective shares of all 10 capital calls and had contributed to the capital funding of FJD 6,525,740 and FJD 909,839 respectively. NJA failed to meet its share of any of the capital calls and its funding default was a total of FJD 2,102,041. Satori failed to meet its share of the last six capital calls and its funding default was a total of FJD 2,048,040.

[21] In accordance with the ARJVA, NJA and Satori lost the right to vote on joint venture matters and their participating shares were not counted for the purpose of calculating whether voting thresholds for passing resolutions were satisfied.

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13 VBJV.
14 VBFL.

Insolvency of the IGJV

[22] On 21 December 2021, the directors of IGFL unanimously resolved that the company was insolvent or likely to become insolvent and appointed administrators.[15]

[23] On 23 December 2021, Mr Strawbridge and Mr McGrath[16] were appointed as receivers of IGFL by Sequitur Hotels pursuant to a security it held.

[24] On 16 February 2022, the receivers were appointed under a second appointment as receivers of IGFL, this time by Sequitur Capital Pty Ltd pursuant to a security it held.

[25] IGFL's main asset was the resort. The receivers engaged a specialist sales agent to market the resort for sale. Following a global marketing campaign, the resort was sold to the highest bidder (Sequitur Resorts Pty Ltd) on 2 May 2022 for FJD 24m.

[26] After sale of the resort FJD 29,768,285 remained owing to creditors.

[27] Pursuant to cl 4.3 of the ARJVA, each of the IGJV parties are severally liable to IGFL for their pro-rata share of that FJD 29,768,285 shortfall. Satori's share of that amount (24 per cent) is at least FJD 6,166,710.

[28] On 5 May 2022, liquidators were appointed to IGFL.

Expert determination

[29] There was a dispute as to the consequence of Satori's failure to meet its share of the capital calls at issue. This included whether Satori's failure resulted in a debt owed to IGFL.

[30] Satori referred the dispute to expert determination pursuant to the dispute resolution provisions of the ARJVA.

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15 On 20 December 2021, Satori sought an interim injunction (on a Pickwick basis) preventing the appointment of an administrator. See *Satori Holdings Ltd v Island Grace (Fiji) Ltd* [2021] NZHC 3574.

16 Receivers.

[31] On 1 April 2022, the Hon Paul Heath KC issued his expert determination. He determined, amongst other things, that Satori's failure to pay its share of the capital calls (a total of FJD 2,048,040) was an outstanding debt owed by Satori to IGFL.

[32] On 13 May 2022, Mr Heath KC issued his costs decision in which he awarded costs against Satori and in favour of Sequitur Hotels in the sum of NZD $73,000.

[33] Clause 13.3 of the ARJVA provides that the expert determination and the costs determination are final and binding on the IGJV partners, which include Satori.

[34] In April 2022, IGFL served a statutory demand on Satori in Fiji in respect of the capital call debt in the sum of FJD 2,048,040. In May 2022, Satori applied to the High Court in Fiji to set aside the demand. IGFL subsequently withdrew the statutory demand.

[35] In April 2022, IGFL served a statutory demand on Satori in New Zealand in respect of the capital call debt. On 10 May 2022, Satori applied to have that statutory demand set aside.[17] Those proceedings are on hold pending the outcome of these proceedings.

[36] In May 2022, Sequitur Hotels served a statutory demand on Satori in New Zealand in respect of the costs debt. On 27 May 2022, Satori applied to have that statutory demand set aside.[18] Those proceedings are also on hold pending the outcome of these proceedings.

Interim liquidation

[37] On 21 June 2022, Campbell J granted an application by IGFL appointing interim liquidators to Satori.[19]

[38] In an updated report to the Court dated 21 November 2022, the interim liquidators advise as to the following assets and liabilities of Satori:

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17 CIV-2022-404-835.
18 CIV-2022-404-977.
19 *Island Grace (Fiji) Limited (in rec and liq) v Satori Holdings Ltd* HC Hamilton CIV-2022-419-145, 21 June 2022 (Minute of Campbell J).

Assets

(i) The VBJV interest, namely a 31.66 per cent shareholding in the VBJV;[20]

(ii) The IGJV interest;

(iii) An ANZ bank account with a residual balance of FJD 96.10 (that account remains frozen).

Liabilities

(i) Capital calls owed of FJD 2,048,040;

(ii) Costs award of the Hon Paul Heath KC of NZD $73,000;

(iii) Indemnity claims of FJD 6,166,710.

Related Fiji proceedings

[39] In 2019, Sequitur Hotels Pty Ltd and Sequitur Capital Pty Ltd filed proceedings against Satori, Mr Griffiths and others in the High Court of Fiji. They allege, amongst other things, misrepresentation, misleading and deceptive conduct in trade and breach of contractual warranties in relation to the formation of the IGJV.[21] An amended statement of claim was filed in July 2022. The proceedings are ongoing.

