IN THE COURT OF APPEAL OF NEW ZEALAND

CA60/2014
[2014] NZCA 607

BETWEEN		DAMIEN GRANT AND STEVEN KHOV (AS LIQUIDATORS OF WEST HARBOUR HOLDINGS LTD) Appellants
AND		WAIPAREIRA INVESTMENTS LTD Respondent

Hearing:	17 November 2014
Court:	Randerson, White and Courtney JJ
Counsel:	K P Sullivan and B J Norling for Appellants B D Gray QC and T J G Allan for Respondents
Judgment:	11 December 2014 at 11.00 am

JUDGMENT OF THE COURT

A By consent, Steven Khov replaces Kirsten Smith as the second named appellant.

B The appeal is dismissed.

C The appellants are to pay the respondent's costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by White J)

Introduction

[1] The appellants, in their capacity as the current liquidators (the Liquidators) of West Harbour Holdings Ltd (West Harbour) appeal against the judgment of Allan J in the High Court holding that the respondent, Waipareira Investments Ltd (Waipareira), did not surrender its security in the liquidation of West Harbour by voting at a creditors' meeting held on 5 April 2013.[1]

[2] The issue is whether, in terms of reg 22(2) of the Companies Act 1993 Liquidation Regulations 1994 (the Regulations), Waipareira, as a secured creditor in the liquidation, is to be taken as having surrendered its security because it in fact voted at the meeting in respect of its whole debt.

Factual background

[3] The relevant factual background, set out in the judgment under appeal,[2] is not disputed. It may be summarised as follows.

[4] Waipareira was a creditor of West Harbour for debts totalling $4,610,745.55, secured at least in large part by mortgages over a number of properties owned by West Harbour (the loans in relation to the mortgages were known as "the Apartment Loan" and "the Townhouse Loan").

[5] On 6 March 2014, two days after West Harbour went into liquidation, Waipareira's lawyer, Mr Morrison of Grove Darlow & Partners, advised the Liquidators that, under the terms of its mortgages, Waipareira had taken possession of three townhouses and two apartments mortgaged to Waipareira. The Liquidators acknowledged the advice and confirmed that they would send letters to the tenants of the townhouses requiring them to pay their rent to Waipareira.

[6] By letter dated 11 March 2013 the Liquidators formally notified Waipareira of their appointment and asked Waipareira, if it was a creditor, to complete an enclosed "proof of debt" form and to return the form with the necessary

---

1 *Waipareira Investments Ltd v Grant* [2013] NZHC 3281 [the High Court judgment].
2 At [5]–[20].

documentation to support its claim. The enclosed form was not in the form of either of the forms prescribed by the schedule to the Regulations.

[7] The Liquidators' letter of 11 March 2013 also advised Waipareira that, if it was a secured creditor, it was required by s 305(1) of the Companies Act 1993 (the Act) to exercise one of the three rights conferred under that section, namely to:

> (a) Realise property subject to a charge, if entitled to do so; or
>
> (b) Value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance due, if any; or
>
> (c) Surrender the charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

[8] Finally, the Liquidators' letter of 11 March 2013 noted that it constituted written notice for the purposes of s 305(8) of the Act and that failure to exercise one of the three options within 20 working days would "result in the surrender of your charge to the liquidator for the general benefit of creditors".

[9] Without considering whether Waipareira was a creditor for the purposes of the creditors' meeting provisions of the Act, Mr Morrison wrote to the Liquidators on 14 March 2013 requesting a creditors' meeting for the purpose of replacing the Liquidators. The liquidators scheduled a creditors' meeting.

[10] On or about 15 March 2013 Mr Morrison completed two proof of debt forms in the form received from the Liquidators: one for $1,311,997 and the other for $3,298,748.55. Both forms referred to Waipareira's mortgage security.

[11] On 3 April 2013, two days before the creditors' meeting, Mr Morrison received from the Liquidators two letters confirming receipt of the proof of debt forms. In each case the letters recorded Waipareira as being wholly secured for the debt owed by West Harbour.

[12] At the creditors' meeting on 5 April 2013, chaired by the first named appellant, Mr Grant, Mr Morrison voted in favour of the resolution to replace the Liquidators. As the transcript of the meeting records, Mr Morrison made it clear that

he was voting for the full amount of Waipareira's claim of $4,500,000 (the transcript records the vote would pass based on a dollar value of debts owed) and that he considered Waipareira was entitled to vote at an unsecured creditors' meeting.

