IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-404-001500
[2015] NZHC 1719

BETWEEN	GRANT ROBERT GRAHAM AND NEAL JACKSON AS RECEIVERS OF THE DEFENDANT COMPANY Plaintiffs
AND	ARENA CAPITAL LIMITED (IN RECEIVERSHIP) Defendant

CIV-2015-404-001501

IN THE MATTER	OF PART 16 OF THE COMPANIES ACT 1993
AND IN THE MATTER	OF AN APPLICATION BY GRANT ROBERT GRAHAM AND NEAL JACKSON

Hearing:	24 July 2015
Appearances:	M G Colson for Plaintiffs/Applicants No Appearance for Defendant D Robinson for Financial Markets Authority
Reasons:	24 July 2015

REASONS FOR JUDGMENT OF GENDALL J

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[1] Today, 24 July 2015 at 10:19 a.m. I made certain orders in this Court on application brought by the plaintiffs to place the defendant company into liquidation.

[2] The orders made were:

(a) An order placing the defendant company, Arena Capital Limited (In Receivership) into liquidation was made

(b) Grant Robert Graham and Neale Jackson were appointed liquidators.

(c) Orders were made in terms of paragraphs 1, 2, 3 and 4 of an originating application without notice for orders under ss 280 and 286 of the Companies Act 1993 brought at the same time by the applicant plaintiffs to the following effect:

> 1. Leave was granted to commence that application by way of an originating application without notice.
>
> 2. Grant Robert Graham and Neale Jackson were appointed to act as joint and several liquidators of Arena Capital Limited (In Receivership) pursuant to s 280 and/or s 286(4)(b) of the Companies Act 1993.
>
> 3. The originating application and orders were to be served on all known creditors of the company at the same time and in the same manner as the liquidator's first report under s 255 of the Act.
>
> 4. Any creditor of the company Arena Capital Limited was granted leave to apply to the Court within five working days of such service to set aside the appointment of the applicants Grant Robert Graham and Neale Jackson as liquidators.

(d) An order was made approving the remuneration of the liquidators in accordance with the application and an affidavit filed in support dated 29 June 2015, subject to s 284 of the Companies Act 1993.

(e) An order was made allowing the liquidators to exercise their powers individually pursuant to s 242 of the Companies Act 1993.

(f) Costs on these applications were awarded to the plaintiffs on a category 2B basis together with disbursements as fixed by the Registrar.

(g) Costs on these applications were awarded to the supporting party, FMA, on a category 2B basis together with disbursements as fixed by the Registrar.

(h) The orders were timed at 10:19 a.m. today, 24 July 2015.

(i) In making these orders I indicated that my detailed reasons for the decision would follow.

[3] I now set out those detailed reasons.

Liquidation application

[4] The plaintiffs bring this liquidation application as receivers of the defendant company, Arena Capital Limited (In Receivership). I am satisfied that the plaintiffs have jurisdiction to bring the application pursuant to s 241(2)(c) of the Companies Act 1993 (the Act). The present application proceeds effectively on the application of the company, or possibly by the plaintiffs as receivers, and perhaps even as creditors of the defendant company.

[5] The grounds advanced in support of the liquidation application are that the defendant company is unable to pay its debts, it being in receivership, with liabilities of approximately $7.119 million and assets of only approximately $1.029 million (excluding contingent assets).

[6] From all the material before the Court it is clear that creditors of the defendant company are facing a significant shortfall in any return, even in the event that liquidators may be successful in the recovery of contingent assets. I am satisfied that the defendant company is quite unable to pay its debts and, in addition, this inability to pay its debts is established pursuant to s 287(c) of the Act in that receivers have been appointed with respect to the company's assets. It is correct to say that the receivers here have been appointed by this Court pursuant to an application made by the FMA. In line with the conclusions reached however in *Fisk*

& Bridgman & Ors v Ross Asset Management Ltd (In Receivership),[1] and notwithstanding this, by analogy on the basis of all the material before the Court I am satisfied that this company is quite unable to pay its debts as they fall due.

[7] Secondly and in any event, as I understand it, the plaintiffs rely also upon the just and equitable ground for liquidation of the company contained in s 241(4)(d) of the Act.

[8] In the present case all the evidence before the Court confirms that the liabilities owing to various investors and creditors of the company, which exceed $7 million, far exceed any assets which might properly be clawed back.

[9] Before me today Mr Robinson appeared as counsel for the FMA and indicated the FMA supported the liquidation application. There was no appearance on behalf of any other party nor, according to Mr Colson, counsel for the plaintiffs, has any opposition been filed to the present application or papers received regarding it.

[10] There is affidavit material before this Court to confirm that the statement of claim to place the defendant company into liquidation, together with all supporting documents, were served on the defendant on 8 July 2015. Advertisements of the application to place the company into liquidation were also published on 16 July 2015 in the New Zealand Herald newspaper, the Press newspaper and the New Zealand Gazette. No application to stay the liquidation proceeding, nor any statement of defence or notice of appearance has been filed.

[11] For all these reasons, and on the basis of all the material which is before the Court, I am left in no doubt that the defendant company is quite unable to pay its debts and it is appropriate for an order for liquidation to be made in this case.

[12] The order outlined at para [2] above accordingly was made.

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1 *Fisk & Bridgman & Ors v Ross Asset Management Ltd (In Receivership)* [2012] NZHC 3459.

Liquidators to be appointed

[13] A second issue before the Court related to the identity of the liquidators to be appointed in the order made today, 24 July 2015.

[14] The application before the Court sought the appointment of Grant Robert Graham and Neale Jackson as liquidators. Some time ago they were appointed by this Court as receivers of the defendant company.

