IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2011-409-001519

BETWEEN	ROONEY EARTHMOVING LIMITED Plaintiff
AND	CALVIN DOUGLAS MCTAGUE First Defendant
AND	CLARENCE HENRY WHITING Second Defendant
AND	KERRY WAYNE BARTLETT Third Defendant
AND	BMW CONTRACTING LIMITED (IN RECEIVERSHIP) Fourth Defendant

Hearing: 1 December 2011

Counsel: N R W Davidson QC and R Brown for Plaintiff
No Appearance for First and Second Defendants
K T Dalziel for Third Defendant
G Carter for Fourth Defendant

Judgment: 2 December 2011

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Solicitors:
Nicholas Davidson QC for Plaintiff. Email: nicholas@davidsonqc.co.nz
Taylor Shaw, Christchurch for Third Defendant. Email: kathryn@taylorshaw.co.nz
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[1] There are two substantive proceedings before the Court.

(a) Proceeding CIV-2010-409-1519. This is a proceeding under s 241 of the Companies Act 1993 for an order appointing a liquidator of the fourth defendant company. This proceeding was filed on 4 August 2011. At the same time the plaintiff filed an interlocutory application seeking appointment of an interim liquidator of the company pursuant to s 246(1) of the Companies Act 1993. On 12 August 2011 the fourth defendant applied for an order restraining publication of an advertisement of the liquidation and for an order staying any further steps in this proceeding.

The plaintiff is a contingent creditor of the fourth defendant. It has a judgment on liability against the fourth defendant from the Employment Court under which it will receive an award of damages. The decision of that Court on quantum (CRC 21/07) is awaited. Evidence and argument were heard by the Court some months ago. The present application is brought under s 241(2)(c)(iv) of the Companies Act 1993. The contention of the plaintiff is that the fourth defendant is unable to pay its debts, including its contingent or prospective liability to the plaintiff, which may be taken into account pursuant to s 288(4) of the Act.

On 24 August 2011 the Court made an order restraining publication. The plaintiff's application to appoint an interim liquidator was set down for hearing at a two day fixture before me commencing on 30 November 2012.

(b) Proceeding CIV-2009-476-471 is against the same defendants seeking damages for conspiracy by unlawful means, interference with the plaintiff's business by unlawful means and inducing breach of contractual relations. These allegations arise out of the actions of the first, second and third defendants in leaving the employment of the plaintiff and setting up the fourth defendant to operate in opposition to the plaintiff. The damages claimed in this proceeding are not less than $6m.

This proceeding has been stayed pending resolution of Employment Court proceedings CRC 21/07 referred to above. On 24 August 2009 the Employment Court found each of the individual defendants liable to the plaintiff for breaches of duties owed to the plaintiff and, as noted above, a hearing to ascertain the measure of damages was concluded in June 2011, with judgment awaited.

On 23 September 2009 the plaintiff was granted a freezing order pursuant to High Court Rule 32 against the fourth defendant on certain terms. This order remains current, and is expressed to remain current until further order of the Court.

[2] On 23 November 2011 pursuant to a general security agreement, the ANZ National Bank Limited appointed Mr S Tubbs and Mr C Gower, chartered accountants, as receivers of the fourth defendant. Counsel (at that time) for all defendants, Ms K Dalziel, drew this matter to the attention of the Court by way of memorandum, and sought a telephone conference prior to the fixture to determine how matters should proceed. The conference was convened on 28 November. As a result of discussions at that conference a further conference was convened on 29 November. In discussion it became apparent that it would not be necessary for contested evidence to be heard on the solvency or otherwise of the fourth defendant because the fourth defendant is now presumed to be unable to pay its debts, pursuant to s 287(c) of the Companies Act, and the receivers did not wish to lead evidence to rebut the presumption.

[3] In a memorandum dated 28 November Ms Dalziel advised she no longer required orders staying advertisement of the application. As a result the plaintiff advised the Court that it wished to proceed with its application to liquidate the fourth defendant, and that if that application were to proceed it may not be necessary to proceed with the application for the appointment of an interim liquidator. Counsel for the plaintiff made it clear that it nonetheless wished the freezing order to remain in force until such time as the company was placed in liquidation. Ms Dalziel advised that the liquidators wished to have the freezing order varied so that they could continue to carry out their duties as receivers. At the second telephone conference it became plain that there was little scope for agreement between the parties on these issues and accordingly I directed a fixture in open court to argue all applications on 1 December.

