IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-002300

UNDER	the Companies Act 1993 and under Part 19 of the High Court Rules 2009
IN THE MATTER OF	the East Tamaki Curry House Ltd (In Liquidation)
BETWEEN	RAMAKRISHNA KULOOR RAI Plaintiff
AND	GILBERT DALE CHAPMAN Respondent

Hearing: 30 July 2010

Appearances: R J Hollyman for Applicant
A Swan for Respondent

Judgment: 30 July 2010

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors/Counsel:
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[1] The present application arises out of the liquidation of East Tamaki Curry House Ltd (In Liquidation). The applicant is Ramakrishna Kuloor Rai, a shareholder and director of the company and arguably also a contingent creditor of the company. In his application, he seeks these orders:

a) Confirming that the proceeding may be commenced by way of originating application;

b) That the applicant be granted leave to bring this proceeding;

c) Ordering the respondent to:

i) hold a meeting of creditors within 14 days;

ii) hold a meeting of shareholders within 14 days;

iii) give full access to all the accounts and records of the company in the liquidation within 14 days to a chartered accountant nominated by the applicant;

d) Removing the respondent from office of liquidator of East Tamaki Curry House Ltd and appointing a new liquidator to that company;

e) Fixing the remuneration of the respondent at a sum of $20,000 or less and requiring him to repay any sums taken above that amount to the company within seven days;

f) Requiring the respondent to account for all company funds which he has received or taken control of as liquidator for the company; and

g) Costs.

[2] The respondent is the liquidator of East Tamaki Curry House Ltd (In Liquidation).

[3] The company was originally called Dakshin Products NZ Ltd. It was incorporated in August 2001. For present purposes, the shareholders of the company are the applicant and his wife, Jewel of India Ltd, a New Zealand company, and a Singaporean company.

[4] The company went into liquidation on 25 September 2009. It was a voluntary liquidation by shareholder resolution. Earlier in the month, Mr Rai, who is the sole director of the company, had followed up an advertisement in the Bartercard Directory and contacted Mr Chapman, who held himself out as a liquidator. Part of the discussions were along the lines that Mr Chapman might be paid by Bartercard credits, although it turned out that nothing came of that.

[5] The company carried on business as the manufacturer and distributor of Indian food products. It also owned the land and buildings. It was negotiating the sale of the business and also the sale of the land and buildings. Mr Rai wanted to have a liquidator to arrange for the orderly winding-up of the company. He says that Mr Chapman told him that it would be in order to appoint a liquidator early on in the piece, rather than to wait for the sale of the assets before the company was put into liquidation.

[6] As matters unfolded, they did not go smoothly. The decision to put the company into liquidation before the sale of assets had been completed was premature. This was a shareholders' voluntary liquidation. The company was seemingly solvent. In the ordinary course of events, I would expect an insolvency practitioner to recognise that the company would have to keep running until the sale of the business had been completed. Unless there was anything unusual appearing, there would certainly be no harm in leaving existing management to carry on running the business up until the sale of the business. This was not a receivership. It was not a case where there was any pressing need for an insolvency practitioner to take over running the company himself. Nevertheless, that was the decision that was made.

[7] Mr Chapman, I am told by his counsel, has some 100 liquidations under his belt so he can be looked upon as having some experience in liquidations. I do not expect Mr Rai to have had any experience in liquidations himself.

[8] Unfortunately for everyone, the purchaser turned out to be difficult. On finding out that the company had gone into liquidation, the purchaser took the point that this was going to have an adverse impact and started threatening to back out of the agreement and to negotiate for a reduction in price. The liquidator says that he had to deal with this crisis. He did so by finding a back-up purchaser and used the leverage of the back-up purchaser to try and hold the original purchaser to the deal. The sale price was $250,000 but, in the end, the re-negotiated sale price was $175,000 which was a 30% reduction in the price.

[9] The liquidator said he had Mr Rai's consent and that Mr Rai was kept in the picture about this. Mr Rai, on the other hand, says that, while he was director, the liquidator was the one who had the running of the matter when it came to re-negotiating the contract. Mr Rai says that, given the attitude taken by the purchaser, he would rather have cancelled the deal and done something else instead.

[10] The liquidator also says that during this period he had to become actively involved in running the company. The sale of the business was settled on 11 November 2009. The sale of land and buildings occurred later and in fact settlement took place today, 30 July 2010.