[13] The resolution was ultimately lost and the then liquidators remained the liquidators of West Harbour.

[14] On 26 April 2013 the Liquidators advised Waipareira that, in view of the provisions of reg 22 of the Regulations, it had, by voting at the meeting its entire debt, "vacated [its] security". The Liquidators asked Waipareira to discharge its mortgages and relinquish its rights as mortgagee in possession of the three townhouses.

[15] The three townhouses have subsequently been unconditionally sold by Waipareira with arrangements made for the eventual sale proceeds to be held pending the outcome of this proceeding.

[16] As the High Court Judge found, until the creditors' meeting of 5 April 2013, the Liquidators had at all times accepted that Waipareira was a secured creditor which intended to and did exercise its power of sale under its mortgage securities by selling the townhouses.[3] Mr Sullivan, counsel for the Liquidators on the appeal, confirmed that this remained the Liquidators' position.

Statutory and regulatory background

[17] For ease of reference, the relevant statutory and regulatory provisions are included in an appendix to this judgment.

The issue

[18] Although other arguments were advanced in the High Court and on appeal, which we address later, the fact that the Liquidators accept that Waipareira remained a secured creditor until the creditors' meeting means that the only real issue is whether Waipareira surrendered its security by voting its whole debt in favour of the

---

[3] At [8] and [19].

resolution for the replacement of the Liquidators. This issue involves the interpretation and application of reg 22(2) of the Regulations which provides:

> Subject to the Act, if a secured creditor votes in respect of the creditor's whole debt, the creditor shall be taken to have surrendered his or her charge.

[19] As Mr Morrison in fact voted at the creditors' meeting on behalf of Waipareira, which was a secured creditor, in respect of its whole debt, the narrow issue is whether there is any provision in the Act or any other reason why his "vote" should not be taken as having resulted in the surrender by Waipareira of its charge.

The High Court judgment

[20] In the High Court Allan J, after considering the relevant interlocking provisions of the Act and Regulations and the arguments for the parties,[4] concluded that Waipareira had not surrendered its security by operation of law. His reasons were:[5]

(a) It made no difference that Mr Morrison erroneously believed he was entitled to vote Waipareira's debt at the creditors' meeting.

(b) By virtue of s 240 of the Act, Waipareira was not a "creditor" for the purposes of pt 16 of the Act and in particular for the purposes of the creditors' meeting.

(c) The proof of debt forms completed by Waipareira did not meet the legal requirements for a valid proof and, accordingly, Waipareira had made no election to become a s 305(1)(b) creditor which would have triggered reg 22(2).

[21] The Judge made the following declarations:[6]

(a) Waipareira was not a creditor of West Harbour for the purposes of pt 16 of the Act, by virtue of the operation of s 240 of the Act.

---

4 At [21]–[71].
5 At [72].
6 At [73].

(b) Waipareira was not entitled to vote at the creditors' meeting of 5 April 2013.

(c) Any vote cast on Waipareira's behalf at that meeting was of no legal effect.

Liquidators' submissions

[22] In summary Mr Sullivan submits that the Judge erred because:

(a) In terms of the plain meaning of reg 22(2), when a secured creditor votes in respect of its whole debt, the creditor is to be taken to have surrendered its charge.

(b) The definition of "creditor" in s 240 of the Act does not limit the application of reg 22(2).

(c) Alternatively, a creditor who elects under s 305(1)(a) or (b) of the Act, is a creditor under s 240.

(d) The words "Subject to the Act" in reg 22(2) enable a secured creditor, who is taken to have surrendered his or her charge, to seek leave to have the security reinstated under s 305(10) of the Act.

(e) This interpretation of reg 22(2) is supported by the comparable Australian statutory provisions and authorities relating to those provisions.

(f) Here the unequivocal conduct of Mr Morrison at the creditors' meeting meant that Waipareira had surrendered its charge.