[40] In June 2022, Satori filed proceedings in the High Court in Fiji, challenging the validity of the appointment of Mr Strawbridge and Mr McGrath as receivers of IGFL. It is contended that the receivers, Mr Strawbridge and Mr McGrath, are not licenced liquidators according to the laws of Fiji and accordingly were and remain unable to be appointed receivers of IGFL. Those proceedings were filed prior to the appointment of the interim liquidators for Satori but served subsequent to the grant of those interim orders. The proceedings remain on foot and there is a dispute as to the legal representation of Satori.[22]

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20 See [14] above.

21 See *Sequitur Hotels Pty Ltd v Satori Holdings Pte Ltd* [2020] FJHC 276; HBC270/2019, 3 April 2020, where Stuart J discharged ex parte freezing and Anton Piller orders on the basis of material non-disclosure by the plaintiffs. See also *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032 at [19] and [20].

22 *Satori Holdings Ltd v Strawbridge* [2022] FJHC 779; HBE30/2022, 16 December 2022.

[41] There are also matrimonial proceedings between Mr and Mrs Griffiths in the family division of the Magistrates Court in Fiji. On 1 April 2022, the resident Magistrate made an order by consent that Mrs Morgen Griffiths, the applicant, was to become the new party (through an entity nominated by her) to the VBJV and the shareholder of Vunabaka Bay Fiji Ltd in the same proportions as held by Satori (31.66 per cent).

[42] The receivers of IGFL, Mr Strawbridge and Mr McGrath, subsequently applied to the family division of the Magistrates Court to stay the consent orders. Stay orders have been granted. At a hearing on 31 May 2022, the Court advised that it had written directly to Mr and Mrs Griffiths seeking information as to whether their marriage had ended, as represented to the Court.

Relevant legal principles

(a) – Standing

[43] Rule 31.16 of the High Court Rules reads:

> **Statement of defence**
>
> (1) Rule 5.47 does not apply to a proceeding commenced by the filing of a statement of claim under rule 31.3.
>
> (2) A person, being the defendant company or a creditor or shareholder of that company, who intends to defend a proceeding commenced by a statement of claim under rule 31.3 must file a statement of defence in the registry of the court named in the notice of proceeding.
>
> (3) A person who files a statement of defence must serve a copy of that statement of defence on –
>
> (a) the plaintiff; and
>
> (b) any other person who, when the statement of defence is filed, has filed a statement of defence in the proceeding.
>
> (4) If the defendant company has filed a statement of defence, a statement of defence filed by a creditor or shareholder of that company must state specifically any grounds of opposition that are additional to those appearing in the company's statement of defence.

[44] Rule 31.18 of the High Court Rules reads:

Appearance

A person (other than the defendant company) who intends to appear on the hearing of the proceedings may, without filing a statement of defence, file an appearance in form C 9 –

(a) stating that the person intends to appear; and

(b) indicating whether that person supports or opposes the application to put the company into liquidation.

[45] Rule 31.20 of the High Court Rules reads:

Effect of failure to file statement of defence or appearance

If a person who is entitled to file a statement of defence or an appearance in a proceeding commenced by the filing of a statement of claim under r 31.3 fails to file a statement of defence or an appearance within the time prescribed, that person must not, without an order for extension of time granted on application made under r 31.22 or the special leave of the court, be allowed to appear at the hearing of the proceeding.

[46] Rule 31.22 of the High Court Rules reads:

Interlocutory applications

(1) When a proceeding is commenced under rule 31.3, an interlocutory application (unless made with the leave of the court) may not be made to the court before the date of hearing specified in the notice of proceeding served with that statement of claim unless it is –

(a) an application for an extension or abridgement of time; or

(b) an application under rule 1.9, 31.6(2), or 31.11; or

(c) an application for the appointment of an interim liquidator; or

(d) an application for directions; or

(e) an application to excuse non-compliance with any rule in this Part.

(2) When a statement of defence is filed in a proceeding commenced under rule 31.3 and the hearing of that proceeding is adjourned for the allocation of a hearing date on a defended basis, these rules apply as if the proceeding had been commenced by a statement of claim filed under Part 5 and not under rule 31.3.

(3) The inherent jurisdiction of the court is not limited by this rule.

(b) – Liquidation

[47] Under ss 241(4)(a) and (d) of the Companies Act 1993 the Court may appoint a liquidator if it is satisfied that:

(a) The company is unable to pay its debts; or

(d) It is just and equitable that the company be put into liquidation.

