IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-003865
[2012] NZHC 766

UNDER	the Companies Act 1993
IN THE MATTER OF	an application to terminate the liquidation of SILVERDALE DEVELOPMENTS (2007) LIMITED (In Liquidation)
BETWEEN	ANTHONY BUNTING, ELAINE TASSIE, GARY RAYMOND COOPER AND JANET MARY COOPER Applicants
AND	JOHN BUCHANAN First Respondent

/...Continued over

Hearing: 23 August 2011

Counsel: L J Turner for applicants
G P Blanchard for first respondent
T J G Allan and J E M Lethbridge for second to fourth respondents

Judgment: 24 April 2012

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 24 April 2012 at 5pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

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AND	ROYDEN BRETT ALLNUT, DIANE PATRICIA ALLNUT AND JANENE MARY OLSON Second Respondents
AND	GARY HUGH CHAMBERS, DENISE CATHY CHAMBERS AND DAVENPORTS HARBOUR TRUSTEE (2008) LIMITED Third Respondents
AND	THE IMPORTER BRASSWARE LIMITED Fourth Respondent
AND	FREDERICK JOSEPH PURVIS AND SUSAN ELIZABETH PURVIS Fifth Respondents

[1] This is an application by the shareholders of Silverdale Developments (2007) Limited (in liquidation) (SD2007) to terminate the liquidation.

[2] SD2007 was incorporated to carry out the development of commercial warehouse premises at 18 David McCathie Place, Silverdale. The applicant shareholders put it into liquidation on 15 May 2009 after the development was complete and the five strata title units in the development were sold to the respondents.

[3] The second to fourth respondents purchased four of the five units from SD2007.[1] After taking possession they observed cracks in the floor slabs and raised this with SD2007's directors. The parties have been unable to agree on the cause of the cracking or the cost of repair. The unit owners attribute it to faulty construction and say that the floor slabs will need to be replaced at a cost of about $2,300,000. The shareholders attribute the problem to site conditions and hard plastic tyres used on forklift machines in the warehouses. They contend that the cracks can be remedied for a cost of about $30,000.

[4] The unit owners dealt with the directors (the applicants Mr Bunting and Mr Cooper) for about a year before they learned that SD2007 was in liquidation. They then filed claims in the liquidation for their estimated costs of repair.

[5] The person who was initially appointed liquidator was not prepared to determine the claim in light of the dispute between the parties, choosing instead to apply to the court for a determination under s 307 of the Companies Act 1993 (the Act). He subsequently resigned and the first respondent (the liquidator) was appointed. The liquidator rejected the unit owners' claims, and left it to them to pursue those claims in the ordinary course. He took, and continues to take, the position that the liquidation and the unit owners' proceedings can continue to run at the same time.

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[1]The second to fourth respondents will be referred to as "the unit owners" as the fifth respondents, the owners of the fifth unit, have not taken a formal position in this proceeding.

[6] The shareholders filed the present application asking the Court to terminate the liquidation. They say that SD2007 is solvent and that the liquidation should be terminated so that they can conduct its defence to what they see as an extraordinarily overstated claim. They wish to avoid what, in their view, are the unnecessary costs of continuing the liquidation.

[7] The liquidator and the unit owners oppose an order for termination. The liquidator takes the view that SD2007 may not be solvent and that there could be a substantial shortfall in the liquidation if the unit owners' contentions are proven. The unit owners say that arrangements proposed by the shareholders to preserve SD2007's one substantial asset (an adjoining warehouse development at 18 David McCathie Place) do not adequately protect that asset. They also say that there is a public interest against terminating the liquidation.

The court's approach to the application

[8] The application is made under s 250 of the Act. The relevant parts of the section for this application are:[2]

> 250 Court may terminate liquidation
>
> (1) The court may, at any time after the appointment of a liquidator of a company, if it is satisfied that it is just and equitable to do so, make an order terminating the liquidation of the company.
>
> (2) An application under this section may be made by—
>
> ...
>
> (c) a director or shareholder of the company;
>
> ....
>
> (4) The court may, on making an order under subsection (1), or at any time thereafter, make such other order as it thinks fit in connection with the termination of the liquidation.
>
> ....
>
> (6) Where the court makes an order under subsection (1), the company ceases to be in liquidation and the liquidator ceases to hold office with effect

[2] Companies Act 1993, s 250.

> on and from the making of the order or such other date as may be specified in the order.
>
> ....