The interpretation of reg 22(2)

Relevant principles of interpretation

[23] The meaning of reg 22(2) is to be ascertained from its text and in the light of its purpose.[7] It is well-established that this will include consideration of the scheme of the legislation and the regulations.[8]

[24] It is also important to bear in mind that as a general principle the provisions of an Act will prevail over an inconsistent regulation.[9] This principle is recognised here not only by s 395(1)(c) of the Act, which empowers the Governor-General to make regulations regulating "in a manner not inconsistent with this Act" the conduct of liquidations, but also by the opening words of reg 22(2) itself.

[25] The expression "subject to" is often used in statutes and regulations to rank a particular provision by making it subordinate to another provision.[10] Examples in the present context include ss 302(1) and 303(1) of the Act and regs 12(1), 13(1) and 14(1) of the Regulations.

Part 16 of the Act

[26] To interpret reg 22(2) consistently with, and as subordinate to, the Act requires at the outset an analysis of the relevant provisions of pt 16 of the Act relating to liquidations as they affect the rights, duties and powers of secured creditors. The following features emerge from this analysis.

[27] First, the Act distinguishes between secured and unsecured creditors in several significant respects. This is clear from:

(a) The definition of the expression "creditor" in s 240(1) which, unless

---

7 Interpretation Act 1999, s 5(1); *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Fonterra Co-Operative Group Ltd v The Grate Kiwi Cheese Company Ltd* [2012] NZSC 15, [2012] 2 NZLR 184; and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 201.

8 Burrows and Carter, above n 7, at 238–242.

9 Burrows and Carter, above n 7, at 25 and compare Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at [3.6.1].

10 Burrows and Carter, above n 7, at 440 –443.

the context otherwise requires, includes a secured creditor only:

(a) for the purposes of sections 241(2)(c), 247, 250, and 289; or

(b) to the extent of the amount of any debt owing to the secured creditor in respect of which the secured creditor claims under section 305 as an unsecured creditor

(b) The confirmation in s 248(2) of the right of a secured creditor, subject to s 305, to take possession of and realise or otherwise deal with property of the company over which that creditor has a charge.

(c) The separate recognition of the rights and duties of secured and unsecured creditors in ss 302(1), 304 and 305.

[28] Second, the Act in s 305 contains a separate regime for secured creditors which gives them priority in respect of the realisation of their security independently of the liquidation unless they surrender their security. Secured creditors have the three powers conferred by s 305(1), namely to:[11]

(a) realise the property the subject to the charge relied on; or

(b) value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance; or

(c) surrender the charge to the liquidator for the general benefit of creditors and claim as an unsecured creditor for the whole debt.

[29] Under s 305(8) a liquidator may require a secured creditor to elect within 20 days which of the three powers the creditor wishes to exercise.

[30] Third, the election by a secured creditor of which power the creditor wishes to exercise leads to different consequences:

(a) If a secured creditor elects to realise property subject to a charge, the

---

[11] Above at [7].

creditor may to do so independently of the liquidation. As this Court has pointed out, the scheme of pt 16 of the Act is to exclude from the ambit of the liquidation property which is subject to a charge.[12] The Act contemplates that secured creditors will operate independently of the liquidation, unless they decide to surrender their security.[13]

(b) If a secured creditor elects to value the security and claim in the liquidation for the balance due, if any, the creditor must by s 305(4) claim "in the prescribed form". The claim is then governed by the provisions of s 305(5)–(7).

(c) If a secured creditor elects to surrender the charge for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt, the creditor must by s 304(1) make a claim "in the prescribed form". The claim is then governed by the provisions of s 304(2)–(5).

[31] The prescribed forms referred to in ss 304(1) and 305(4) are contained in the schedule to the Regulations authorised by s 395(1)(a) of the Act. The first form is the form for an unsecured creditor under s 304(1) and the second is the form for a secured creditor under s 305(4).[14] While reg 4 permits the forms to be varied, such variations are limited to those "as the circumstances of any particular case may require".

[32] Fourth, a secured creditor may surrender a charge in one of two ways:

(a) by making an election to do so under s 305(1)(c); or

(b) by failing to comply with a notice from a liquidator to make an election within 20 days: s 305(9).

---

12 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602 (CA) at [43].

13 Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [20.35(b)].