[11] The major issue in this case is the fees charged by the liquidator. The invoices submitted by the liquidator show fees charged of $62,768.89 plus GST. It is these fees that have been the matter of most concern in generating the present application.

[12] In December 2009, Mr Rai began to have concerns about the liquidator and his conduct of the liquidation. Relations between the liquidator and Mr Rai deteriorated. It was not helped by the liquidator taking his holidays overseas during the December/January Christmas holiday period, when Mr Rai says that he was

given to understand that the liquidator's office would still remain open during that period.

[13] Mr Rai pressed for the liquidator to step down. He instructed solicitors. His solicitors issued demands for a creditors' meeting to be called and for a shareholders' meeting to be called. In particular, a requisition complying with s 258(2)(c) of the Companies Act 1993 calling for a creditors' meeting was given, and there was a similar resolution by shareholders for a shareholders' meeting to be called. These proved unavailing. Mr Rai's solicitors also requested the liquidator to make his records available so that an independent accountant could look at them and assess the reasonableness of the work carried out by the liquidator. The liquidator did not comply with those requests. The solicitors gave the appropriate notice under s 286(2) of their intention to bring an application, giving no less than five working days' notice.

[14] It is clear that relations between Mr Rai and Mr Chapman had become strained during November and December. In hindsight, it can be seen that this was inevitable. This was the business of Mr Rai. He was director, and he was also a shareholder. It was his company for all intents and purposes. He would naturally be concerned with maintaining the operations of the company until the sale date. On the other hand, Mr Chapman complains that Mr Rai went ahead and did things without authorisation. In a situation like this parties should be operating harmoniously. But where one has asserted control as a liquidator and the other one is the director with the business close to his heart, it is inevitable that there will be a mis-match between them. Mr Rai got upset when Mr Chapman was apparently not paying PAYE. Mr Chapman got upset when Mr Rai apparently ordered naan bread which he had not authorised. These difficulties largely stem from the original decision to put the company into liquidation ahead of the completion of the sale of the business.

[15] In his notice of opposition, Mr Chapman did not object to this proceeding being commenced by originating application and he did not object to the grant of leave to begin this proceeding. Grant of leave was required under s 284(1) because an application under s 284(1) may be brought as of right only by a liquidator or a

liquidation committee. Otherwise, a creditor, shareholder or director need leave of the Court. Although having apparently conceded this point in his notice of opposition, his written submissions today spelt out reasons why the Court should have concern about granting leave in this case. They were not developed in oral submissions. Leave ought not to have been opposed. In this case, the level of fees and the failure to respond to the requests to hold meetings gave good grounds for Mr Rai to come to this Court to seek directions about the running of the liquidation.

[16] This opposition permeated the stance that the liquidator has taken to this proceeding. He has been less than co-operative.

[17] One matter that struck me when I read the evidence is Mr Rai's complaints of Mr Chapman not responding to telephone calls and not responding to correspondence. That is not directly relevant in this case but it is a clue as to what was going on here. This liquidator has not adopted good business practice in terms of maintaining timely contact with people wanting to have access to him.

[18] The liquidator has used the occasion to counter-attack Mr Rai. He suggested that Mr Rai is motivated to call a meeting of creditors because he wants Mr Chapman sacked as liquidator. That cannot be a good ground for opposing the calling of a creditors' meeting. It is a matter of good governance that liquidators have to be accountable to creditors. Accountability can be achieved by allowing meetings to be held between creditors and the liquidator. Accountability may be reduced if there is not the machinery available to require meetings and to require a liquidator to appear at the meetings to answer the creditors for the conduct of the liquidation. A simple comparison would be this. Imagine, for example, that the directors of a company put off calling an annual general meeting, knowing that the shareholders would not have them voted back in again and stayed in office by stalling an annual general meeting. That would be reprehensible conduct. Mr Chapman's tactic of stalling on calling a creditors' meeting falls into the same category.

[19] In response to the demand sent by Mr Rai's solicitors calling for a shareholders' meeting, Mr Chapman has put in evidence a letter addressed to Mr Rai

and his wife, dated 25 February 2010, saying that there would be a shareholders' meeting on 3 March 2010. There is no evidence that it was delivered, and Mr Rai denies receiving it. The letter was defective because it was not addressed to other shareholders and it also failed to give enough time for the holding of a meeting. A notice calling a shareholders' meeting in these cases must comply with the First Schedule of the Act. That includes a requirement that at least 10 working days' notice must be given. That was not done in this case.