[4] At the first telephone conference on 28 November the second defendant was represented by Ms Shakespeare. She sought and was granted leave to withdraw and did not appear at either subsequent hearing.

[5] The receivers of the fourth defendant elected to appoint counsel to represent their interests and accordingly Mr Carter appeared at the fixture on 1 December for the fourth defendant. Ms Dalziel appeared for the third defendant.

[6] The applications before the Court are:

(a) On 2010-409-1519:

- application to revoke the order restraining advertising;
- application for appointment of an interim liquidator;
- application for appointment of a liquidator.

(b) On 2009-476-471:

- application to revoke or vary the freezing order.

On this proceeding there is also an application to revoke the stay, for procedural direction only.

Possible sale of the fourth defendant's business : relevant facts

[7] Shortly after their appointment the receivers advertised for expressions of interest from prospective purchasers of the business and assets of the fourth defendant, as a going concern. Expressions are sought by 5 December. Ms Dalziel by telephone and later Mr Carter explained to me that the receivers consider there are advantages for both secured and unsecured creditors in taking this course. First, they wish to conclude a sale of the business as a going concern because in their opinion this is likely to yield a significantly higher sum than sale of the assets of the business on a broken down basis. Secondly, it would be advantageous to achieve this outcome before the Christmas and New Year holiday period this year to avoid the cost of operating the company over the ensuing weeks of December and January, a period during which there is little work and for which the company holds few forward orders. It seems this is a period when the financial position of the company has the potential to deteriorate as expenses will exceed income. The company employs a significant number of staff and of course has other overheads.

[8] Mr Carter explained to me that it is the view of the receivers that the appointment of a liquidator at this stage is undesirable, for two reasons. First, it is likely to discourage potential purchasers from attempting to buy the business as a going concern, as it will engender in those persons an expectation that they might be able to buy the assets of the business more economically if they wait until the liquidation proceeds. Secondly, it will curtail their ability to act without the approval of the Court or the written consent of the appointed liquidator, because of the provisions of s 31 of the Receiverships Act 1993. Mr Carter emphasised to me the fact that the appointed receivers are extremely experienced and well regarded professionals in their field, and that they owe certain duties and have clear responsibilities as a matter of law, including both general duties, and specific duties when selling property, to exercise their powers with reasonable regard to interests of a range of persons including unsecured creditors.

[9] Against that background Mr Carter argued that it was both unnecessary and undesirable to appoint an interim liquidator or a liquidator. He also sought a variation of the freezing order in terms which would allow the presently appointed receivers (only) to carry out their duties as receivers.

[10] It will be noted that I have referred to submissions made by counsel, and to his passing on to me the instructions of his client. Mr Carter was instructed to act for the receivers late in the afternoon before the fixture on 1 December. He had not had time to prepare any evidence by way of affidavit from either receiver. The plaintiff filed an affidavit from Mr M G Hollis, a chartered accountant whom the plaintiff asks the Court to appoint as liquidator, or interim liquidator, as the case may be. I will refer to this affidavit shortly. Initially Mr Carter sought leave to file an affidavit from one of the receivers responding to Mr Hollis's affidavit and elaborating upon certain of the instructions given to Mr Carter and relayed through him to the Court. Mr Davidson did not oppose that but naturally sought to file an affidavit in reply. After consideration of this both counsel accepted that it was appropriate for me to determine this matter on the information I have at present, because there is a significant degree of urgency, and further delay for the provision of further affidavits could render it unlikely that a judgment on the applications before me could be issued until approximately 10 days time. In my view these were appropriate

decisions by counsel in the circumstances and I am satisfied I have sufficient material to decide the issues before me.

[11] Mr Davidson informed me that his client regards the defendants with grave suspicion, founded on their conduct which is the subject of the judgment for liability by the Employment Court. The same conduct forms the basis of the pleaded allegations in High Court proceeding CIV-2009-476-471. As that conduct is the basis of the Employment Court judgment it is also the basis upon which the plaintiff is a prospective creditor and thus forms the foundation for this application to wind up the fourth defendant. Its particular relevance to the applications before me is two-fold. First, it is the plaintiff's position that, without casting any aspersion on the professional ability of the receivers, there should nonetheless be a liquidator who is empowered to exercise a degree of control and who would need to approve any sale of the business unless Court approval were obtained. Secondly, Mr Davidson pointed out that for a long period the High Court has respected his client's position by maintaining a freezing order, and he submitted this should continue notwithstanding the receivership, because of the potential for the defendants to become involved either directly or indirectly in the process of the receivers' sale of the business, either as purchasers (disclosed or not) or by interfering with purchasers to the detriment of unsecured creditors.