14 Companies Act 1993 Liquidation Regulations 1994 [Regulations], regs 6 and 7.

[33] Finally, by s 305(10) a secured creditor who has surrendered a charge under s 305(1)(c) or who is taken as having surrendered a charge under s 305(9) may, with the leave of the Court or the liquidator and subject to such terms and conditions as the Court or liquidator thinks fit, at any time before the liquidator has realised the property charged:

(a) withdraw the surrender and rely on the charge; or

(b) submit a new claim under s 305.[15]

[34] For present purposes, it is clear from this analysis of the relevant provisions of the Act that a secured creditor will remain a secured creditor under the Act unless and until the creditor's charge is surrendered in one of the two identified ways. In the absence of a surrender in accordance with either s 305(1)(c) or s 305(9), the creditor will remain secured and entitled to realise property subject to the charge under s 305(1)(a) or s 305(1)(b).

Meetings of creditors

[35] Before turning to the Regulations, it is next necessary to summarise the relevant statutory provisions relating to meetings of creditors.

[36] In this case, where the Liquidators were appointed by the same shareholders' Special Resolution placing West Harbour into liquidation on 4 March 2013 under s 241(2)(a) of the Act, they were required by s 243 of the Act to summon a meeting of creditors. Then, as required by s 243(5), the meeting had to be held in accordance with sch 5 of the Act.

[37] Schedule 5 contains provisions covering methods of holding meetings, notice of meetings, the chairperson, the quorum, voting, proxies, postal votes, minutes, corporations acting by representatives, regulating procedure and the effect of an

---

[15] Examples of relief being granted under s 305(10) are: *Consolidated Technologies Development (NZ) Ltd v McCullagh* (2006) 9 NZCLC 264,056 (HC); *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)* (2008) 23 NZTC 22,074 (HC) (now overruled in other respects in *Strategic Finance Ltd (in rec and in liq) v Bridgman* [2013] NZCA 357, [2013] 3 NZLR 650); and *A J Park v Nepri Ltd (in Liq)* HC Auckland CIV-2009-404-2629, 15 February 2010.

irregularity or defect.

[38] The effect of an irregularity or defect is covered by cl 11 of sch 5 which provides:

> **11 Effect of irregularity or defect**
>
> (1) An irregularity or defect in the proceedings at a meeting of creditors does not invalidate anything done by a meeting of creditors, unless the court orders otherwise.
>
> (2) The court may, on the application of the liquidator or a creditor of the company, make an order under subclause (1) if it is satisfied that substantial injustice would be caused if the order were not made.

[39] Meetings of creditors are usually called by liquidators. While they may notify secured creditors of meetings, that will not make them unsecured creditors entitled to vote at those meetings unless they have surrendered their charge and made a claim as an unsecured creditor or claimed as an unsecured creditor for the unsecured portion of their debt under s 305(1)(b) or s 305(3)(a).

The Regulations

[40] Against this statutory background, we now turn to the relevant provisions of the Regulations relating to voting at meetings of creditors.

[41] It is clear from reg 19 that a person is not entitled to vote "as a creditor" unless the following conditions are met "by the time the vote is taken":

> (a) the creditor has made "a claim" either as an unsecured creditor under s 304(1) or as an unsecured creditor under s 305(4), that is, a secured creditor who has valued the security and claimed as an unsecured creditor for the balance due; and either
>
> (b) the liquidator has admitted "the claim" wholly or in part either for payment or for voting purposes; or
>
> (c) the chairperson of the meeting of creditors allows the person to vote in accordance with reg 20.

[42] The first condition, the making of "a claim" as an unsecured creditor before the vote is taken, is an essential prerequisite to entitlement to vote. A person who has not made a claim in that capacity by that time is not entitled to vote. In other words, reflecting the statutory scheme, a secured creditor has no entitlement to vote in his or her capacity as a secured creditor.

[43] The extent to which a secured creditor is entitled to vote as an unsecured creditor is then clarified by reg 22(1) which provides that a secured creditor "shall be entitled to vote":

(a) "for the whole debt" if he or she surrenders the charge to the liquidator for the general benefit of creditors, that is a secured creditor who has elected to exercise the power under s 305(1)(c), and claims as an unsecured creditor for the whole debt, that is, under s 305(1);[16] or

(b) "in respect of the balance of the debt" if he or she realises property subject to a charge and claims as an unsecured creditor under s 305(4) for the balance due, that is, a secured creditor who has elected to exercise the power under s 305(1)(b);[17] or

(c) "in respect of the balance of the debt" if he or she realises property subject to a charge and claims as an unsecured creditor under s 305(3)(a) for any balance due after deducting the net amount realised, that is a secured creditor who then also makes a claim under s 305(4).