[48] In *Yan v Mainzeal Property and Construction Ltd (in rec and liq)*, the Court of Appeal made the following observations:[23]

> [61] It has long been established that, as a general rule, an order to put a company into liquidation will not be made where the application is founded upon a debt that is genuinely disputed. To apply to wind up a company in such circumstances is regarded as an abuse of the court's process: *Bateman Television Ltd (in liq) v Coleridge Finance Co Ltd*. In such cases, the court has an inherent jurisdiction to prevent such an abuse of process. But the court also has power to consider disputed debts in the context of an opposed application for liquidation or upon applications for orders restraining advertising and staying proceedings. The relevant principles were recently summarised by Associate Judge Faire (now Faire J) in *South Waikato Precision Engineering Ltd v Ahu Developments Ltd* in these terms:
>
> (a) A winding up order will not be made where there is a genuine and substantial dispute as to the existence of a debt such that it would be an abuse of the process of the Court to order a winding up;
>
> (b) In such circumstances, the dispute, if genuine and substantially disputed, should be resolved through action commenced in the ordinary way and not in the Companies Court;
>
> (c) The assessment of whether there is a genuine and substantial dispute is made on the material before the Court at the time and not on the hypothesis that some other material, which has not been produced might, nonetheless be available;
>
> (d) The governing consideration is whether proceeding with an application savours of unfairness or undue pressure.

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[23] *Yan v Mainzeal Property and Construction Ltd (in rec and liq)* [2014] NZCA 190 at [61] (footnotes omitted).

Analysis and decision

Issue (a) – Standing of Mr Griffiths

[49] It is clear from the notice of appearance and protest to jurisdiction, as well as affidavits and other documents filed, that Mr Griffiths seeks to appear and be heard as a contributory. As he says in his notice of appearance, he is a shareholder holding 100 per cent of shares in Satori.

[50] Mr Griffiths has clearly been on notice since IGFL's notice of opposition of 22 July 2022 that IGFL's position is that he has no standing. Mr Griffiths has made a clear choice not to file a statement of defence. He could have chosen that option under r 31.16(2) of the High Court Rules. I also accept that as Satori's sole director he could have given instructions on behalf of Satori to file a statement of defence.[24] Again, he did not do so, despite being legally represented throughout.

[51] The issue of standing, therefore, arises in the context where the Court is being asked by Mr Griffiths, as a shareholder, to decline jurisdiction, set aside the appointment of interim liquidators and to stay the proceedings. He also opposes the substantive liquidation application without having filed a statement of defence and been added as a defendant.

[52] IGFL submits that the issue of whether Mr Griffiths has standing to be heard on these matters is to be determined by reference to two questions:[25]

(a) As a matter of interpreting the relevant statutory provisions or rules of the Court, is Mr Griffiths, as a shareholder, within the category of persons who may seek such orders?

(b) Has Mr Griffiths established that he is a proper person to seek such orders (i.e. does he have a proper interest)?

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[24] Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [20.12]. The learned authors suggest that the approach taken by the English Courts, where powers of directors are terminated upon appointment of a provisional liquidator aside from the power to oppose the liquidation application, must also apply to the appointment of interim liquidators under the New Zealand Act.

[25] *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 at 1611.

[53] IGFL contends that the same two-step analysis is applicable to determining whether Mr Griffiths has standing to be heard in opposition to IGFL's substantive liquidation application. It says that "a proper person" does not mean a person with an interest in the outcome of an application or a person that may be affected by the outcome. A person with a proper interest means a person with a legitimate interest in the relief sought (in this case, appointment of liquidators to Satori).[26]

[54] IGFL places particular emphasis on the English jurisprudence and the principle that a contributory of a company must establish that the company is solvent before it is entitled to oppose a petition for liquidation.[27]

[55] I intend to confine my analysis of the standing issue to the question of interpreting the relevant High Court Rules (Part 31) to determine whether Mr Griffiths, as a shareholder, is within the category of persons who may seek the orders sought. It is not necessary for me to address the issue of whether under New Zealand law a contributory must establish solvency as a matter of standing, and whether it might create an impermissible gloss on the New Zealand High Court Rules (or otherwise). I heard very little argument on that issue. Having said that, as analysed below, the question of solvency does arise as a factor to be considered in relation to the grant of leave that I must determine.

[56] In applying the relevant provisions of Part 31 to the High Court Rules, I proceed on the basis that Mr Griffiths is not a defendant. He has not filed a statement of defence and has not been added as a defendant to the proceedings. In my view, if Mr Griffiths wishes to defend the substantive liquidation proceedings, he needs to file a statement of defence. That is clear from r 31.16(2) which says that a creditor or shareholder "must" file a statement of defence.

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26 At 1611.

27 Andrew Keay *McPherson & Keay The Law of Company Liquidation* (5th ed, Sweet & Maxwell, 2021) at [5-015]; Edward Bailey and Hugo Groves *Corporate Insolvency Law and Practice* (5th ed, LexisNexis, 2017) at [25.1], n 2; *Deloitte & Touche AG v Johnson*, above n 25, at 1611; *Re Corbenstoke Ltd (No 2)* [1990] BCLC 60. See also *Re CBL Insurance Ltd (in liq)* [2019] NZHC 2291 at [19]–[23], where Courtney J cited both *Corbenstoke* and *Deloitte* in the context of a costs application by a shareholder against the interim liquidators of an insolvent company. Her Honour refused the shareholder any costs because it "had no legitimate interest in the outcome of the proceeding".