[12] Mr Davidson referred to the affidavit of Mr M G Hollis in which Mr Hollis disagreed with the receivers' view that a liquidation might affect their ability to achieve the best possible sale price for the business and/or the assets of the company. Mr Hollis went on to express the view that despite the freezing order being in place if the company is not in liquidation, "Rooney requires the necessary protection of a liquidator to ensure that any sale of the business and/or assets of the company is for fair market value". Acknowledging that if he were appointed liquidator the receivers would need to obtain either Court or his approval in relation to the sale of the business or assets of the company, he confirmed that provided fair value has been achieved "that should not be an impediment".

Liquidation

[13] Mr Davidson submitted that now the company is presumed to be insolvent as a result of the appointment of a receiver, in the absence of evidence to rebut that presumption the Court must proceed on the basis that the company is insolvent. I accept that submission.

[14] Mr Davidson submitted that as the company is presumed to be insolvent the normal course is for the Court to appoint a liquidator. Although receivers are in office, the Court still regards a liquidator as serving a useful function in investigation of the Company's affairs and acting as a guardian of the interests of unsecured creditors: *Re Marlborough Sealink Ltd*;[1] *Westgold Finance Ltd v Pan Pacific Cameras Ltd*;[2] *Re Feltex Carpets Ltd (In Receivership)*.[3]

[15] In *Commissioner of Inland Revenue v Chester Trustee Services Ltd*,[4] Tipping J said:

> That said, I agree with Baragwanath J that the general policy of the Act that insolvent companies should be put into liquidation, if a creditor seeks such an order, should not be departed from lightly. To justify such departure there must be some other factor, be it policy, principle or simply the justice of the particular case, which outweighs the prima facie entitlement of the creditor to an order putting the insolvent company into liquidation. If the focus is on the justice of the particular case the discretion must always be exercised on a principled basis and not on some ad hoc perception of what individual justice might require.

[16] Based on these authorities Mr Davidson urged me to appoint a liquidator immediately. For reasons which I will now set out, I have decided that it is premature to do so. The application for appointment of a liquidator has not been advertised. Now the application for stay of advertising has been withdrawn, the plaintiff can proceed to advertise. Part 31 of the High Court Rules applies to applications to place companies into liquidation – r 31.1. Rule 31.9(1) provides that a proceeding commenced by a statement of claim under r 31.3 must be advertised at least five working days before the hearing. I note the directory terms of this rule. I

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1 *Re Marlborough Sealink Ltd* (1986) 3 NZCLC 99,501
2 *Westgold Finance Ltd v Pan Pacific Cameras Ltd* HC Christchurch M699/88, 11 May 1989
3 *Re Feltex Carpets Ltd (In Receivership)* HC Auckland CIV-2006-404-6525, 13 December 2008
4 *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 at [3]

also note that in *McGechan on Procedure* (online edition) at HR 31.9.04 the learned authors cite *Registrar of Companies v First Investments Ltd (In Liq)*[5] as deciding that the advertising requirement may be waived under r 1.5. With respect to the learned authors, I do not read the judgment that way. Neither Mr Davidson nor Mr Brown was able to direct me to any other authority in support of the proposition that notwithstanding the terms of r 31.9 I still have a discretion not to require advertising. They referred me to s 291 of the Companies Act which gives the Court power, after dismissing an application under s 290 to set aside a statutory demand, to order that the company be put in liquidation under s 241(4). That is an isolated statutory power to order the appointment of a liquidator without the application having been advertised, but there is no similar provision elsewhere. I prefer to interpret r 31.9 as a mandatory requirement that an application be advertised, whilst noting that counsel had little time in the circumstances of this case to research or argue the matter comprehensively and in the end Mr Davidson reserved his position. I am satisfied that the appointment of a liquidator in this case is not so urgent as to bring into sharp focus the issue of whether I may appoint a liquidator without the application having been advertised. Given cancellation of the order staying advertising, there is no reason why advertising should not now take place.

