

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2012-485-1617  
[2012] NZHC 2835**

UNDER section 17A Judicature Act 1908

IN THE MATTER OF an application to appoint liquidators to a trust

BETWEEN BANK OF NEW ZEALAND  
Plaintiff

AND DAVID INGRAM ROWLEY AND  
BARRIE JAMES SKINNER AS  
TRUSTEES OF TPS ASSET TRUST  
Defendant Trustees

**CIV-2012-485-1618**

UNDER section 17A Judicature Act 1908

IN THE MATTER OF an application to appoint liquidators to a trust

BETWEEN BANK OF NEW ZEALAND  
Plaintiff

AND DAVID INGRAM ROWLEY AND  
BARRIE JAMES SKINNER AS  
TRUSTEES OF TPS ASSET NO 2 TRUST  
Defendant Trustees

Hearing: 18 September 2012

Counsel: J W G Grant for plaintiff  
No appearance for defendant trustees

Judgment: 29 October 2012

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## INTERIM JUDGMENT OF DOBSON J

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[1] This interim judgment addresses the first stage of what appear to be novel proceedings in which the plaintiff (the BNZ) invokes s 17A of the Judicature Act 1908 in seeking orders for the liquidation of two trusts, or alternatively for orders operating against the trustees of those trusts to effect the same outcome.

[2] The individuals who were originally sued as defendants in the proceedings (Messrs Rowley and Skinner) were at the relevant time in business as tax advisers. For the purposes of their business, they used an incorporated company, TPS Accounting Limited (TPS Accounting), as a relevant vehicle. In January 2003, they formed two trusts, one each for the interests of the other of them and that individual's wife and family, to which it was intended that proceeds of the business be transferred.

[3] TPS Accounting borrowed certain amounts from the BNZ and that indebtedness was the subject of guarantees granted by Messrs Rowley and Skinner, both in their personal capacity and in their capacity as trustees of the trusts.

[4] On 17 August 2012, Messrs Rowley and Skinner were convicted of numerous counts of fraud, tax evasion and attempting to pervert the course of justice. They have subsequently been sentenced to eight years' imprisonment and eight and a half years' imprisonment respectively.

[5] TPS Accounting was placed in receivership on 25 August 2011 and subsequently placed in liquidation on 7 May 2012.<sup>1</sup> Messrs Rowley and Skinner were adjudicated bankrupt on 30 July 2012.

[6] It is clear, however, that the orders for their bankruptcy operate only to vest in the Official Assignee property that was not held by the bankrupt in trust for another person.<sup>2</sup>

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<sup>1</sup> *Bank of New Zealand v TPS Accounting Ltd* [2012] NZHC 899.

<sup>2</sup> Insolvency Act 2006, s 4.

[7] In the present proceedings, the BNZ has sought to invoke the Court's jurisdiction under ss 17A, 17B and 17C of the Judicature Act 1908.

[8] The first of those sections provides as follows:

**17A Jurisdiction as to liquidation of associations**

- (1) In this section, association includes any partnership, company, or other body corporate, or unincorporated body of persons other than—
  - (a) A company or an overseas company, as defined in section 2 of the Companies Act 1993; or
  - (b) A company as defined in section 2 of the Companies Act 1955; or
  - (c) A body corporate that may be put into liquidation in accordance with the provisions of any Act under which it is constituted.
- (2) The Court has jurisdiction to appoint a named person or an Official Assignee for a named district as the liquidator of an association.
- (3) An application for the appointment of a liquidator may be made by the association or a director or member or creditor or the Registrar of Companies.
- (4) The Court may appoint a liquidator if it is satisfied that—
  - (a) The association is dissolved or has ceased to carry on business or is carrying on business solely for the purpose of terminating its affairs; or
  - (b) The association is unable to pay its debts; or
  - (c) It is just and equitable that the association be put into liquidation.