[20] The parties told me that they had agreed that there will be a meeting of shareholders and there will also be a meeting of creditors, one to be held after the other. I understand that that will take place before 12 August 2010. There will be orders calling those meetings.

[21] The next order sought by Mr Rai is the removal of the liquidator and the appointment of a new liquidator. The circumstances in which the Court can order the removal of a liquidator are spelt out in s 286(4), which allows the Court to order the removal of a liquidator if he fails to comply with an order made under subsection (2) or if he becomes disqualified under s 280. At this point, no orders have been made under s 286 for Mr Chapman to do anything and nothing has been proved to show that he is disqualified from becoming or remaining a liquidator. Accordingly, on this application, I cannot make any order for Mr Chapman's removal.

[22] Mr Hollyman also drew my attention to subsection (5), which allows for the Court to make a prohibition order if a person is unfit to act as a liquidator by reason of persistent failures to comply or the seriousness of a failure to comply. On the material I have seen today, I see no basis for me to make such an order against Mr Chapman. While there are matters of concern in the way he has conducted his liquidation, this is not a case where such a serious matter as a prohibition order ought to be made. I add, for the record, that Mr Hollyman did not press for that today.

[23] That leads to the matter of remuneration. Counsel are agreed that the decision *Re Roslea Path Ltd* HC Tauranga, CIV-2005-470-611, 17 December 2009, applied. In terms of that case, this is a contested application where the matter at issue is retrospective determination of costs claimed by the liquidator. Under s 276,

a liquidator is entitled to charge reasonable remuneration for carrying out his or her duties in exercising his or her powers as liquidator. A liquidator's remuneration has to be fair and reasonable, reflecting both the time and effort put in, but also with regard to value of the services provided by the liquidator.

[24] I bear in mind, in particular, that liquidators have important statutory functions to carry out in the liquidation of a company and that can often involve quite lengthy and arduous work which ultimately may not bear any fruit. It is particularly so in cases of insolvent liquidations. I am conscious that liquidators have a duty to follow matters up and may have to pursue questions quite diligently without, at the end of the day, being able to show anything for it, while carrying out their job in a thorough and professional manner.

[25] In this case, the liquidator has provided the Court with copies of his time recordings and has simply used those to justify his fees. He has charged out his own time at $200 an hour, plus GST, and he has someone else who works with him who provides secretarial support. He has charged her out at $140 per hour, plus GST. These are the rates under the Companies Act 1993 Liquidation Regulations 1994, Regulation 28. There is no objection to the rate that Mr Chapman has charged for himself. I do draw the line at the rates claimed for his assistant. It is not clear from the evidence what her skills are, whether she is simply providing secretarial support, or whether she is someone who has highly developed accounting skills. If she is simply providing administrative support, a reasonable rate would be between $50 and $70 per hour but no more than that.

[26] My concern is to look at the bigger picture and to see how this liquidation has been conducted at a whole. At the end of the day, I have to consider whether the fee charged by the liquidator is one that is fair and reasonable as reflecting a proper return for work that he has carried out, and also provides some value for creditors in terms of an efficient conduct of the liquidation.

[27] My problem with the liquidator's time records is that there are large amounts of time charged, sometimes a whole working day at a time, where it is simply not possible for me to determine quite what he was doing. He makes general assertions

that he was involved in the management of the company and these attendances seem to be concentrated in the September/October/November period. But I have no way of knowing whether time recorded was reasonably spent on the job or not.

[28] The problem is compounded by the consideration I referred to earlier, that a decision was made to go into liquidation ahead of the completion of the sale of the business. My view is that that decision was a mistake. I accept that, at the outset, the parties could not have known that the purchasers were to be difficult and were to raise objections and try to beat the vendor down on the price. Nevertheless, any insolvency practitioner looking at this as a solvent liquidation with a company apparently trading and able to carry on trading up until the sale of the business, would have stepped back and advised the company to carry on trading under current management so that the liquidator could do his job after the assets had been realised. There was no pressing need in this case for the liquidator to take over the running of the business and become involved with it up to the completion of the sale of the business. The liquidator in this case chose to take that on and in doing that, he took on a job which was unnecessary. There was an error of judgment on his part and, to a large extent, a lot of the charges in this case are attributable to his accepting the appointment at a stage. A more reasonable course to have taken would have been to have tell the company that it should carry on operating and complete the sale. He would then be able to arrange to collect receivables and arrange the realisation of other assets and pay off creditors at that stage.