[17] It follows from this that the application to appoint a liquidator will be called on a later date and accordingly it is not appropriate in this judgment to make any further comment or finding in relation to that application. Counsel have informed me that they intend to advertise the application immediately, and accordingly I adjourn the application to **9.45 am on 15 December 2011**.

[18] I am also satisfied that in all the circumstances of this case it is presently unnecessary to appoint an interim liquidator, and I did not understand counsel for the plaintiff to be seeking such an order at this point. That application is also adjourned and may be brought on for hearing on one day's notice should the circumstances change prior to 15 December.

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5 *Registrar of Companies v First Investments Ltd (In Liq)* [1998] 2 NZLR 352

Freezing order

[19] Mr Carter sought a variation of the freezing order to provide that it does not prohibit the present or any receivers of the fourth defendant under the appointment of ANZ National Bank Limited from exercising powers conferred by any deed, agreement or order of the Court, or under the Receiverships Act 1993, and further to provide that the order remain in effect until the date the fourth defendant is placed into liquidation. He proposed a consequential change to the order to provide that the requirement on the fourth defendant to notify the plaintiff of any proposed sale of any land, plant or equipment before the sale process is commenced not apply while the fourth defendant is in receivership. Mr Davidson proposed a variation of the order to provide that if the receivers seek to vary the order for the purposes of sale of the business and/or assets of the fourth defendant, they should be required to apply to the High Court for that variation on seven days' notice.

[20] Mr Carter explained that the effect of the changes he proposed to the order would be to allow receivers appointed by ANZ National to carry out their duties without reference to the plaintiff or the Court. In presenting his argument in support of this proposition Mr Carter relied on the experience of the receivers and their powers and duties whilst acting in that capacity. He also expressed particular concern about any requirement to notify the plaintiff of any proposal to sell the assets of the company. He noted that the plaintiff is in competition with the defendant and that Mr Davidson had frankly accepted that the plaintiff may be a party interested in purchasing its business; he submitted that there is a real prospect of there being an adverse effect on the sale process if a competitor, who might also be a potential competing bidder for the business, is placed in a position of having knowledge which other competing purchasers do not have, or there being a requirement to take a proposed sale back to the Court on seven days' notice, given the exigencies of the sale process within the limited time before the Christmas and New Year holiday period, to which I have earlier referred.

[21] Mr Davidson argued that a variation of the freezing order to allow any receivers of the fourth defendant to sell its assets would abrogate the protection granted by the High Court to the plaintiff, as the present receivers could be removed

from office should the security instrument under which they were appointed be purchased, and control of the receivership thus change. Mr Carter acknowledged the force of this submission, but emphasised that the variation to the freezing order which he proposed was specifically limited so that only receivers appointed by ANZ National were excepted from its terms.

[22] Mr Davidson alternatively proposed that a further provision could be incorporated in the freezing order for it to expire 24 hours after notice to the plaintiff of a proposed sale, accompanied by sufficient information for the plaintiff to be fully informed of the proposal, unless the plaintiff has within that time sought an order from the High Court that the freezing order remains in place. Mr Carter opposed the involvement of the Court because of the potential adverse effect of that on potential bidders. He indicated his clients' preference that a liquidator be appointed (a step he otherwise opposed) rather than there being any provision in the order requiring the receivers to give notice to the plaintiff, with the plaintiff then being involved in the sale process. This was, as he put it, the lesser of two evils.

Decision on the freezing order

[23] I am satisfied that the freezing order should be varied in the manner proposed by the fourth defendant in receivership, for the following reasons:

1. Since the freezing order was granted there has been a material change of circumstance. Control of the fourth defendant has been taken from the first to third defendants and is now vested in independent receivers who are governed by principles of law which impose on them duties not only to the party which appointed them, but also to unsecured creditors, a class which includes the plaintiff. Accordingly the receivers are accountable as a matter of law. The risks associated with the assets of the defendant company, to which the plaintiff has a claim, remaining in the hands of those who carried out the actions which gave rise to that claim no longer exist.