[9] There is no definition in the Judicature Act of “association” or “unincorporated body of persons” but in other contexts the expression is defined as including trustees of a trust.<sup>3</sup> Provisionally therefore I accept that s 17A of the Act creates the jurisdiction to appoint a liquidator if the Court is satisfied of one of the conditions for doing so in s 17A(4).

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<sup>3</sup> See, for example, Goods and Services Tax Act 1985, s 2 and Child Support Act 1991, s 2.

[10] I am also satisfied that the trusts are unable to pay their debts. In July 2011, the BNZ made demand on the trusts by their trustees pursuant to their guarantees in respect of the indebtedness of TPS Accounting. Then, in April 2012, the BNZ obtained judgment against the trustees as trustees of these trusts for the sum of approximately \$509,700. The BNZ contends that at no stage have the trustees denied or disputed their liability and the full amount remains outstanding.

[11] The jurisdiction for making orders of the type sought therefore appears to exist.

[12] Initially, the BNZ sought orders that liquidators be appointed to the trustees, Messrs Rowley and Skinner. That is understandable, given that legal ownership of all assets of the trusts, and the assumption of liabilities in relation to the trusts, must be in the names of, and assumed by, the trustees. Given the absence of separate legal identity for the trusts as entities able to enjoy legal ownership of assets, there is an artificiality about contemplating liquidating “the trusts”.

[13] However, more recently the BNZ has filed amended statements of claim in which it seeks that the trusts be placed in liquidation. That change may be motivated, at least in part, by each of the trustees apparently conveying to those responsible for serving the original documents on them in Rimutaka Prison that they had purported to resign their position as trustee.

[14] When the proceedings were called on 18 September 2012, I invited Mr Grant to provide me with copies of the trust deeds. On the basis of the terms of the trust deeds, it appears at least to be arguable that the trustees cannot unilaterally or informally “resign”. The trust deeds appear not to make specific provision for “resignation” and a somewhat narrower provision for trustees to surrender powers, authorities or discretions reposed in them would require the completion of a deed.

[15] It is to be expected that the trust deeds would be interpreted in a way promoting continuity, and certainly to avoid the possibility that the trusts might fail in the absence of duly appointed trustees, in which case any assets would become vulnerable to assignment to the Crown on *bona vacantia*.

[16] After I had traversed the matters reviewed above, and others, with Mr Grant at the hearing on 18 September 2012, I had drawn to my attention a letter written by Mr Rowley from Rimutaka Prison dated 16 September 2012. The letter was apparently received by the Court Registry on 19 September 2012.

[17] In that letter, Mr Rowley advised that he and Mr Skinner had been replaced as trustees “some time ago” by a sole corporate trustee, namely St George Towers Trustees Limited (St George). I directed that a copy of the letter was to be referred to solicitors for the BNZ, and subsequently received a memorandum from them dated 27 September 2012. In that memorandum, counsel addressed impediments to the relief sought that had been raised by Mr Rowley’s communication, and reiterated the application that the orders be made as sought.

[18] Notwithstanding the content of the memorandum of 27 September 2012, I directed that all the documents filed thus far in the proceedings be served on St George at its registered office, including a copy of my Minute of 2 October 2012 which directed that step. I indicated that that company would have a period of 10 working days after service to file and serve documents making out grounds for opposition to the orders sought on behalf of the BNZ.

[19] Solicitors for the BNZ have confirmed that service was effected on 9 October 2012. Accordingly, any steps were required to be taken by St George by 23 October 2012. No documents have been filed.

[20] In those circumstances, the prospect remains that either or both of Messrs Rowley and Skinner have taken steps purporting to resign as trustees and appointing a new corporate trustee, but that such steps are legally ineffective. The appropriate course to adopt, until the lawfulness of any change of trustees is clarified, is to treat Messrs Rowley and Skinner and St George as the trustees of the two trusts for the time being.