[9] As is apparent from the wording of the section, the Court has a discretion to make an order terminating the liquidation of a company at any time after appointment of a liquidator, if satisfied that it is just and equitable to do so. The discretion is a broad one and is generally exercised if three factors identified in *Re Bell Block Lumber Ltd (in liq)*[3] are met. In that case Tipping J held that the discretion to order the stay of a liquidation should not be exercised unless:

a) All creditors had been paid in full or satisfactory provision has been made for them to be paid in full or they consent to the application; and

b) The liquidator's costs have been fully paid or secured; and

c) All shareholders consent, or will be no worse off than if the liquidation proceeded to its conclusion.

[10] In *Canterbury Squid Co Ltd v Southwest Fishery Ltd*, Gallen J accepted the three factors identified in *Re Bell Block Lumber Limited* and noted a fourth factor that the Court should take into account, namely, the public interest:[4]

> … the public should not have … insolvent companies foisted upon them or allowed to operate in such a way that members of the public may be put at risk.

[11] Although *Re Bell Block Lumber Ltd* and *Canterbury Squid Co Ltd* were decisions on applications for stay under s 250 of the Companies Act 1955, which did not contain a power to terminate the liquidation of a company, these principles have been consistently held as applicable to a consideration under s 250 of the 1993 Act.[5]

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[3] *Re Bell Block Lumber Ltd (in liq)* (1992) 6 NZCLC 67,690 (HC).
[4] *Canterbury Squid Co Ltd v Southwest Fishery Ltd* HC Wanganui M31/93, 24 August 1993.
[5] *Foundation Securities (NZ) Ltd v Direct Labour Services Ltd* [2008] NZCCLR 1 (HC) at [21]; *Tai Ping Trading Co Ltd v Regina Enterprises Ltd* HC Auckland CIV-2009-404-007754, 29 March 2010; *Victor Services Ltd v Wise Coach Ltd* HC Auckland CIV-2010-404-1200, 16 July 2010; *Network Plumbing Ltd v Beyond the Obvious* HC Wellington CIV-2004-485-1792, 9 July 2010.

[12] In *Foundation Securities (NZ) Ltd v Direct Labour Services Ltd* Cooper J expressed the caution that the factors identified in *Re Bell Block Lumber Company Limited* should not be regarded as:[6]

> ...an exclusive set of criteria for the exercise of what is a very broadly expressed power, which the legislature contemplated should be exercised wherever it is just and equitable to do so.

[13] He referred specifically to the need to have regard to the public interest:[7]

> ... while proof of the three matters identified by Tipping J might be necessary pre-conditions to the termination of a liquidation, the Court will not be constrained to a consideration of those matters only, in determining whether or not it is just and equitable to terminate a liquidation. The Court will also have regard to the public interest, and be concerned to protect the interests of the present creditors of the company, as well as the interests of those parties who would, in future, have dealings with it if the liquidation were terminated.
>
> (citations omitted)

The background to the application

[14] SD2007 was incorporated on 27 March 2007. It entered into sale and purchase agreements with the unit owners between August 2007 and February 2008. Construction of the units took place between January and October 2008. The agreements were completed and the unit owners moved into their units in December 2008 or January 2009. The first unit owner to move in noticed cracking in the floor and raised that with one of SD2007's directors, Mr Bunting, in February 2009. Nothing was done about it at that time. It soon became apparent that the other units suffered from the same problem.

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[6] At [21].
[7] At [22].

[15] The shareholders placed SD2007 into voluntary liquidation on 15 May 2009. Mr Callum Macdonald was appointed liquidator. He noted in his first report that the company had ceased to trade following the sale of its major asset.

[16] In July 2009 the second respondent (Mr Allnut) started an investigation into cracking present in his unit. Subsequently the body corporate for the development engaged an engineer, Mr G Chilcott of MSC Consulting Group Ltd (MSC), to advise on the cause of the cracking and the remedial work required. He considered that the cracking was primarily due to shrinkage in the concrete which was not allowed for sufficiently in the design or construction of the floor slab and control joints in the concrete. He recommended that the cracks be filled and their surrounds be resurfaced. The cost of this work has been assessed at $30,429 (GST inclusive).

[17] The consulting engineer who had been engaged in the construction visited the site as did the sub-contractor who had undertaken the cutting of the floor slabs to view the cracks and the expansion joints. The parties discussed the problem but were unable to agree on who was responsible for any remedial work.

[18] In April 2010 the unit owners sought a meeting to discuss what was to be done to rectify the problem. They proposed that a meeting be held on 30 June 2010. In early June Mr Bunting informed the unit owners that he and Mr Cooper would be unable to attend that meeting and that Mr Macdonald had been appointed liquidator of SD2007. The unit owners say that this was the first time they were aware of the liquidation.

