IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-003094
[2018] NZHC 222

UNDER	Sections 174 and 246 of the Companies Act 1993
BETWEEN	DAVID WEIGUANG HAN First Plaintiff
	CYNTHIA MAY Second Plaintiff
AND	KUAN YAP & ASSOCIATES LIMITED First Defendant
	KUAN CHEONG YAP Second Defendant

Hearing: 22 February 2018

Appearances: A M Swan for the Plaintiffs
J Hunter and E Y Y Ho for Second Defendant

Judgment: 22 February 2018

JUDGMENT OF WOOLFORD J

Solicitors: Richard Wood, Auckland
Focus Law, Auckland

Counsel: A M Swan, Auckland

Introduction

[1] The plaintiffs have applied for liquidation of the first defendant, Kuan Yap & Associates Limited (the Company), which carries on business as an accountancy practice. The second plaintiff is the first plaintiff's partner. Together they hold 50 per cent of the shares in the Company. The second defendant holds the other 50 per cent of the shares in the Company. The first plaintiff and the second defendant are both directors of the Company and work in the business together.

[2] The second defendant opposes the application for liquidation and counterclaims for an order under s 174(2)(a) of the Companies Act 1993 requiring the plaintiffs to acquire his shares in the Company.

[3] The plaintiffs say that there has been an irretrievable breakdown in the relationship between the first plaintiff and the second defendant and as a consequence the Company cannot continue in business. The plaintiffs also say that the Company is facing insolvency and that urgent steps are required to prevent the value of its assets being lost pending a hearing of their application for liquidation of the Company. They have therefore applied today for the appointment of an interim liquidator under s 246 of the Companies Act 1993.

Appointment of interim liquidator

[4] The plaintiffs apply under s 246, which relevantly provides:

> **246 Interim liquidator**
>
> (1) If an application has been made to the court for an order that a company be put into liquidation, the court may, if it is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a named person, or an Official Assignee for a named district, as interim liquidator.
>
> (2) Subject to subsection (3), an interim liquidator has the rights and powers of a liquidator to the extent necessary or desirable to maintain the value of assets owned or managed by the company.
>
> (3) The court may limit the rights and powers of an interim liquidator in such manner as it thinks fit.
>
> (4) The appointment of an interim liquidator takes effect on the date on which, and at the time at which, the order appointing that interim liquidator is made.

[5] Case law makes it clear that the appointment of an interim liquidator requires not only a good prima facie case for liquidation, but also a need for urgency and special circumstances.[1] One of the grounds on which a liquidation order may be made is that it is just and equitable that the company be placed in liquidation. Under this heading liquidation may be ordered where grounds exist that would justify the dissolution of a partnership. Some small companies, such as this, share the same basic characteristics of partnership and are therefore reliant on the existence of probity, good faith and mutual confidence between shareholders and directors. Liquidation may also be ordered where there is a deadlock between directors who are so opposed that an impasse is reached in the management of the company.

[6] The circumstances justifying the appointment of an interim liquidator were considered in *Robert Bryce & Co Ltd v Chicken & Food Distributors Ltd*.[2] After specifying the preconditions for the appointment of an interim liquidator, the Court stated that in determining whether there is a need for interim control the following factors need to be considered:

(a) Whether the company's assets are in jeopardy.

(b) Whether the status quo should be maintained.

(c) Whether the interests of creditors are safeguarded.

[7] Section 246(2) makes it clear that the rights and powers of an interim liquidator are the rights and powers of a liquidator, but only to the extent necessary or desirable to maintain the value of assets owned or managed by the company. The appointment of an interim liquidator effectively displaces the directors. The interim liquidator controls the affairs and assets of the company. The directors do, however, retain some residuary powers including the power to appeal against the appointment of an interim liquidator and the power to instruct counsel to oppose the liquidation proceedings.

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1 *Halliday v Heavy Diesel Specialists Ltd* HC Wellington CIV-2008-485-776, 16 April 2008 and *Keet v Hidden Valley Ltd* [2016] NZHC 2089.

2 *Robert Bryce & Co Ltd v Chicken & Food Distributors Ltd* (1990) 5 NZCLC 66,648 (HC).

