IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2397
[2023] NZHC 1507

UNDER	Part 19 of the High Court Rules 2016 and s 284 of the Companies Act 1993
IN THE MATTER OF	Ex-CM Group Holdings Limited, Ex-CM Assets Limited, Ex-CM Limited, Profiles Woodproducts Limited, Ex-CM International Limited, Ex-CM Europe Limited, and Ex-CM US Limited
BETWEEN	BANK OF NEW ZEALAND First applicant
	NEALE JACKSON, BRENDON JAMES GIBSON and GRANT ROBERT GRAHAM Second applicants
AND	DAMIEN GRANT and ADAM STEVENSON BOTTERILL Respondents

Hearing: 17 May 2023

Appearances: S M Hunter KC and D T Broadmore for first applicant
S M Hunter KC, J Marcetic and LJH Norton for second applicants
R J Hollyman KC and T M Molloy for respondents

Date of judgment: 19 June 2023

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 19 June 2023 at 2.00pm. Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
Stephen Hunter KC, Auckland
Robert Hollyman KC, Auckland
T M Molloy, Barrister, Auckland
Buddle Findlay, Auckland
Chapman Tripp, Auckland
Lindsay & Francis, Auckland

[1] The Bank of New Zealand (the bank) appointed receivers to former Claymark Group parent and subsidiary companies,[1] which owed the bank some $50 million (plus interest) secured by first-ranking general security agreements (the GSAs) in like terms. The bank and receivers seek my declaration the respondents' post-receivership appointment as liquidators of the subsidiaries is invalid.[2]

[2] The argument is, on the receivers' appointment to the parent company's property as if its absolute owner, only they could pass the necessary special resolutions to put the parent company into liquidation by appointing liquidators. The respondents neutrally observe the bank and the receivers may lack standing to seek such declaration, but in any event contend for the bank's and the receivers' more limited security interest only in realising value from the companies' property under the GSAs.

[3] The receivers realised the companies' assets to repay the bank some $61 million as long ago as December 2021, leaving unpaid debt of some $2 million. Their subsequent reports serially proposed to retire on finalisation of outstanding matters, ultimately to include appointment of liquidators to the companies (if not the respondents). So far they have done neither, although this proceeding now includes a claim to put the companies into liquidation (not presently for my determination).

[4] The respondents say they are appointed and funded to investigate conduct of the receivership, inferentially as prospectively offering further realisable assets, which may not be the case for other liquidators. The bank says it is ambivalent as to the identity of liquidators, only they should validly be appointed. Ultimately, this Court's supervision of the liquidation should mean, funded or not, any reasonably further realisable assets should be obtained for distribution, while any conduct of liquidation for collateral purpose should not be permitted.

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1 The parent is Ex-CM Group Trustee Limited; the subsidiary is Ex-CM Group Holdings Limited with sub-subsidiaries Ex-CM Assets Limited, Ex-CM Limited, Profiles Woodproducts Limited and Ex-CM International Limited (which, at risk of sounding like a Phil Collins' lyric, has sub-sub-subsidiaries Ex-CM Europe Limited and Ex-CM US Limited). Other trustee companies associated with the former Claymark Group, to which the receivers also were appointed but from which appointment they since have retired and the respondents appointed as their liquidators, are not in issue.

2 Companies Act 1993, s 284(1)(g). Leave is required to apply for such declaration, on which the respondents abide.

Background

[5] The GSAs granted the bank "a Security Interest in the Secured Property as security for payment of the Secured Amounts and the performance of [the company's] obligations to [the bank] from time to time".

[6] By 'Security Interest', the GSA generally means in terms of s 17 of the Personal Property Securities Act 1999, otherwise "a fixed charge". The 'Secured Property' is "all of [the company's] present and after-acquired property, and all personal property in which [the company has] rights, whether now or in the future". And 'Secured Amounts' are:

> … all amounts that at any time are due and owing by [the company] to [the bank], or [the company owes the bank] but are not then due, or [the company owes the bank] upon a contingency (directly or indirectly and for any reason).

Such is "to provide [the bank] with the broadest possible security".[3]

[7] By the GSA, under cl 6.1, the company agreed not to deal with the Secured Property without the bank's consent "except as permitted by cl 6.2", which generally permitted dealings with the company's inventory and money "in the ordinary course of, and for the purpose of carrying on, [the company's] ordinary business, on ordinary arms-length commercial terms and for proper value". Under cl 6.4, "[o]n the occurrence of any Event of Default all of [the company's] rights under this clause 6 to deal in any way with the Secured Property shall immediately cease".

[8] Clause 14.1.7 entitles the bank, "[a]t any time after an Event of Default occurs" (subject to notice), to "appoint any person or persons to be a Receiver of all or any part of the Secured Property". Clause 13.1.6 defines an 'Event of Default' to include "if [the company requests] you to appoint a Receiver".