[19] In July 2010 the unit owners' solicitors wrote to Mr Macdonald suggesting that he replace Messrs Cooper and Bunting as directors of Silverdale Developments (2008) Limited (SD2008), which is a wholly-owned subsidiary of SD2007 and the owner of the adjoining commercial property at 16 David McCathie Place, in order to protect the value of that asset. Mr Macdonald did not do so, but he did lodge a caveat against the title to 16 David McCathie Place to address the unit owners' concern that SD2008 was endeavouring to sell the property. Messrs Bunting and Cooper remained in control of SD2008, and particularly of the income from a lease of that property which they had put in place after SD2007's liquidation.

[20] On 6 October 2010 the unit owners lodged proofs of debt for nearly $2 million (on a without prejudice basis as further information was being sought). Upon receipt of those proofs, Mr Macdonald informed the unit owners that he would not determine the claims at that time. A month later he filed an application under s 307 of the Act (whereby the Court can determine the quantum of a contingent or an unquantified claim) for the court to resolve the unit owners' claim.

[21] The unit owners responded by applying to remove Mr Macdonald as liquidator. After meetings with the unit owners, Mr Macdonald resigned in February 2011 and was replaced by the first respondent, Mr Buchanan (the liquidator). Following his appointment, the liquidator took control of SD2008 and its income (by appointing himself as director in substitution for Messrs Bunting and Cooper). The income from the lease of 16 David McCathie Place is now being used to fund the liquidation.

[22] In September 2010 MSC reinspected the second respondent's unit and provided a supplementary report revising the recommended remedial work to an overlay over the whole of the floor slab. The unit owners have obtained a quotation for the cost of that work of $414,287.50 (GST inclusive).

[23] The unit owners were still unsure about the cause of the cracking and in December 2010 engaged a further expert, Mr Brown of the engineering consultants Fraser Thomas Brown, to assess the likely cause of the damage and recommend appropriate remedial work. Mr Brown was also later engaged by the body corporate to investigate and make recommendations on cracking in the carpark slab and its retaining wall. Mr Brown has concluded from his inspection, and from core samples taken of the concrete, that the cracking is a consequence of inadequate design and construction of the slab. He refers to issues over the engineering specifications and construction defects (including insufficient thickness of the floor slab and strength of concrete used, inappropriate placement of reinforcing mesh and a failure to cut expansion joints to the correct depth). He considers that the only realistic remedial option is to demolish and replace the slab. The cost of that work has been assessed at $665,382 (GST inclusive).

[24] Shortly after Mr Brown was engaged by the unit owners, in early 2011, the liquidator commissioned the engineering firm Beca Carter to provide a report. Beca Carter undertook a visual inspection and reviewed the plans and specifications for the building and earlier reports (from the time of construction and including Mr Chilcott's original report). Beca Carter did not undertake any testing of the concrete or other possible investigations. It reported in mid-May its conclusion that this was shrinkage cracking "primarily attributed to inadequate specification and detailing, or construction, of the sawn contraction joints". It found no evidence that the performance of the slab was compromised, and said that "wholesale replacement did not appear to be warranted".

[25] Following receipt of the Beca Carter report (and apparently without knowledge of Mr Brown's views) the liquidator notified the unit owners that the s 307 proceeding was to be discontinued, that the unit owners' proofs of debt were rejected, and that he consented to the unit owners commencing proceedings against SD2007. A creditors' meeting was held on 11 June 2009 at which the liquidator tabled the Beca Carter report, confirmed his approach, and put forward the proposal that Beca Carter's recommendation for remedial work be costed and that 16 David McCathie Place be sold to meet the remedial cost. The liquidator commented that he did not consider that it was a solvent liquidation as there might not be sufficient funds to undertake the remedial work.

[26] On 29 June 2011 the liquidator's solicitors wrote to the unit owners' solicitors in response to matters raised after the meeting, and confirmed the liquidator's decision to discontinue the s 307 proceeding. They stated as his reasons:

> The s 307 procedure is clearly not the appropriate one in this case. As previously advised, this is because your clients' claims raise issues as to liability, as well as quantum. In addition, other parties are exposed as a result of the claims ... but there is no ability to join these parties to a s 307 proceeding.
>
> ....As previously indicated, the liquidator also considers that it would be inappropriate to attempt to resolve your clients' claims through the proof of debt procedure. This is because of the nature of the claims and the exposure of other

> parties that we have referred to above. In addition, the liquidator considers that insufficient material has been provided to support your clients' proofs. Realistically your clients' claims will have to be resolved by way of ordinary court proceedings.
>
> .... Your clients' claims involve some complexity and will require considerable cost and time if they are to be resolved in Court.

[27] In the same letter the solicitors informed the unit owners that the shareholders intended to make the present application to terminate the liquidation.

[28] This application was filed shortly afterwards, on 1 July 2011 – the same day that the unit owners' solicitors wrote to the applicants' solicitors informing them of the reasons why they would not consent to termination. The unit owners filed notice of opposition on 13 July 2011. The liquidator filed notice of opposition on 21 July 2011.