[57] As the commentary in *McGechan on Procedure* makes clear, shareholders have an independent right to file a defence to protect their position.[28] The learned authors state: [29]

> Contributories or shareholders who file a statement of defence will be added as defendants and thus made parties to the proceedings. They can then participate fully in the proceedings. That procedure applies where a contributory or shareholder files, as Mr Griffiths did here, an appearance under r 31.18 and indicating an opposition to the application. Once joined as the defendant, the contributory or shareholder is then required to file a statement of defence.

[58] Despite not being a defendant, Mr Griffiths nevertheless seeks to oppose the liquidation proceedings and has filed a r 5.49 protest to jurisdiction. However, that rule refers specifically to defendants and makes no provision for a shareholder/contributory or creditor to appear in protest to jurisdiction. Furthermore, form C9, which is the form required for the filing of a notice of appearance under r 31.18, does not provide for a shareholder to protest to jurisdiction of the court. In my view, because Mr Griffiths is not a defendant, he is not within the category of persons who may protest to jurisdiction of the Court to hear and determine IGFL's substantive liquidation application. It makes good sense that only the principal parties in a liquidation proceeding can protest jurisdiction under r 5.49 – and in particular, the defendant company whose status and assets are at issue.

[59] In my view, Mr Griffiths, in seeking to defend the proceedings and raise *forum conveniens* issues, should have filed a statement of defence under r 31.16(2). He should then have been added as a defendant party to the proceedings. In that capacity he could have filed *forum conveniens* issues.

[60] There is no evidence before the Court as to why Mr Griffiths, legally represented throughout, has chosen not to file a statement of defence. I do not accept the explanation that to have filed a statement of defence would have given rise to a submission to jurisdiction and therefore prejudice on his behalf. The filing of a statement of defence would not preclude a shareholder such as Mr Griffiths from

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28 Robert Osborne (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR31.16.01].

29 At [HR31.16.04].

raising *forum conveniens* arguments. Equally, the procedure set out in r 5.49 is not mandatory. A defendant may, instead, file a statement of defence that alerts the plaintiff to the defendant's objection to jurisdiction, rather than filing an appearance under r 5.49.[30] Furthermore, the Court has an inherent jurisdiction to stay proceedings on the grounds of *forum conveniens*.[31]

[61] Regardless of his failure to file a statement of defence, I have considered, and as analysed below, Mr Griffiths' *forum conveniens* argument. That is because of the way these proceedings have evolved and the directions made.

[62] In respect of Mr Griffiths' interlocutory applications, r 31.11 provides that a shareholder may, with the leave of the Court, apply to restrain advertising and for a stay of liquidation proceedings. The requirement for leave is a safeguard against frivolous applications by shareholders. Having not filed a statement of defence within time, Mr Griffiths also needs to leave to file a statement of defence if he wishes to defend the proceedings.[32]

Issue (b) – Should special leave be granted to allow for the filing of the statement of defence and to apply for orders staying proceedings, restraining advertising and rescinding interim appointments?

[63] No formal application has been made by Mr Griffiths to file a statement of defence out of time. However, I indicated at the hearing that I would address that issue.

[64] The principles to apply in determining whether to grant leave to file a statement of defence out of time and whether to grant leave to bring the various interlocutory applications are similar and inter-related. In *Auckland City Council v Stonne Ltd*, this Court held, in determining whether to grant leave to file a statement of defence out of time, that there were three matters to consider:[33]

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30 *Kim v Oh* [2020] NZHC 2985 at [18].

31 *Crane Accessories Ltd v Lim Swee Hee* [1989] 1 NZLR 221 (HC); *Ghose v Ghose* (1997) 12 PRNZ 149 (HC).

32 High Court Rules 2016, r 31.20.

33 *Auckland City Council v Stonne Ltd* HC Auckland CIV-2007-404-4208, 30 November 2007 at [21]. Associate Judge Doogue stated that he was guided by the judgment of Paterson J in *Fresh Cut Flower Wholesalers Ltd v The Living and Giving Gift Co Ltd* (2001) 60 PRNZ 173 (HC) at 175.

(a) Is there an arguable basis that the defendant is not liable for its debts?

(b) Is the defendant solvent?

(c) Has the defendant advanced a reasonable explanation for its failure to file and serve its statement of defence?

[65] The principles to apply in determining whether to grant leave under r 31.11 (power to stay liquidation proceedings and restrain advertising) were summarised in *Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd*:[34]

(a) A winding up order will not be made where there was a genuine and substantial dispute into the existence of a debt;

(b) If the debt is genuinely and substantially disputed it should be resolved through action commenced in the ordinary way and not in the Companies Court; and

(c) The governing consideration is where the proceeding with an application savours of either fairness or undue pressure.

[66] As to whether Mr Griffiths has advanced a reasonable explanation for a failure to file and serve a statement of defence, I am prepared to give him the benefit of the doubt, for the purpose of considering whether leave should be granted, that there was a concern about his submission to jurisdiction. That is not the decisive criteria in any event.