[9] As requested by the parent company's sole shareholder and director (and sole director of the subsidiaries), Mark Clayton, the bank appointed the receivers to the

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3 *Strategic Finance Ltd (in rec & in liq) v Bridgman* [2013] NZCA 357, [2013] 3 NZLR 650 at [23]; see comparable wording at [25]–[29].

parent and subsidiary companies on 4 December 2019. The appointments were made under each company's GSA in favour of the bank.

[10] On 22 November 2022, Mr Clayton appointed the respondents liquidators of the parent company, in which capacity on 25 November 2022 they appointed themselves liquidators of the subsidiaries. At issue would be if those latter appointments are valid.

Discussion

—leave to seek declaration

[11] For the purposes of this Court's supervision of any liquidation, various directions and orders may be sought by liquidators or, with leave, by "a creditor, shareholder, other entitled person, or director of a company in liquidation".[4] The bank here claims to be a 'creditor', and the receivers 'shareholders'.

[12] Section 240(1)(b) of the Companies Act defines 'creditor' as meaning:

> … a person who, in a liquidation, would be entitled to claim in accordance with section 303 that a debt is owing to that person by the company; and includes a secured creditor only … to the extent of the amount of any debt owing to the secured creditor in respect of which the secured creditor claims under section 305 as an unsecured creditor.

[13] In terms of the bank's standing to seek its desired declaration, the contest is between if the bank "would be entitled to claim in accordance with section 303" or, as a secured creditor, is limited to any "claims under section 305".

[14] The bank has not claimed under s 305, which would have required it either to value the property subject to the charge and claim in the liquidation as an unsecured creditor for any balance due, or to 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. It has done neither.

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4 Companies Act, s 284(1).

[15] Section 240(1)'s limited inclusion of 'secured creditors' generally is to leave them to their own devices, consistently with the Act's scheme "to exclude from the ambit of the liquidation property which is subject to a charge".[5] By that apprehended 'exclusion', "[t]he Act contemplates that secured creditors will operate independently of the liquidation", except if exceeding or surrendering their security or for other limited and presently irrelevant purposes.[6]

[16] But, under s 303, any "debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation". Plainly the bank would be entitled to raise such a claim, contingent on the inadequacy (or surrender) of its security. Section 240(1)(b)'s limited inclusion of secured creditors is to exclude them from even discretionary engagement in the liquidation process to the extent of their charge.

[17] The liquidators' concern such would mean "any 'secured creditor' with a *potential* shortfall could seek directions under s 284" is overstated. Such potential only entitles a secured creditor to seek leave to participate in the Court's supervision of the liquidation, as it would have also to do on any balance due or surrender.

[18] Leave should turn on if prospective intervention in the liquidation process outweighs secured creditors' anticipated independence from it. In the particular circumstances of this case — where the validity of the liquidators' appointment is directly at issue as impinging on the bank's independence, and the liquidators take a neutral position (extending to preparedness, although only after this proceeding was issued, to apply for declaration of their valid appointment) — I will grant leave to the bank.

[19] I would have come to the same conclusion on the same grounds if in exercise of my inherent jurisdiction to supervise liquidations,[7] necessarily as complementary

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5 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [43].

6 At [43].

7 *Re Securitibank Ltd (in liq)* [1978] 1 NZLR 97 (SC); *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674; *Commissioner of Inland Revenue v Livingspace Properties Ltd* (in rec and in liq) [2020] NZHC 1434, [2021] 2 NZLR 252. See also *Jindal v Registrar of Companies* [2021] NZHC 3268 at [39]–[43] and *Boult v Cain* [2022] NZHC 2402 at [24]–[27].

to the statutory jurisdiction. It would be wrong in principle, in the circumstances I have identified, to decline leave as a matter of form.

[20] Given such grant, I do not need to consider if the receivers are 'shareholders' for the purposes of s 284(1). Particularly given the subsection's inclusion of "other entitled person", being "a person upon whom the constitution confers any of the rights and powers of a shareholder",[8] unless that includes the receivers here, I incline to the view the receivers are not entitled to seek leave under s 284(1) (and should not be indulged under my inherent jurisdiction independently of their appointing creditor).

—are the liquidators validly appointed?

[21] Although the bulk of written and oral argument before me focused on company law policy, practice and procedure, the starting point — for analysis of the validity of the liquidators' appointments to the subsidiary companies — is by parsing the relevant statutory provisions in the GSAs' context for the latter's construction.