[29] The unit owners issued their proceedings against SD2007, the directors and shareholders, and others associated with the construction of the building on 16 August 2011. They seek to recover damages of approximately $2 million for the cost of replacement of the floor slab, the cost of temporary relocation of their businesses, and loss of value due to stigma. The body corporate for the development also seeks to recover $287,500 as the cost of remedying defects in the common property (the carpark slab and a retaining wall). In addition, the second respondents have notified the liquidator that they are investigating a further claim for a transverse crack running along one of the walls of the building which appears to be moving onto a second wall.

[30] The only asset of SD2007 is its 100% shareholding in SD2008. SD2008's only asset is the building at 16 David McCathie Road. The liquidator states that the building has a valuation of approximately $1,250,000. After deducting costs associated with sale, it is expected to realise approximately $1,100,000. SD2007 owes approximately $620,000 to the applicant shareholders for advances, secured by a general security agreement. For that reason the liquidator believes that funds

available in the liquidation will be $500,000 or less. He also deposes that, in addition to normal liquidator's fees and legal fees, he will have to incur valuation and engineering costs in order to carry out his obligations in the liquidation.

Late affidavits

[31] The applicants filed two affidavits shortly before the hearing, one by Mr Bunting and another by an independent liquidator, Mr R J Chapman. Counsel for the unit owners objected to them being read, saying that there was no reason for them to have been filed so late, which would have the effect of denying the unit owners the opportunity to respond. I ruled that they could be read as it appeared arguable that they were in reply, but ruled that I would consider what weight should be attributed to them on matters to which the other parties could not have anticipated and might have wished to reply.

The arguments

[32] Counsel for the applicants accepted that the matters stated in *Re Bell Block Lumber Ltd* were guidelines which were normally applied in straightforward cases, but argued that they were not to be followed slavishly: the Court must still determine what is just and equitable and may impose appropriate terms to achieve that outcome.

[33] He argued that the guidelines were met in the present case, relying upon the following:

(a) The fact that the shareholders are bringing the application demonstrates consent to the application;

(b) The shareholders have undertaken to pay the liquidator's reasonable costs;

(c) No provision needs to be made for the unit owners because they are not creditors (their claims having been rejected by the liquidator);

(d) There are no other creditors; and

(e) There is no issue of commercial morality which might raise countervailing public interest considerations.

[34] If, however, the unit owners are to be taken to be creditors on the strength of the claim they have commenced, counsel for the applicants submits that that claim has significant weaknesses and is outweighed by the benefit to both the shareholders and the unit owners to be gained from controlling costs by allowing the shareholders to direct the defence of the claim. This is particularly beneficial in circumstances where the shareholders have undertaken to preserve the company's assets pending determination of the claim.

[35] Counsel further submitted that there was no proper ground for the liquidator to resist termination: he had obtained a professional engineer's report which supported the shareholders' view that the cracks could be remedied for a comparatively modest cost, meaning that the company was solvent and had declined the unit owners' proofs of debt. To the extent that the liquidator could be obliged to make some provision for the claim, he submitted that that concern was adequately covered by the undertaking to protect assets (save for the ability to use those assets to meet the costs of the claim, which he argued was similar to the way the Court would act when making *Mareva* orders). He also relied on the evidence filed by the accounting/liquidation expert, Mr R J Chapman, to the effect that the liquidator's hands were tied and that it was doubtful whether there was any practical point in him remaining in office in light of his inability to resolve the dispute between the shareholders and the unit owners.

[36] Counsel for the liquidator submitted that the status quo should remain. He said that the liquidator accepted that his continuing involvement would add a layer of cost, but held the view that there was a real risk that the company was insolvent by reason of the unit owners' claims. He acknowledged that the liquidator had rejected their proofs of debt, but noted that that was because the unit owners had not been able to substantiate their claim that the floor slab needed to be replaced, and he had

accepted that there was a basis for some claim by consenting to the bringing of the proceeding by the unit owners.

[37] Counsel said that the liquidator would take a commercial position on the claim after receiving a further report from his engineers (Beca Carter), given that its initial report had been based on visual inspection rather than detailed testing. He submitted that the liquidator would add objectivity and independence to the determination of the dispute. Further, it was for the applicants to show that there was no risk that the unit owners would be prejudiced by the order being sought, and the liquidator was not convinced that there were no matters potentially requiring investigation, such as relation-back issues over the general security agreement and income received by SD2008 from the lease, which could be affected by termination.