[67] Because of the way Mr Griffiths has framed his case, I propose to address the twin elements of solvency and liability as part of my consideration of the substantive merits of IGL's liquidation application. As noted above, the substantive application and the interlocutory applications were all heard together. The substantive liquidation

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[34] *Commissioner of Inland Revenue v Ron West Motors (Otahuhu) Ltd* (2003) 21 NZTC at 18,281 (HC) at [15]. See also *Commissioner of Inland Revenue v K J Cummings Ltd* (2003) 21 NZTC 18,277 (HC).

application engages the same elements of solvency and whether Satori is liable for the debts.[35]

[68] The opposition by Mr Griffiths, as shareholder, is wide-ranging. This has given rise to an unnecessary degree of complexity. I will focus on the key points. In his notice of appearance, Mr Griffiths says that the plaintiff, IGFL, is not a creditor and he disputes the debts on which the application is brought. He also says:

(a) There is an extant proceeding in the Fijian courts, as yet undetermined, relating to the validity of the appointment of the receivers who have brought the liquidation proceedings. In those proceedings, orders are sought to set aside the transaction under which the joint venture assets of IGFL were acquired by Mr Fell and his interests through Sequitur Hotels in conjunction with the receivers;

(b) Upon proper accounting being undertaken of the assets of the IGJV, of which IGFL was a bare trustee, IGFL will be a debtor or hold assets on behalf of Satori;

(c) The joint venture's sole business operations were based in Fiji and it was not conducting business in New Zealand. IGFL is a company that operates in Fiji and is registered there as an overseas company. So, too, is Satori. It is the Fijian courts that have jurisdiction over the business operations and assets held in Fiji by those overseas companies carrying on business there.

Issue (c) – Is Satori unable to pay its debts?

[69] The debts of Satori pleaded in the statement of claim are:

(a) Capital call debt of FJD 2,048,040 owed to IGFL confirmed, IGFL says, by the final and binding determination of the Hon Paul Heath KC;

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[35] I also note that in a minute of 10 November 2022, Associate Judge Gardiner noted that having filed a notice of appearance, Mr Griffiths was entitled to participate in the proceedings as a defendant.

(b) Costs debt of NZD $73,000 owed to Sequitur Hotels Pty Ltd confirmed, IGFL says, by the final and binding costs determination of the Hon Paul Heath KC; and

(c) The initial indemnity debt of FJD 6,166,710 owed to IGFL.

[70] IGFL says that these debts arise under the ARJVA or, in the case of the costs debt, out of the dispute resolution process initiated by Satori under the ARJVA.

[71] IGFL does not rely upon the statutory presumption of insolvency in s 287 of the Companies Act 1993. It accepts that the statutory demands relating to the capital call debt and the costs debt are the subject of proceedings that remain on hold. It also accepts that a statutory demand served in Fiji in relation to the capital call debt was withdrawn after Satori applied to set it aside.[36]

[72] Ms O'Gorman KC's principal submission on behalf of Mr Griffiths was that on a proper accounting between the plaintiff and the defendant there is no reliable basis for concluding that any debt is owed by Satori or that Satori is unable to pay its debts as they fall due. That contention is based in a large part on the allegation that the sale of the resort was an unlawful/improper sale by the receivers to a related party at a "gross under-value".[37]

Under-value sale

[73] Ms O'Gorman submitted that the marketing process for the sale of the resort was exceedingly short. She also contended that the 10-year projections and the forecasts bookings information were missing from the due diligence data room. That is said to be an explanation as to why the valuations obtained were less than the market value for which Mr Griffiths contends.

[74] However, there is no probative evidence to support those assertions and they are expressly contradicted by the expert evidence of IGFL.

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[36] See [34], [35] and [36] above.

[37] In his written submissions, Mr Griffiths contends at 2.13 that there was a substantial shortfall in the price paid for the resort.

[75] In his affidavit, Mr Strawbridge, one of the receivers of IGFL and a very experienced insolvency practitioner in both New Zealand and Australia, provides a comprehensive account of the receivership and sale of the resort. This involved the appointment of Jones Lang Lasalle Hotels & Hospitality,[38] to market and sell the resort, a global campaign, and the selection of the party that provided the highest offer (i.e. approximately 15 per cent higher than the second-highest offer received). Mr Strawbridge notes that the sale price of FJD 24m represented a significant premium to the most recent valuation of the resort. That valuation was obtained by Fiji Development Bank,[39] then the first-ranking secured lender to IGFL.

[76] Mr Strawbridge says that the sale of the resort was carried out in accordance with normal market practice for a receivership sale.

[77] Mr Strawbridge further notes that FDB advised the directors of IGFL in July 2021 that it intended to engage a registered Fijian valuer to carry out a fresh valuation of the resort. A market valuation of the resort was then obtained from Lomara Associates. The valuation was in the range of FJD 18m – FJD 21m. The sale price achieved for the resort represented a premium of 33.3 percent over the lower end of that range, 23.1 per cent over the mid-point of that range and 14.3 per cent over the high end of that range.