Discussion

[8] It is obvious from the affidavits filed by the first plaintiff and the second defendant that the relationship between them has broken down. In his submissions, Mr Swan submits that the deadlock that has arisen between the directors has been caused, in Mr Han's view, by Mr Yap essentially shutting him out of the business decisions or not consulting him at all. Other issues include misappropriating Company funds, engaging employees unilaterally, removing Mr Han's administration rights to the Company's website and Xero, disconnecting the company's website and the issuing of proceedings by Mr Yap against the plaintiffs in respect of the purchase of his 50 per cent share in the company.

[9] Ms Hunter acknowledges there currently exists a deadlock in respect of the operation of the business, but submits from the second defendant's perspective, Mr Han unilaterally cut off the working capital overdraft at a time when fees are traditionally slow to be collected and froze the bank accounts. In addition, Mr Han has failed to work in the business generating fees, refused to advance any funds to overcome the difficulties caused by the frozen bank accounts, and appears to have withdrawn physically from the practice by removal of his computers and equipment from his office.

[10] So whatever the cause of the breakdown, it is clear that the relationship is fraught with difficulty.

[11] There is, therefore, a good prima facie case, in my view, for liquidation, but whether the breakdown is irretrievable is an issue for the substantive hearing of the plaintiffs' application for liquidation to be heard at a later date.

[12] In the meantime, however, it seems to me that there is a possibility that the business will fail before the application for liquidation can be heard. For instance, the directors have been unable to agree on the payment of ordinary creditors. The first plaintiff says he has signed a mandate for the ANZ Bank which allows the payment of such creditors following approval by directors, but says the second defendant has refused to do so unless the directors each inject $10,000 into the business and the first

plaintiff reinstates a $50,000 overdraft with Heartland Bank. In the absence of payment of overdue accounts, an ordinary creditor may well issue a statutory demand.

[13] Furthermore, staff have been understandably upset by the disagreements between the two directors. There is a real possibility that staff will leave and the business will not be able to fulfil its commitments to clients.

[14] The second defendant wrote to staff on 29 August 2017 as follows:

> Recent events may have caused confusion in relation to governance and day to day management. It is observed that such recent events have affected internal morale and, more importantly, the viability of the Company in its client's service. Such is not in the best interests of the Company and your future.

[15] Much of the value of an accountancy practice is in clients who will not continue with a business if they do not receive service. The second defendant gives an example of Xero suspending its services because of the on-going dispute between the directors, which caused two clients to complain angrily as they could not issue invoices and conduct their normal business for two days.

[16] In his latest affidavit sworn on 15 February 2018, the first plaintiff states:

> 6. The operation of the business is winding down. Productivity has decreased significantly predominantly because of the directors' relationship breakdown. Work is being carried out for clients only if it is absolutely necessary. Income from the business has dropped further and is unable to support the outgoings.

[17] Mr Yap says that he is committed to the business and believes that it can trade out of its current predicament. However, I do not see that as possible unless urgent action is taken. In my view, not only is there a need for urgency, but there are special circumstances in terms of the caselaw.

[18] In the circumstances, it seems to me appropriate that an interim liquidator should be appointed to preserve the value of the practice. Grant Reynolds from Reynolds & Associates Limited has consented to act as an interim liquidator. In my view it is appropriate to appoint Mr Reynolds as an interim liquidator until further order of the Court. The alternative put forward by the second defendant of the Court

ordering the first plaintiff to resign as a director – in effect, handing control to the second defendant, - is not practicable in all the circumstances.

[19] In the present case, I therefore direct:

(a) Mr Grant Reynolds of Reynolds & Associates is appointed as interim liquidator of the Company; and

(b) Remuneration of Mr Reynolds and his staff is approved on a prospective basis for acting as interim liquidator of the Company at the following hourly rates:

(i) Interim liquidator @ $300 per hour plus GST.

(ii) Associates @ $200 per hour plus GST.

(iii) Administration and support staff @ $120 per hour plus GST.

[20] As required by s 246, I record that this order is being made at 11.42 am on Thursday, 22 February 2018.

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Woolford J