[22] Liquidators are "to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company", first, to meet creditors' demands, then of any surplus.[9] Liquidation "does not affect the right of a secured creditor … to take possession of, and realise or otherwise deal with, property of the company over which that creditor has a charge".[10] That means "the liquidation does not limit the secured creditors' rights of enforcement".[11]

[23] Except by court order, putting a company into liquidation by appointment of a liquidator is a power attaching to share ownership, either directly by special resolution of shareholders or indirectly by constitutional delegation to the company's board on occurrence of a specific event.[12]

[24] From commencement of liquidation by their appointment, the respondents' custody and control of the parent company's assets under s 248(1)(a) does not affect

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8 Section 2(1), definition of "entitled person".
9 Companies Act, s 253.
10 Section 248(2).
11 *Dunphy v Sleepyhead Manufacturing Co Ltd*, above n 5, at [43].
12 Companies Act, s 241(2)(a) and (b).

the bank's right to deal with the parent company's secured property.[13] At issue is any effect of liquidation — especially, of the liquidators' custody and control of the parent company's assets — on the bank's right to deal with the parent company's property.

[25] Here, "Secured Property" is all the parent company's property, of which the liquidators have custody and control without affecting the bank's right to deal with it. Only to that extent may the secured property be said 'excluded' from the ambit of property subject to the liquidation; that is to say, the secured property remains within the liquidators' custody and control subject to the bank's rights to deal with it.

[26] The source of the bank's right to deal with the secured property predominantly is the GSA's cl 15.1, when entitled, to appoint a receiver with powers as set out at cl 15.2, including:

(a) at cl 15.2.1, non-exhaustive power to "take immediate possession of all or any part of that Secured Property and exercise and enforce all or any of [the company's] Rights in respect of it"; and

(b) at cl 15.2.11, "generally do and cause to be done any act, matter or thing in respect of that Secured Property … the Receiver might do or cause to be done if the Receiver was the absolute owner of the Secured Property…".

Under cl 21.1, the bank or receivers also may exercise any of the companies' "Rights" at their respective discretion. 'Rights' means the company's "rights, remedies, powers, authorities, discretions and privileges under this agreement, or any Collateral Security or other document … , or at law (whether express or implied)".

[27] While cl 15.3 deems the receivers "at all times and for all purposes to be [the company's] agent", and liquidators' assumption of custody and control of the company's assets is effective to terminate any agency,[14] agency is not the source of the

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13 A more difficult question may have been raised if the parent company owned any of its own shares, but I infer — from the lack of contest to Mr Clayton's appointment of liquidators to the parent company, and his description as "sole shareholder" — it did not.

14 *Walker v Gibbston Water Services Ltd* [2013] NZHC 2933 at [53], citing Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at [12.04].

bank's right to appoint receivers but only a prospective incident of it. Rather, s 31(1)(a) of the Receiverships Act 1993 makes it plain "a receiver may … continue to act as a receiver and exercise all the powers of a receiver in respect of property of … a company … that has been put into liquidation".

[28] The bank's particular right at stake is to exercise the parent company's entitlement as shareholder of its subsidiaries "to vote … on the question" of a liquidator's appointment.[15] Such is the parent company's right at law.[16] Under the GSA, the bank also may exercise that right directly under cl 21.1, or indirectly by appointment of receivers with power also to exercise the company's right under cl 15.2. In themselves, those are not necessarily to the exclusion of the parent company's right.

[29] However, also under the GSA, the parent company required the bank's consent to exercise such entitlement; in the event of default, the parent company surrendered even that conditional right.[17] The parent company then had no voting power to exercise in relation to its shareholding in the subsidiary companies.[18] The liquidators' custody and control of the parent company's assets omitted power to exercise its shareholding right, which the company had surrendered to the bank under the GSA.

[30] The liquidators' custody and control of the parent company's assets does not affect the bank's right to exercise the parent company's entitlement to vote on liquidator appointments to subsidiary companies. In the particular circumstances of the GSA, on the parent company's default, the liquidators' custody and control of its assets thus does not extend to exercise of the parent company's shareholding entitlement to appoint liquidators to its subsidiaries.

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15 Section 241(2)(a)–(b).

16 At [23] above.

17 At [7] above.

18 For that reason, the liquidators' reliance on s 254, as permitting them to "exercise any power in relation to property that is subject to a charge", is misplaced. There is no power available to exercise.

Result

[31] Under s 284(1)(g) of the Companies Act, the bank has leave to seek a declaration of the validity of the liquidators' appointment to the subsidiary companies.

[32] I **declare** the respondents' appointment as liquidators of the subsidiary companies invalid.

Costs

[33] I reserve costs for determination on short memoranda each of no more than five pages — annexing a single-page table setting out any contended allowable steps, time allocation and daily recovery rate — to be filed and served by the bank within ten working days of the date of this judgment, with any response or reply to be filed within five working day intervals after service.

—Jagose J