[78] Mr Strawbridge also directly addresses the issue of the data room for the due diligence process. He notes that 24 parties signed non-disclosure agreements to access the online data room. Through the data room those parties were given access to confidential information and had the ability to ask questions and to request further information. He notes that all bidders had access to the same information. He also says that the online data room contained information relevant to potential purchasers of the resort, including 10-year projections, the 2020 budget and a forecast rooms revenue report prepared by the operator.

[79] Mr Griffiths makes some serious allegations against experienced and independent receivers. He says in essence that they have breached their obligation to

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38 JLL.
39 FDB.

obtain the best price reasonably obtainable. However, as noted, there is no evidence to support that assertion and, in particular, no expert evidence. The complaints about the data room are speculative. In the circumstances here, the Court could reasonably have expected some expert evidence given the serious allegations and amount of money at stake.

[80] I note that in the Fiji proceedings against Mr Strawbridge and the other receiver (i.e. challenging their appointment) that although orders are sought to set aside the transaction on which the joint venture assets of IGFL were acquired, the purchasers of the assets, namely interests associated with Mr Fell, have not been named as parties. I also note that there is no extant legal challenge to the second appointment of the receivers of IGFL by Sequitur Capital, pursuant to the security it held following the acquisition by it from FDB of the debt owed to FDB by IGFL. Neither of those factors is decisive in itself, but they are of relevance in assessing the overall critical question of whether Mr Griffiths has established an arguable basis that he has a defence to the liquidation proceedings and/or a basis for a stay pending the outcome of related litigation.

Allegations of breach of good faith

[81] There are further weaknesses with the related allegations that Mr Griffiths makes. He alleges that Sequitur Hotels and SLH, both parties to the IGJV (and who both voted in favour of the capital call resolutions), combined to plan to ultimately buy the resort at an under-value. However, the basis for the fiduciary claim appears to be tenuous. Ms O'Gorman relies on cl 2.1 of the joint venture agreement for the submission that it imposes an obligation to maximise the value of the joint venture. However, cl 2.1 does not impose such an obligation. Furthermore, cl 8.1 states that nothing in the agreement is to create a partnership or make joint venture parties responsible for the acts of the others. The indemnity that each party gives to the other is outlined in detail in cl 9.1, however it makes no reference to fiduciary duties.

[82] Furthermore, and importantly, these serious allegations are made by Mr Griffiths on behalf of Satori, the party who failed to meet its most fundamental obligation, namely to provide funding – and the allegation is made in respect of two

separate joint venture partners, one of whom is an international corporate, who funded the resort to the tune of some $10m for a period of over two years. Beyond the mere assertions, there is little probative evidence to support these serious allegations.

[83] Having said that, I accept that I cannot make any informed assessment of the merits of these potential claims based on untested affidavit evidence. Nevertheless, these claims/allegations are at best a potential asset of Satori. I agree with the submission of Mr Olney that if there is merit to these claims and a proper economic basis for prosecuting them then the liquidators are best placed to make the relevant assessments and decisions.[40]

[84] I further observe that even if relief were granted by a court setting aside the sale to Sequitur, it is not at all obvious that Satori would be better off. IGFL would still be in liquidation and would still have some FJD 56,000,000[41] in overdue liabilities, including to its secured senior lender, Sequitur Capital, and the IGJV parties, including Satori, would still be liable under their indemnification of IGFL.

Binding determination of Satori's liability?

[85] Ms O'Gorman submitted that I should not regard Mr Heath KC's determinations as a final and binding determination that there was a debt owing by Satori. It was contended that Mr Heath KC had left some logically prior issues undetermined. However, I have some difficulty in understanding that submission; it overlooks the way in which the dispute between the parties was raised and the principal reason why Satori referred the dispute to expert determination in the first instance.

[86] In his determination, Mr Heath KC recorded Satori's position as follows:

> The consequence of a JV partner not meeting a capital call was to have its proportionate shares diluted in accordance with the agreement. Neither Satori nor NJA (the JV parties who have not met the capital calls) has an ongoing

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40 See *Re Latreefers Inc, Stocznia Gdanska SA v Latreefers Inc* [1999] 1 BCLC 271 at 283; *Ebbvale Ltd v Hosking* [2013] UKPC 1. See also *Cummins v Body Corporate* [2021] 3 NZLR 17 at [63].

41 This includes FJD 49,000,000 when the receivers were appointed, plus some FJD 7,000,000 in re-opening costs incurred.

> obligation to pay the calls that they have not met. There is nothing for the defaulters to pay.[42]

[87] Despite Satori's position, Mr Heath KC concluded that the agreement imposed an obligation on the JV partners to meet their pro rata share of capital calls. He also concluded that a failure by a JV partner to meet its pro rata share is an event of default. In this case therefore, there was an event of default.