[38] The unit owners say that the applicants have not made out a sufficient case for termination of the liquidation. They contend that the applicants have not met the core criteria of paying or securing all liabilities[8] or the total indebtedness[9] of SD2007, pointing to significant costs still to be paid to the liquidator, in addition to the unit owners' claims, both as advanced in their proceedings ($2,330,711) and the further potential claim in respect of the horizontal cracking that has emerged in the second respondents' units. Counsel argued that the unit owners were creditors for the purpose of assessing this criterion for liquidation, and submitted that the applicants' proposal to "protect" SD2007's assets would not adequately do so because it reserved to the applicants the right to use the income stream from the lease of SD2008's building to pay costs of defending the unit owners' claims (which were likely to be substantial) and other day-to-day operating costs of SD2007.

[39] Counsel for the unit owners also argued that there were strong public interest reasons to refuse the application,including:

(a) The undesirability of the message it would send to developers that liquidation could be reversed if it suited the liquidating shareholders' purposes;

[8] *Re Calgarry & Edmonton Land Co Ltd* [1975] 1 All ER 1046 at 1050.
[9] *Re Bell Block Lumber Ltd*, at [3].

(b) There remain matters requiring investigation by the liquidator which will not be investigated if SD2007 goes back into the shareholders' hands;

(c) That the shareholders had demonstrated that they did not have a genuine intention of protecting assets in the interests of creditors;

(d) That the so-called "complete security" for the unit owners' claims is not at all complete;

(e) That the opposition by the unit owners and the liquidator ought to be a sufficient basis for rejecting the application; and

(f) That any cross-claims available to SD2007 (against Messrs Bunting and Cooper) in the unit owners' proceeding were unlikely to be pursued if SD2007 was taken out of liquidation.

[40] The essential question for the Court arising out of these arguments is whether it is just and equitable to exercise its discretion to terminate the liquidation. In addressing this question, the Court must also have regard to a sub-issue as to whether it should treat the unit owners as creditors for the purpose of this application. I will address the latter issue first, as it affects the Court's assessment of one of the criteria usually considered on these applications.

Discussion

a) Are the unit owners to be regarded as creditors?

[41] The unit owners say that they are creditors by reason of their claims against SD2007 arising out of the purchase of the units at 16 David McCathie Place. They accept that their claims are contingent on the outcome of the proceedings they have issued (as well as the potential further claim still under investigation).

[42] "Creditor" is defined in s 240 of the Act by reference to the admissibility of a claim in the liquidation of the company in accordance with s 303 of the Act. The relevant parts of the sections provide:

> 240 Interpretation
>
> (1) In this Act, unless the context otherwise requires,—
>
> *creditor* means a person who, in a liquidation, would be entitled to claim in accordance with section 303 that a debt is owing to that person by the company....
>
> 303 Admissible claims
>
> (1) Subject to subsection (2) of this section, a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation.
>
> (2) Fines, monetary penalties, and costs to which section 308 of this Act applies are not claims that may be admitted against a company in liquidation.

[43] Contingent claims and claims for damages are also subject to s 307 of the Act (the basis on which the liquidator initially appointed embarked, but which is not pursued):

> 307 Claim not of an ascertained amount
>
> (1) If a claim is subject to a contingency, or is for damages, or, if for some other reason, the amount of the claim is not certain, the liquidator may—
>
> (a) Make an estimate of the amount of the claim; or
>
> (b) Refer the matter to the court for a decision on the amount of the claim.
>
> (2) On the application of the liquidator, or of a claimant who is aggrieved by an estimate made by the liquidator, the Court shall determine the amount of the claim as it sees fit.

[44] It is apparent from these sections that virtually every debt or liability capable of being expressed in money terms is eligible for proof in the liquidation of a company, and that this includes claims subject to a contingency and claims for damages in respect of contractual obligations incurred before the company is put into liquidation. This underpins the view taken of unliquidated or prospective claims by

policy holders in the liquidation of an insurance company, HIH Casualty and General Insurance (NZ) Limited, where this Court accepted that it was appropriate for the liquidators to accept them as contingent claims and make appropriate provision for them in the liquidation:[10]

> The proposed directions 7, 8, 9 and 10 relate to unliquidated or prospective claims for FAI general policy holders. The Liquidators wish to make provision for outstanding claims...When making distributions to creditors, liquidators will, if these directions are given, retain sufficient assets to make pro rata distributions of the same percentage to FAI General policy holders....
>
> Many of the policies written by FAI General are long tail policies, being either professional indemnity or public liability policies. Some cover losses which occur or are caused during the currency of the policy, but in respect of which a claim and/or notification is not made until a later period. Potentially, the Liquidators face future claims of an unknown amount from these policy holders. Once the Liquidators accept liability under a claim, the claimant is treated as any other creditor. Until this stage, claims or potential claims by policy holders in the liquidation will be unliquidated and probably contingent. A contingent claim is founded on an obligation incurred by an insolvent company before it is put in liquidation which will crystallise on the happening of some future event into a present debt or liability provable in the liquidation. Liquidators are obliged to accept contingent claims: Hoffmann J in *Transit Casualty Co & Anor v The Policyholders Protection Board & Ors*, noted the law in the United Kingdom as it related to unliquidated and contingent claims in the winding up of an insurance company.
>
> [citations omitted]