[44] The important point to note is that reg 22(1) is not dealing with a secured creditor's entitlement to vote in that capacity but only with the consequential matter of the extent to which a secured creditor, who also claims as an unsecured creditor, may vote ("for the whole debt" or "in respect of the balance of the debt"). There is nothing in reg 22(1) to suggest that it alters in any way reg 19 which does not permit a secured creditor to vote in his or her capacity as a secured creditor.

---

16 See above at [30(c)].
17 See above at [30(b)].

[45] It is in this statutory and regulatory context that reg 22(2) then provides:

> Subject to the Act, if a secured creditor votes in respect of the creditor's whole debt, the creditor shall be taken to have surrendered his or her charge.

[46] Under this regulation a secured creditor will be taken to have surrendered his or her charge "if" he or she "votes" in respect of his or her whole debt. A secured creditor who votes in respect of his or her whole debt will be one who has elected to exercise the power to do so under s 305(1)(c) and claimed as an unsecured creditor under s 304(1). If the secured creditor has not taken these steps he or she will have no entitlement to vote under reg 19. In other words, the reference in reg 22(2) to a secured creditor who "votes" should be read as a reference to a secured creditor who "is entitled to vote".

[47] Interpreting reg 22(2) in this way gives meaning and effect to the opening words "Subject to the Act". If reg 22(2) were not interpreted in this way, it would create a new method for a secured creditor to surrender his or her charge outside the ambit of the limited statutory elections under s 305(1)(b) and (c) and the requirements for a claim as an unsecured creditor under s 304(1) or s 305(4). This would not accord with the policy of the Act.

[48] We accept the submission of Mr Gray QC for Waipareira that reg 22(2) is intended to cover the situation that arises when a secured creditor is claiming as an unsecured creditor for the balance due after valuing or realising the security. In such a case, if the creditor votes in respect of the whole debt, the creditor is taken to have surrendered the security.

[49] Our interpretation means that we do not accept Mr Sullivan's submissions relating to the interpretation of reg 22(2). In particular, we do not agree that reg 22(2) applies whether or not the secured creditor was entitled to vote. It would be surprising if a secured creditor, who was not entitled to vote, lost his or her property rights by surrendering his or her charge as a result of exercising an invalid vote. In particular, we do not consider that a vote by a secured creditor who was not entitled to vote may be cured as an irregularity or defect under cl 11 of sch 5 of the Act. A vote without entitlement is not a mere irregularity or defect.

[50] As Mr Gray submits and Mr Sullivan accepts, this interpretation of the reg 22(2) is consistent with the principle that provisions of this nature should not be interpreted as taking away existing property rights when not so required.[18]

[51] Nor do we agree with Mr Sullivan's submission that the words "Subject to the Act" in reg 22(2) enable a secured creditor, who is taken to have surrendered his or her charge, to seek leave to have the security reinstated under s 305(10) of the Act. The power for a secured creditor, with the leave of the Court or the liquidator, to withdraw a surrender and rely on the charge arises under s 305(10) only in respect of a secured creditor who has surrendered the charge under s 305(1)(c) or is taken as having done so under s 305(9). It does not relate to a secured creditor who is taken to have surrendered his or her charge solely by reason of having voted in respect of the creditor's whole debt when not entitled to do so.

[52] Finally, we do not agree with Mr Sullivan that comparable Australian statutory and regulatory provisions and authorities support the Liquidators' interpretation of reg 22(2). The short answer to this submission is that, unlike the New Zealand Act, the Australian Corporations Act 2001 (Cth) does not distinguish between secured and unsecured creditors in the same way. In Australia both secured and unsecured creditors are treated as "creditors" for the liquidation regime.[19] A secured creditor may lodge a proof of debt as a creditor and in doing so may be taken to have elected to have surrendered his or her security interest.[20] In New Zealand, however, as we have seen, the question of surrender of a security by a secured creditor is governed by the express provisions of s 305(1)(c) or s 305(9) and not otherwise.[21] This means that the Australian authorities decided under a different statutory regime should be distinguished.