[88] I accept that not all matters in dispute between the parties were resolved by Mr Heath KC. In particular, he did not address the question of whether Sequitur, in bad faith, instituted a capital call process designed to enable it to control the governance and management of the JV. He did nevertheless address the critical issue of default and concluded that Satori and NJA continue to be in default under the agreement. In any event, it does not automatically follow from the decision of Mr Heath KC not to address all outstanding issues that there is an arguable case that Satori is not liable for the capital call debt or that there is any merit to the allegation against Sequitur of bad faith.

[89] Furthermore, the capital call debt is just one of a significant number of debts that the plaintiff, IGFL, relies upon.

[90] As I have noted above, Mr Griffiths takes issue with a wide range of actions and decisions taken by IGFL. This includes an allegation that IGFL is not entitled to pursue the indemnity claim for FJD 6,166,710 pursuant to cl 4.3 of the ARJVA. Again, Mr Griffiths seeks to put at issue an interpretation of the ARJVA.

[91] These issues are integrally linked with the broader contention made by Mr Griffiths that upon a proper accounting being undertaken of the assets of the IGJV, Satori will not be a debtor.

[92] In my view, the claims made by Mr Griffiths about the indemnity debt, and in particular the dispute about whether the plaintiff is entitled to enforce the indemnity provision under cl 4.3, is part of a pattern of ever-widening claims made in an attempt to defeat the liquidation application. This appears to be an evolving pattern.

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[42] Determination of Hon Paul Heath KC dated 1 April 2022, at [13(a)] and [13(b)].

[93] It is of course not enough for Mr Griffiths to make bare allegations; Mr Griffiths needs to demonstrate there is some substance or arguable merit to such contentions. He has not done so.

Conclusion – Satori's insolvency

[94] It is clear on the evidence before me that Satori is deeply insolvent. That is apparent from the recent report of the interim liquidators.

[95] The evidence before the Court is that Satori has no assets of any material value. Mr Griffiths has elected not to provide any evidence to the contrary. IGFL has established insolvency on both a balance-sheet basis and a cash-flow basis. I accept that Satori is not a trading company.

Issue (d) – Jurisdiction/forum conveniens

[96] I reject the contention of Mr Griffiths that this Court lacks jurisdiction to make the substantive liquidation orders sought.

[97] I accept that jurisdiction is a separate issue from whether there are relevant legal proceedings before the courts in Fiji which ought to be determined before this Court should proceed and make any substantive liquidation orders. The focus of MS O'Gorman's submissions at the hearing was on the latter.

[98] Satori is incorporated in New Zealand, is registered under Part 2 of the Companies Act 1993 and is a company for the purposes of that Act. This proceeding is of course an application made pursuant to the Act, under s 241, for this Court to exercise its statutory jurisdiction. In these circumstances, the claim that the Court lacks jurisdiction is without merit.

[99] Ms O'Gorman's submission that the only assets of value of Satori are located in Fiji also needs to be considered in context. Satori's only asset is its right to be indemnified from the assets of the Satori Family Trust, of which it is a trustee. The Satori Family Trust is a foreign trust registered in New Zealand. The right of indemnification is therefore a New Zealand asset and Satori's creditors have a right to

be subrogated to that indemnity. IGFL claims to be one such creditor and it is incorporated in New Zealand.

[100] As to the assets of the Trust, namely the Satori Family Trust, the Trust owns shares in IGFL and VBFL, both of which are incorporated in New Zealand. VBFL is the trustee company for the VBJV.

[101] The Satori Family Trust also holds Satori's interests in the IGJV and VBJV. Both of those joint ventures are unincorporated and are governed by joint venture agreements subject to New Zealand law. As to the loan of approximately FJD 3,000,000 by Satori to VBFL, that is a loan from one New Zealand company to another New Zealand company, albeit denominated in Fiji dollars.

[102] The decision of this Court in *Sequitur Hotels Pty Ltd v Satori Holdings Ltd*[43] does not, in my view, assist Mr Griffiths. That proceeding concerned statutory contractual causes of action against Satori and Mr Griffiths arising from alleged misleading and deceptive conduct. It was common ground that the impugned conduct did not take place in New Zealand.

[103] Whata J held that Fiji was the natural forum for claims against Mr Griffiths. On balance, his Honour favoured Fiji as the preferable forum for the proceeding overall, particularly as Mr Griffiths was the "main actor"; at that time, he was resident in Fiji and the conduct by him initially took place in Fiji. However, and critically, his Honour also held that New Zealand is the more natural forum in respect of the contractual claims against Satori.[44]

[104] I further note that the debts of Satori pleaded in the statement of claim, namely the capital call debt and the indemnity debt, arise under the ARJVA, which has a New Zealand law and New Zealand forum clause.

[105] I find that this Court has jurisdiction to make the liquidation orders sought and is *forum conveniens* for determination of IGFL's s 241 application.

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43 *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032.
44 *Sequitur Hotels Pty Ltd v Satori Holdings Ltd*, above n 44, at [81]–[82].

Is it just and equitable to order liquidation?