[45] Counsel for the applicants submitted that the unit owners did not qualify as contingent creditors because their claims had been rejected by the liquidator. In clear-cut cases, there would be strength to this submission. However, it does not reflect the circumstances of the present case. First, both the initial liquidator and the (present) liquidator have clearly accepted that the unit owners have a contingent claim. Counsel for the unit owners referred me to several aspects of evidence in the earlier injunction proceeding (relating to removal of the person initially appointed) which support his submission that the initial liquidator accepted liability for the claims and intended to contest quantum only. I note that this issue has not been resolved but it appears to be arguable. Secondly, the liquidator has expressly stated

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[10] *HIH Casualty & General Insurance (NZ) Ltd* HC Auckland CIV 2003-404-2838, 17 December 2003 at [18] and [19]; see also Justice Paul Heath and Michael Whale (eds), *Insolvency Law In New Zealand* (looseleaf edition, LexisNexis) at [16.40].

that he did not pursue the s 307 application because there was insufficient evidence before him, and he did not consider it appropriate to take the claims further under that process because there were other parties who were likely to share any liability. In other words, he accepted that there was potential merit in the claims (evidenced by his agreement to the unit owners bringing a proceeding to determine them).[11]

[46] I accept that the unit owners have advanced claims for breach of contractual (and tortious) obligations incurred before the liquidation, and that they should be treated as creditors of SD2007 for the purpose of the present application. Their interests in the liquidation must be taken into account. It is significant, in my view, that the applicants have tacitly recognised this position by putting forward their proposal to protect the assets of a company pending determination of the unit owners' proceeding.[12]

b) The approach to exercise of the discretion

[47] This brings me to the factors bearing on the exercise of the Court's discretion. I will first address a difference between counsel as to the approach to the criteria in *Re Bell Block Lumber Ltd*. Counsel for the applicants submitted that those criteria were a helpful checklist for the Court in straight-forward cases, but the essential question remained whether it was just and equitable to terminate the liquidation (regardless of whether the criteria were met). Although it does not alter the outcome in this case, I prefer the approach advanced by counsel for the liquidator – that the Court's starting point will be to consider whether the criteria are met and, if not, whether there are exceptional circumstances which warrant the making of an order even if the criteria are not fully satisfied.

[11] The learned authors of *Insolvency Law in New Zealand* refer at [16.39] to this as a more convenient procedure for determining claims in some cases, for example where the case is of sufficient complexity that it is likely that the liquidator would reject the claim.
[12] My approach is consistent with the approach of this Court in *Tai Ping Trading Co Ltd*, above n 5.

c) Assessment of factors

[48] Counsel for the applicants argued that even if the Court accepted that the unit owners were creditors, the existence of their claims should not outweigh other, more compelling, considerations:

(a) There were no other creditors, so the Court need only consider what was necessary to provide appropriate protection for the unit owners.

(b) The unit owners' claims were weak and, even if liability could be established, the weight of expert opinion indicated that the quantum would be substantially less than that claimed and could easily be met by SD2007's assets.

(c) The shareholders ought to have the opportunity to control the defence of the claim and hence protect the bulk of SD2007's assets directly and without having the assets eroded by the costs of continuing liquidation and duplication of their defensive efforts by the liquidator.

(d) Given the prospect that any problem could be rectified for a substantially lower amount than the unit owners were claiming, their concerns were more than adequately met by the applicants' undertaking to protect SD2007's assets (and the likely quantum of the claim meant that there was more than sufficient to allow for the applicants' costs of defending the claim to be met out of those assets, particularly as there were other parties who would be contributing to any losses that the unit owners could establish).

[49] These arguments are largely founded on the applicants' view of the merits. In his oral submissions, counsel for the applicants traversed the various allegations in the statement of claim and the evidence of Mr Bunting (particularly that given in his second affidavit) in answer to the matters raised by Mr Brown for contending that the problem was greater than the unit owners' first expert (Mr Chilcott of MSC) had found. If the applicants establish their case on the facts on which Mr Brown has

reached his conclusions, SD2007 is likely either to have a defence to the claim in its own right, or grounds for contribution or indemnity from its professional advisors or contractors. However, I am unable to determine these matters on this application, a point properly conceded by counsel for the applicants.