[15] For this reason, a second application was before the Court pursuant to ss 280 and 286 of the Companies Act regarding the appointment of Mr Graham and Mr Jackson as liquidators.

[16] First, in this particular application, the plaintiff receivers seek leave to commence it by way of originating application without notice pursuant to r 7.46 and 19.5 of the High Court Rules. In my view this is appropriate in all the circumstances here. Leave is granted accordingly.

[17] Next, in this application the receivers seek an order from this Court that they be appointed as liquidators, notwithstanding their role as receivers. This is because s 280(1)(c) of the Companies Act provides that:

> **280 Qualifications of liquidators**
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> (1) Unless the court orders otherwise, none of the following persons may be appointed or act as a liquidator of a company:
>
> ...
>
> (c) a person who has, within the 2 years immediately preceding the commencement of the liquidation, been a shareholder, director, auditor, or receiver of the company or of a related company.
>
> ...

[18] It follows therefore, notwithstanding the plaintiff's role as Court appointed receivers of the defendant company here, that this second application seeks an order that it is the current receivers who are permitted to be appointed as liquidators.

[19] As to this, an affidavit has been filed by Mr Jackson which confirms that there is no conflict of interest in the present case. Further, this affidavit suggests that, given their recent dealings and knowledge in this reasonably complex matter, as current receivers the plaintiffs are in the best position to be appointed liquidators of the defendant now.

[20] In all the circumstances prevailing here I agree. The receivers have filed consents to act as liquidators and it is appropriate that an order be made pursuant to s 280(1)(c)(i) that, notwithstanding their previous appointment as receivers of the defendant company, the plaintiffs should now be appointed to act as liquidators. This order is now made.

[21] That application also seeks ancillary directions pursuant to rule 18.7 of the High Court Rules that:

(a) The originating application and orders be served on all known creditors of the company at the same time and in the same manner as the liquidators' first report under s 255 of the Companies Act; and

(b) Any creditor of the company is granted leave to apply to the Court within five working days of such service to set aside the appointment of the plaintiff applicants as liquidators.

[22] As I understand the position, the large number of investing clients of the defendant company who are known have all been informed of the receivers' application to liquidate the defendant. In addition, it is my view that the interests of justice here require the speedy and inexpensive determination of the present liquidation proceedings and therefore the plaintiffs should not be required to effect personal service on all of the approximately 970 clients/creditors who are known. The orders sought by the plaintiffs therefore seek to protect those clients/creditors of the defendant by requiring that the proceedings be served at the same time as the liquidators' first report (i.e. within 25 working days after the liquidator's appointment), and then granting them leave to apply to set aside the appointment.

This will avoid any prejudice occurring to the creditors as I see it. Orders to this effect, as noted at para [2] above have been made.

Application for orders fixing remuneration

[23] Lastly, before the Court is an application by the plaintiffs seeking orders to fix the rates of remuneration of the liquidators. The application before the Court is a prospective one of the type contemplated in *Medforce Re Medforce Healthcare Services Ltd (In Liquidation)*[2] discussed in *Flynn v McCallum (Re Roslea Path Ltd (In Liquidation)*.[3]

[24] Section 284(1)(e) of the Companies Act provides:

> **284 Court supervision of liquidation**
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> (1) On the application of the liquidator, a liquidation committee, or, with the leave of the court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the court may—
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> ...
>
> (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances:
>
> ...

[25] The proposed hourly rates for the liquidators and their supporting staff in the present case are set out in the affidavit of Mr Jackson filed in support of this application.

[26] Mr Colson, counsel for the plaintiffs, has confirmed that these hourly rates for liquidators have been approved previously by this Court.

[27] In my view they are in order and accordingly the order noted at [2] above was made. This approved the liquidators' rates of remuneration in accordance with the 29 June 2015 application filed herein but, of course, was always subject to the provisions of s 284 Companies Act 1993 as I have noted above.

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2 *Medforce One Re Medforce Healthcare Services Ltd (In Liquidation)* [2001] 3 NZLR 145 (HC).
3 *Flynn v McCallum; (Re Roslea Path Ltd (In Liquidation)* [2013] 1 NZLR 207.

[28] Finally, before me Mr Colson for the plaintiffs noted that there may be some uncertainty here as to whether the relationship of the defendant company's investing clients to the company, in light of its lack of trading and the Financial Markets Conduct Act 2013, may be that of creditors or beneficiaries. Issues might arise therefore as to whether assets recovered by the liquidators will be subject to the standard Companies Act distribution regime or whether orders as were made in *Re International Investment Unit Trust*[4] and *Waipawa Finance Company Ltd* will be required.[5] In either case the liquidators now seek an order allowing them to deduct their fees on a monthly basis, but subject to the Court's overall supervision, whether under s 284 of the Companies Act or in accordance with its inherent jurisdiction. Also, on appointment, the plaintiffs as liquidators have indicated they will pay the fees incurred as receivers and, as permitted by para [3](b)(ii) of the Court orders dated 27 May 2015 in CIV-2015-409-294. Counsel confirm that a further memorandum will be filed shortly to detail these fees and this will first be provided to the FMA.

[29] In all these circumstances, the order sought here by the plaintiffs is appropriate. An order is now made allowing the liquidators to deduct their fees on a monthly basis once their work commences subject to the Court's overall supervision whether under s 284 of the Companies Act or under its inherent jurisdiction.

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Gendall J

Solicitors:
Belly Gully, Wellington

Copy to Defendants
Copy to Financial Markets Authority

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4 *Re International Investment Unit Trust* [2005] 1 NZLR 270.

5 *Waipawa Finance Company Ltd* (HC) Wellington, Ronald Young J, 7 February 2011, CIV-2011-441-465.