[106] A basis for a winding up order under the just and equitable ground will be established if there is a justifiable loss of confidence in the conduct and management of the company, evidenced by fraudulent or improper administration of the company's affairs, although it is not necessary for the business of the company to involve illegality.[45] As Saville LJ observed in *Re Senator Hanseatische Verwaltungsgesellschaft mbH*:[46]

> On the contrary the phrases used (namely "expedient in the public interest" and "just and equitable") to my mind indicate that Parliament did not intend to impose such a restriction but instead simply decided to leave it to the Secretary of State to form a view as to what was expedient in the public interest and the court to then decide on the material before it whether the justice and equity of the case dictated that the company concerned should be wound up.

[107] On their face, the circumstances in which Mr Griffiths sought and obtained orders from the Fijian Family Court are of concern. Mr Griffiths purported to replace Satori as a party to the VBJV with the Delaware corporation associated with his wife and to transfer Satori's 31.66 per cent shareholding in VBFL to that Delaware corporation. However, it is not possible for me to reach a concluded view on that matter. I would, nevertheless, observe that the order sought by the receivers staying that consent order, whilst protecting the position in the interim, does not address the question of whether there was a valid basis for the order in the first instance. Nor has Mr Griffiths provided a full explanation of the circumstances giving rise to the consent order.

[108] IGFL alleges not only profound insolvency on both a balance-sheet basis and a cash-flow basis, but also alleges that Satori has continued to incur obligations while insolvent since July 2020 when it stopped meeting its capital call obligations. It also says that Mr Griffiths has allowed Satori to do this.

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45 *Insolvency Law and Practice* (online ed, Thomson Reuters) at [CA241.03] and *Loch v John Blackwood Ltd* [1924] AC 783 (PC).

46 *Re Senator Hanseatische Verwaltungsgesellschaft mbH* [1997] 1 WLR 515 (CA) at 523.

[109] I agree with the submission of IGFL that there is a proper basis for an investigation by the liquidators into the company's affairs in light of the allegations made and the circumstances of the Family Court consent order.

[110] In the circumstances, including where it has been established that Satori is cash-flow insolvent and balance-sheet insolvent, I find that it would be just and equitable to make a substantive liquidation order.

Conclusion

[111] I decline to grant Mr Griffiths special leave to file a statement of defence out of time and/or to pursue any of the interlocutory applications. That includes the application seeking a stay of the proceedings, a restraint of advertising and the application to set aside the interim liquidation. Mr Griffiths has failed to establish to the arguable basis threshold that Satori is solvent and not liable for the debts at issue. There is no legitimate basis for staying the proceedings pending determination of the related proceedings in Fiji. That includes the proceedings in which there is a challenge to the appointment of the receivers.

[112] I accept that IGFL may, at times, have pursued litigation against Mr Griffiths and/or Satori in an aggressive fashion, but there is no basis for concluding these winding up proceedings savour of either unfairness or undue pressure. I note also that Mr Griffiths has himself instituted many legal proceedings against Sequitur and others in both New Zealand and Fiji.

[113] I find that IGFL has established that Satori is unable to pay its debts and that it would also be just and equitable to make the liquidation order sought. The statutory criteria in s 241 is made out. Even if there is some arguable basis that Satori is not liable for the full extent of the debts claims, Satori remains unable to pay a substantial portion of that debt and IGFL has established that Satori is insolvent. In reaching those conclusions, I have had regard to the opposition of Mr Griffiths despite my findings that he should be refused leave to file a statement of defence out of time.

[114] I find that this Court does have jurisdiction to make the liquidation order sought and there is no basis for concluding that the Fijian courts are *forum conveniens*.

[115] It is not necessary for me to determine the question of whether Mr Griffiths has standing to oppose the liquidation on the basis that he has failed to establish an arguable case of solvency. He does have standing, as a shareholder, to seek to file a statement of defence out of time, however, as noted, I found that he should not be granted leave to do so.

Result

[116] The protest to jurisdiction and opposition to the liquidation proceedings filed by Mr Griffiths is dismissed.

[117] I decline to grant leave for Mr Griffiths to file a statement of defence out of time and dismiss all of his interlocutory applications. That includes the two applications under High Court Rules 2016 r 9.75 for examination of Mr Rees Logan and to obtain documents. Neither of those two applications were pursued with any rigour and were not addressed at all in the oral submissions of Ms O'Gorman.

[118] I make an order pursuant to s 241 of the Companies Act 1993 placing the defendant, Satori Holdings Ltd, into liquidation. I dispense with any requirement for advertising.

[119] I appoint Mr Mark McDonald and Mr Raymond Cox as the liquidators. Their rates of remuneration and terms and conditions of their appointment are as set out in their consent to act dated 30 November 2022.

[120] My orders are timed at 4.55 pm on 17 February 2023.

[121] As to costs, I am of the preliminary view that the plaintiff, IGFL, having succeeded, is entitled to costs and on a 2B basis. If costs cannot be agreed, then memoranda (no more than four pages) are to be filed and served within 21 days.

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Associate Judge P J Andrew