[50] Similarly, I do not consider it appropriate to dismiss the unit owners' case as weak on the evidence before the Court. It is apparent that "the goal posts have moved" over time, but that appears to be the result of further assessment (first by Mr Chilcott, and then by Mr Brown) as the extent of the cracking became more apparent, rather than signalling a contrived claim as counsel for the applicants sought to persuade me. It is significant that all of the early reports (including that of Beca Carter) were based on a visual assessment, whereas Mr Brown has taken core samples of the slab. He is an experienced professional. There is no reason to believe that he would express his views if he did not believe that there was a proper basis for them. Added to that, Mr Chilcott substantially revised his view of the remedial work required shortly before Mr Brown conducted his investigations. Beca Carter does not appear to have been given that revised assessment before expressing its views, and it is also significant that the liquidator has arranged for Beca Carter to revisit its conclusions in light of the detail provided by Mr Brown.

[51] There are conflicting views on the effect of the hard plastic wheels used on the forklift machines in the second respondents' units, which applicants have put forward as the primary contributor to the extent of the cracking. Again, I am unable to resolve this difference, but I do not see any reason to favour one view over another at this time.

[52] The net effect of this is that I do not consider it appropriate at this time to dismiss as weak the unit owners' claims either in relation to liability or as to quantum. As such it is appropriate that provision be made for them in the liquidation, and that the Court take into account the steps being proposed to protect SD2007's assets until the claims are determined.

d) The applicants' proposal for provision

[53] I accept that the Court can make an order on terms.[13] I am not persuaded, however, that the applicants' proposal is an appropriate one in that it allows the applicants to use SD2007's assets for expenditure "in the ordinary course of business", including payment of legal costs. I do not regard orders in cases of *Mareva* injunctions as analogous. At present all SD2007's assets are held by the liquidator for the benefit of creditors and contributors. This includes the income stream. Use of this money to pay the applicants' costs will diminish the funds available for creditors in the liquidation. Although the liquidator will be entitled to use that income stream to meet costs of the liquidation, including defence of the claim, he does so under statutory responsibilities and will exercise objective judgment in incurring those costs. The same cannot be said about costs incurred by the applicants who, for obvious reasons, will take a subjective view of what is needed (they should not be entitled to use SD2007's assets to protect their personal interests as distinct from the interests of the company and its creditors).

[54] Counsel for the unit owners also challenge the fact that the applicants' proposal left them free to charge the assets. I regard that as being of lesser significance, and a point that could be addressed by further terms.

[55] I do not place any significant weight on the applicants' argument that it is in fact unlikely that SD2007 will have to meet any liability because of its potential claims for contribution or indemnity. There is no certainty that the rights will result in all costs being passed on to other parties. For example, I accept the point made by counsel for the unit owners that the local authority may well not have any liability because this is a commercial, rather than a residential, property. However, the more significant point is that primary responsibility rests with SD2007 and the unit owners ought to be entitled to look to it.

[56] Before turning to address the liquidator's opposition or public interest factors, I should also add that I do not see great merit in the applicants' argument that they

[13] This Court did so in *Tai Ping Trading Co Ltd*, above n 5.

(as shareholders) should be able to meet the unit owners' claim "head on". The applicants chose to put SD2007 into liquidation after they had been informed that the slab had cracks. It appears that they did not attempt to investigate the complaint, but rather chose to "keep their heads down" and proceed with liquidation without any investigation. There is some suggestion in the evidence that they made a conscious decision not to engage with the problem in the hope that it would go away. This may well need to be explored further (and may apply only to events after liquidation) but, if established, will add to the view that I take which is that the applicants made a voluntary decision to put SD2007 into liquidation and to be subjected to the procedures of liquidation. In those circumstances they need to show something more than that they may not recover from liquidation what they anticipated before the Court will exercise its discretion.

e) The position of the liquidator

[57] The applicants are critical of the liquidator's decision to oppose termination. They say that there was nothing to be gained by the liquidator remaining in office, and rely on the evidence of Mr Chapman that in the circumstances of this case the liquidator is in a "virtually impossible position" as a result of the conflicting expert reports, including his own expert (Beca Carter). Counsel for the applicants argued that Mr Chapman's evidence was consistent with the view taken by the former liquidator to seek directions (under s 307) in relation to the claims.

[58] I am not persuaded that there is nothing to be gained by the liquidator remaining in office. This view is not shared by the liquidator (who has not had opportunity to respond to Mr Chapman). Counsel for the liquidator submitted that the liquidator was entitled to, and will, take a commercial position in relation to these claims. This is but one of the tasks that he will have to undertake in due course. I consider it relevant that the liquidator has a real concern about the solvency of SD2007 if the unit owners' claims are established to any significant degree. He regards the outcome as unpredictable, and says that the unit owners could be materially prejudiced by a termination in the event of a shortfall.