[21] I was advised by Mr Grant at the hearing on 18 September 2012 that the trusts do not operate bank accounts with the BNZ, and that the BNZ has no reliable

information as to the extent of assets of the trusts. Nor does it have information in relation to debts owed by the trusts to other creditors.

[22] There is a similar dearth of information as to the identity and ages of beneficiaries. Although it may be possible to deduce indirectly the scope of the immediate families apparently intended by the settlors as the discretionary and final beneficiaries of each of the trusts, that is also not entirely clear. It may be that the draftsman of the trust deeds intended to include a definition of “parents” that appears to have been omitted. For present purposes, I assume that the beneficiaries include the wives and children of Messrs Rowley and Skinner. It is also appropriate to assume that the beneficiaries of the trusts include minors.

[23] Depending on the financial position of the trusts, a range of issues may need to be addressed as to how the interests of other creditors of the trusts are appropriately recognised and protected, and similar issues arise in respect of the beneficiaries of the trusts.

[24] As a matter of law, creditors of a trust do not have a direct claim on its assets. The route to satisfaction of a creditor’s claim is to assert subrogation to the rights of indemnity that the trustee has, in respect of liabilities assumed by the trustee in relation to the conduct of the business of the trust.<sup>4</sup> Here, the trust deeds include an indemnity for the trustees to resort to the assets of the trust in respect of liabilities they incur, except in the case of fraud.<sup>5</sup> I proceed on the provisional assumption that the trustees would, in present circumstances, be entitled to rely on that indemnity, but acknowledge that this is also an issue that may need closer consideration, given that Messrs Rowley and Skinner appear to have involved the trusts in the criminal conduct leading to their convictions.

[25] In these circumstances, I am minded to order that liquidators be appointed in respect of the assets and liabilities held by all or any of the trustees of the trusts, on terms requiring the liquidators to ascertain promptly:

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<sup>4</sup> See, for example, Paul Heath and Michael Whale *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [46.4(b)].

<sup>5</sup> See para 20 of the trust deeds.

- the status of trustees of the trusts;
- the state of assets and liabilities of the trusts by reference to the last set of financial statements prepared for each trust, together with all accounting and other records available to reflect movements of financial position since the last balance date;
- the pattern of any distributions from the trusts to creditors and beneficiaries of the trusts; and
- the identity and ages of the beneficiaries of each trust.

[26] I am minded to direct that such steps be taken by the liquidators within 42 days of their appointment and that, depending on the outcome of those steps, the liquidators are to report to the Court on their view as to:

- the identity of creditors and/or beneficiaries with a sufficient interest to warrant their being served with the proceedings and the liquidators' report;
- the liquidators' recommendation for future steps in the liquidation; and
- any additional initiatives the liquidators consider appropriate and for which additional court orders may be required.

[27] As to the identity of the appropriate liquidators, the BNZ's applications seek the appointment of insolvency practitioners in private practice, Messrs Barry Phillip Jordan of Wellington and Grant Stephen Jarrold of Christchurch. In the submissions I heard from Mr Grant, he acknowledged that solicitors for the BNZ have been liaising with personnel in the office of the Official Assignee who are responsible for administering the estates in bankruptcy of Messrs Rowley and Skinner in their personal capacity. Risks of inefficiency or duplication arise if those charged with liquidating the assets held in the legal ownership of Messrs Rowley and Skinner in their capacity as trustees are separated from the administration of their personal

bankruptcies. I accordingly would propose the appointment of the Official Assignee in lieu of the form of order sought by the BNZ.

[28] However, in the first instance, I direct that all the pleadings filed on behalf of the BNZ, together with the terms of this interim judgment, be served on the Official Assignee. A copy of this interim judgment is also to be served on St George. I invite written submissions be filed and served within seven days after service of the documents and/or this judgment on behalf of any of the BNZ, the Official Assignee or St George, to the extent that they would propose a course different to that which I have set out.

**Dobson J**

Solicitors:  
JT Law, Wellington for plaintiff