2. In my judgment the interests of all creditors will be better served by a sale process conducted independently by the receivers without

information relating to that sale process coming into the hands of the plaintiff. I cannot discount the prospect of the plaintiff itself being a purchaser. Whilst one consequence of that fact might be that knowledge of the bids of other parties might encourage the plaintiff to bid a higher price, I am not satisfied that the interests of those who will ultimately receive the sale proceeds are best served by one bidder in a process being in possession of information that other bidders are not. The fact that one bidder can come into possession of information about the bidding process is in my judgment likely to be a disincentive to other bidders participating.

3. The fourth defendant is a competitor of the plaintiff. The receivers consider the interests of creditors are better served by sale as a going concern (see [7]). I cannot rule out the possibility that the plaintiff may see it as in its best interests for the business of the fourth defendant not to be sold as a going concern, but rather for its assets to be sold separately, thereby removing this competitor from the market. I do not need to speculate on how the plaintiff might bring this about; it is of sufficient concern to me that there exists the possibility of this occurring to persuade me to avoid a situation where the plaintiff is involved in consideration or approval of a potential sale.

4. Mr Davidson stressed that the directors of the plaintiff operate in the mid-Canterbury area and are highly likely to become aware of any actions by the first to third defendants which might (as he put it) contaminate the sale process. Mr Davidson pointed out that the first to third defendants might seek to become the purchasers of the business of the fourth defendant as a going concern either overtly or covertly. Reference of any proposed sale to the plaintiff would give the plaintiff an opportunity to look into whether that was occurring and advise the receivers or to raise this with the Court. Whilst I acknowledge that may possibly be advantageous, I find the other factors which underpin my decision to be more compelling. It is in the interests of the plaintiff that the sale proceeds are maximised in order to increase its prospect of

receiving satisfaction of the judgment it is in the course of obtaining from the Employment Court, and the judgment it seeks from this Court under the 2009-476-471 proceeding. Therefore, if the plaintiff becomes aware of any activities by any persons which might lessen the sale proceeds it is plainly in its interest to notify that to the receivers, and it would be consistent with the receivers' duties to take such information into account, to the extent it is relevant, when making their decisions. The objective of the plaintiff can be achieved, therefore, without their being expressly involved in the sale process. Further, a purchase by the first to third defendants may not necessarily be disadvantageous to the fourth defendant, depending on its terms, and the receivers are well qualified to judge.

5. In my opinion there is some force in Mr Carter's submission that potential purchasers might be discouraged from participating in the process if it is necessary for any sale to be approved by the Court, because of possible attendant delays and uncertainty, particularly given the receivers' particular wish to conclude the sale of the business as a going concern before the Christmas and New Year holiday period, for the reasons expressed earlier in this judgment. I have given this submission some weight but only as part of my overall assessment of the factors under consideration. It would not have been sufficient on its own to convince me that the freezing order should be varied in the manner he proposes.

[24] I am not attracted by Mr Davidson's proposal that the receivers be permitted to proceed with the sale 24 hours after giving detailed notice of it to the plaintiff. It has some potential to simplify the process which would otherwise be involved in obtaining Court approval, but it has the disadvantage of putting information in the hands of a potential bidder and actual competitor of the fourth defendant which in my opinion outweighs the little which would be gained by proceeding in this way. When one puts into the balance the professional duties of the receivers in relation to the sale process, it is in my opinion appropriate to allow them to proceed in accordance with their duties as receivers.

Outcome

[25] Accordingly I make the following orders:

1. I revoke the stay on advertising of the application to wind up.

2. I adjourn the application to appoint an interim liquidator; it may be brought on at 24 hours notice if the circumstances change from those prevailing at this point.

3. I adjourn the application for appointment of a liquidator to **9.45 am on 15 December 2011**, to allow advertising in the Gazette and the Christchurch Press to take place. I abridge time for advertising in the Gazette by one day to allow the hearing of the application to proceed on this date.

4. I vary the freezing order so that it is in the terms of the draft attached to the memorandum of counsel for the fourth defendant dated 30 November 2011.

5. The plaintiff's application to lift the stay of proceeding 2009-476-471 which continues to be opposed by the third defendant (though not by the fourth defendant) will be considered for procedural directions at a **telephone conference on 31 January 2012 at 12.30 pm**.

6. The costs of the applications considered today are reserved. If not agreed by the parties, memoranda may be filed for my attention by 31 January 2012.

J G Matthews
Associate Judge