[59] I accept that leaving the liquidation in place will mean that the liquidator will need to incur further engineering (and perhaps valuation) costs in addition to normal liquidation costs to reach an impartial view on the alleged building defects. That is offset, in my view, by the liquidator being able to bring a more objective view to the claim than would be the case if the applicants were left to pursue it outside of liquidation. I have already commented on, and rejected, the applicants' view that the liquidator has obtained a report from Beca Carter. That report appears to have been based on assumptions which now need to be reviewed. I regard it as an entirely proper exercise for the liquidator to have that review undertaken in light of the further information put forward in Mr Brown's report.

f) Public interest

[60] The last factor to consider is the public interest. I accept the argument that this case is different from those where there were clearly issues of commercial morality involved.[14] Counsel for the unit owners argued that the Court should take into account that the applicants failed to inform the unit owners of the liquidation of SD2007 for nearly a year, and made a conscious decision not to engage with the unit owners over the problem in the hope that it would go away. I regard the failure to inform the unit owners of the liquidation of SD2007 as curious but equivocal. Equally I do not regard any "head in the sands" attitude as necessarily giving rise to a commercial morality issue in the sense of those considered in *Foundation Securities (NZ) Ltd* (in that case, the company was clearly insolvent at the time it went into liquidation, the applicants were in contempt of court orders when the application was heard, and the applicants had knowingly put forward incorrect financial information). It does, however, give rise to other public interest considerations:

(a) It would send the wrong message to the commercial community to allow companies to be put into and then withdrawn from liquidation for the convenience of shareholders, regardless of what steps may be taken to address the interests of creditors.

[14] For example: *Foundation Securities (NZ) Ltd*, above n 5.

(b) The directors' failure to inform the unit owners that they had put SD2007 into liquidation, and to continue to treat the assets as "their own" (albeit without objection by the liquidator), and then to apply for termination when it became apparent that there was a continuing and substantial dispute which potentially rendered SD2007 insolvent, runs counter to the underlying policy of liquidation of protecting the interest of creditors.

(c) There remain matters requiring investigation by the liquidator, such as the circumstances in which SD2007 gave security to the directors, how the rental income from SD2008 was applied before the liquidator took control of it, and the withdrawal of money from SD2007's bank account shortly before the liquidator's appointment.

(d) The liquidator's ability to investigate and recover sums could be affected if the liquidation was terminated only to be re-established after the unit owners' claims were resolved.

(e) Potential claims by SD2007 against Messrs Bunting and Cooper in relation to their role in the construction of the units were unlikely to be considered, let alone pursued, if liquidation was terminated (the unit owners contend that there is evidence that Messrs Bunting and Cooper acted as builders and project managers in the development).

[61] I consider that the matters I have just mentioned, in circumstances where there is uncertainty as to solvency, speak against terminating the liquidation. I take the view that all assets should be retained in their entirety and all issues as between SD2007 and its directors and shareholders should remain alive until it is known whether it is necessary to investigate them.

[62] Lastly, I am not persuaded there is any merit to a submission on behalf of the applicants that the unit owners have an ulterior purpose in bringing this claim, namely to force them to hand over SD2008's property at 16 David McCathie Place. They rely for this submission on evidence of an overheard conversation between two

of the unit owners. That evidence, in my view, is equivocal at best as to the unit owners' motivation. The unit owners say that the remarks were made in the context that they were looking for alternative premises whilst repair work was being undertaken on 18 David McCathie Place. It is not a matter that I can determine on this application.

Decision

[63] I am not persuaded that the applicants have made out a sufficient case for termination of the liquidation of SD2007. There is a real but unpredictable prospect that SD2007 is insolvent, and its assets need to be protected until the claims are determined. The proposal for protection of its assets does not fully protect the income stream, which should all be available for its creditors, subject only to proper costs of liquidation. There is a real possibility of prejudice to creditors if SD2007 is taken out of liquidation before the extent of the creditors' claims is determined.

[64] I accept that this decision will mean that the liquidator may wish to take a role in the proceeding issued by the unit owners, and that this will entail some further costs in the liquidation. However, given that there are no other creditors, it seems unlikely that there will be need for any further significant costs in the liquidation until the unit owners' proceeding has been determined. It also ought to be possible for the liquidator and the applicants to co-operate on aspects of the defence and to limit costs in that way. I also take the view that there will be benefits generally from having the objectivity of the liquidator in that proceeding.

[65] The application to terminate the liquidation is dismissed.

[66] The unit owners and the liquidator are entitled to costs on a 2B basis together with disbursements.

Associate Judge Abbott