[53] It is also significant in this context that the Australian equivalent of reg 22(2), regs 5.6.24(2) and (3) of the Corporations Regulations 2001 (Cth) provide:

---

18 Burrows and Carter, above n 7, at 322–323.

19 Corporations Act 2001 (Cth), s 554E.

20 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646; *Champtaloup v Thomas* [1976] 2 NSWLR 264 (CA) at 274–275; *Health & Life Care Ltd (in liq) v South Australian Asset Management Corp* (1995) 65 SASR 48 (SCFC); *Surfers Paradise Investments Pty Ltd (in liq) v Davoren Nominees Pty Ltd* [2003] QCA 458, [2004] 1 Qd R 567; and *Brown v Brown* [2007] FCA 2073, (2007) 69 ATR 533.

21 Above at [33]–[34].

> 5.6.24(2) A creditor is entitled to vote only in respect of the balance, if any, due to him or her after deducting the value of his or her security as estimated by him or her in accordance with regulation 5.6.41.
>
> 5.6.24(3) If a secured creditor votes in respect of his or her whole debt or claim, the creditor must be taken to have surrendered his or her security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

[54] The inclusion in the Australian regulations of an express relief provision again distinguishes the position in Australia from the position here. Under reg 22(2) the absence of any relief provision supports the interpretation we have adopted.[22] It also means that the Australian decisions interpreting their regs may again be distinguished.[23]

Waipareira's vote

[55] There is no dispute that at the West Harbour creditors' meeting on 5 April 2013 Mr Morrison, Waipareira's duly appointed representative, purported to vote in respect of Waipareira's whole debt.

[56] We are satisfied, however, for the following reasons that Waipareira was not entitled to vote at the meeting and that Mr Morrison was therefore not in a position to cast a valid vote for Waipareira in respect of its whole debt when the vote was taken:

(a) At that time, as the Liquidators accept, Waipareira remained a secured creditor which had made it clear to the liquidators that it intended to exercise its power of sale under its mortgage securities.[24] In terms of s 305(1), Waipareira had decided to exercise its power to realise the property the subject of its charge and it later did so.

(b) At that time Waipareira had not surrendered its charge either by making an election to do so under s 305(1)(c) or by failing to comply

---

22 Above at [46]–[51].

23 *Young v ACN 081 162 512 Pty Ltd (in liq)* [2005] NSWSC 139, (2005) 218 ALR 449 and *Re Cosmopolitan Constructions Pty Ltd (in liq)* [2013] NSWSC 780.

24 Above at [16].

with the notice from the Liquidators to make an election within 20 days.[25] The two proof of debt forms completed by Mr Morrison on behalf of Waipareira did not constitute a claim as an unsecured creditor under s 304(1) following an election under s 305(1)(c) or under s 305(4) following an election under s 305(1)(b). We agree with the Judge that the proof of debt forms issued by the Liquidators to creditors did not comply in important respects with the forms required by the Act and the schedule to the Regulations.[26] (Mr Sullivan did not suggest that the forms were in the right form or that they might be saved by reg 4.) On the contrary, as the Liquidators' letters in response confirmed, Waipareira, having elected to exercise its power to realise its charge under s 305(1)(a), remained a secured creditor.[27]

(c) In terms of reg 19 Waipareira was not entitled to vote at the creditors' meeting because it had not made a claim as an unsecured creditor either under s 305(1) or under s 305(4).[28] At that time Waipareira remained a secured creditor with no entitlement to vote.

(d) Mr Morrison ought not to have been permitted to vote at the creditors' meeting because Waipareira had no entitlement to vote. Mr Morrison's purported vote was invalid.[29]

(e) As Waipareira had not elected to exercise the power under s 305(1)(c) and had not claimed as an unsecured creditor under s 304(1), the provisions of reg 22(2) did not apply.[30] Waipareira was therefore not to be taken as having surrendered its charge when Mr Morrison voted invalidly at the creditors' meeting.

[57] Accordingly, the declarations made by Allan J in the High Court were

---

25 Above at [32]
26 The High Court judgment, above n 1, at [53].
27 Above at [11]
28 Above at [41]–[42].
29 Above at [42].
30 Above at [46].

correctly made.[31]

Result

[58] The appeal is dismissed.