[29] Accordingly, I see the liquidator as personally responsible for creating a lot of the difficulties that the company got into. A lot of his effort was spent in catch-up in trying to put right the position that the company got into. In particular, there was the problem of the liquidator accepting a reduced price.

[30] I accept that in hindsight it is all too easy to come to judgments about what should and should not have been done when a dispute has arisen. Nevertheless, I note that the liquidator apparently did not make much use of legal services available to him. The company did have solicitors acting on the sale – I have seen their account – but that account does not suggest that they worked particularly hard or long on the dispute with the purchaser. Surely when there is a threat of breaking the

contract, that is the time when a company should look to its solicitors for advice on how to deal with the dispute. I am surprised that more use was not made of the lawyers to resolve the dispute.

[31] I have to come to a view as to what is proper remuneration for the liquidator in this case. The job is more difficult for me for a number of reasons:

a) The time records provided by the liquidator are not particularly helpful in terms of establishing quite what he did.

b) The liquidator refused requests from the applicant that an independent accountant, chosen by the applicant, should be able to look at the records and come to a view as to what would be a reasonable fee.

c) The liquidator has not provided any evidence from an independent insolvency practitioner to verify his charges in this case. Advice from independent insolvency practitioners can be of immense assistance to the Court in deciding what a proper fee would be.

[32] I have to approach the matter not in a broad brush basis (the *Roslea* case recorded that that was not permissible) but in an informed manner.

[33] For this case, I have decided that there is a base fee which is a sum with which the applicant could not have any argument, and which would be a reasonable fee to the respondent if matters had gone smoothly. That base fee is $15,000 plus GST. I have decided also to allow an uplift. That is because, to a certain extent, the applicant did contribute to the difficulties in the case and also because, while there was the error of judgment at the outset, there should still be some recognition to the liquidator for the catch-up steps that he did take. The uplift figure is $10,000 plus GST. The total figure, $25,000 plus GST, covers all expenses he has incurred in the conduct of the liquidation up until the date of his last invoice, which was work done up until 3 May 2010. This decision does not cover any work he does after 3 May 2010.

[34] I order:

a) That the liquidator is to hold a meeting of creditors no later than 12 August 2010;

b) That the liquidator is to hold a meeting of shareholders no later than 12 August 2010. The meeting of creditors and the meeting of shareholders may be held in the same place, one after the other.

c) That the liquidator give access to all accounts and records of the company to a chartered accountant nominated by the applicant.

d) That the remuneration of the liquidator is fixed at $25,000 plus GST, to cover his work and expenses from appointment and any work done before appointment up until 3 May 2010.

e) That the liquidator is return to the company all payments he has received in excess of that sum of $25,000 plus GST.

f) That if the liquidator wants to take any further remuneration from the company, that is to be the subject of an application to this Court, which I will consider. To allow that to occur, this case is to be called again on **8 September 2010 at 11:45 am**. At that time, the liquidator is also to file an affidavit showing that he has provided to the applicant an account of all company funds he has dealt with during his liquidation of the company. At the hearing on 8 September 2010, I will also require evidence from the liquidator that he has repaid to the company all sums other than the remuneration I have recognised as payable to him.

[35] On costs, the case has gone in favour of the applicant and therefore there should be an order for costs in his favour as well. I order an uplift in this case for these reasons:

a) Applications challenging liquidator's remuneration are difficult cases to bring. This was adverted to in the *Roslea* case. Most times, it is not worthwhile for a creditor to do so and that, to a certain extent, leaves the liquidator in a position of some immunity. It is always a strong call for someone to bring an application to this Court to challenge the remuneration of a liquidator. Mr Rai has done the company's creditors a favour by taking the course that he has.

b) Mr Rai has also had to endure ill-founded attacks and criticisms by Mr Chapman for having brought the application.

c) Mr Chapman's conduct in avoiding calling a creditors' meeting for fear that he would be removed by the creditors is an unsatisfactory explanation and inappropriate for a liquidator who is, after all, an officer of the Court.

[36] For those reasons, Mr Rai will have costs on the 2B scale with an uplift of 50% plus disbursements approved by the Registrar.

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R M Bell
Associate Judge