[59] As costs should follow the event, the appellants are to pay the respondent's costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

Solicitors:
Waterstone Insolvency, Auckland for Appellants
Grove Darlow & Partners, Auckland for Respondents

[31] The High Court judgment, above n 1, at [73].

APPENDIX

Companies Act 1993

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; and includes a secured creditor only—

(a) for the purposes of sections 241(2)(c), 247, 250, and 289; or

(b) to the extent of the amount of any debt owing to the secured creditor in respect of which the secured creditor claims under section 305 as an unsecured creditor

...

243 Liquidator to summon meeting of creditors

(1) Subject to section 245 and to subsection (8), the liquidator of a company must call a meeting of the creditors of the company for the purpose,—

(a) in the case of a liquidator appointed pursuant to paragraph (a) or paragraph (b) of subsection (2) of section 241, of resolving whether to confirm the appointment of that liquidator or to appoint another liquidator in place of the liquidator so appointed:

(b) in the case of a liquidator appointed pursuant to paragraph (c) of subsection (2) of section 241, of resolving whether to confirm the appointment of that liquidator or to make an application to the court for the appointment of a liquidator in place of the liquidator so appointed:

(c) in either case, of determining whether to pass a resolution for the purposes of section 258(1)(b).

(1A) If the appointment of a liquidator under paragraph (a) or paragraph (b) of section 241(2) is not confirmed at a meeting of creditors and another liquidator is not appointed in place of that liquidator, the appointment of the liquidator under paragraph (a) or paragraph (b) of section 241(2) continues until another liquidator is appointed.

(2) Notice in writing of a meeting of creditors—

(a) must be given to every known creditor together with the report and notice referred to in section 255(2)(c); and

(b) if the liquidator receives a notice under section 245(1)(b)(iii), must be given within 10 working days after receiving the notice.

(3) Public notice of the meeting of creditors must also be given by the liquidator not less than 5 working days before the date of the meeting.

(4) Except if subsection (2)(b) applies, a meeting of creditors must be held,—

(a) in the case of a liquidator appointed under paragraph (a) or paragraph (b) of subsection (2) of section 241, within 10 working days of the liquidator's appointment; or

(b) in the case of a liquidator appointed under paragraph (c) of subsection (2) of section 241, within 30 working days of the liquidator's appointment; or

(c) in either case, within such longer period as the court may allow.

(4A) If subsection (2)(b) applies, a meeting of creditors must be held within 15 working days after the liquidator receives a notice under section 245(1)(b)(iii) requiring a meeting of creditors to be called.

(5) Every meeting of creditors must be held in accordance with Schedule 5.

(6) If at a meeting of creditors it is resolved to appoint a person as liquidator of the company in place of the liquidator appointed pursuant to paragraph (a) or paragraph (b) of subsection (2) of section 241, the person who it is resolved to appoint as liquidator shall, subject to section 282, be the liquidator of the company.

(7) If at a meeting of creditors it is resolved to apply to the court for the appointment of a person as liquidator in place of the liquidator appointed pursuant to paragraph (c) of subsection (2) of section 241, the liquidator of the company must forthwith apply to the court for the appointment of that person as liquidator and the court may, if it thinks fit, appoint that person as the liquidator of the company.

(8) Nothing in this section applies to the liquidator of a company appointed pursuant to paragraph (a) or paragraph (b) of subsection (2) of section 241 if, within 20 working days before the appointment of the liquidator, the board of the company resolved that the company would, on the appointment of a liquidator under either paragraph (a) or paragraph (b) of that subsection, be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration.

(9) The directors who vote in favour of such a resolution must sign a certificate stating that, in their opinion, the company would, on the appointment of a liquidator under either paragraph (a) or paragraph (b) of subsection (2) of section 241, as the case may be, be able to pay its debts, and the grounds for that opinion.

(10) Every director who fails to comply with subsection (9) commits an offence and is liable on conviction to the penalty set out in section 373(1).

(11) Except for subsection (5), this section does not apply if the liquidator is appointed under section 241(2)(d).

248 Effect of commencement of liquidation

…

(2) Subsection (1) does not affect the right of a secured creditor, subject to section 305, to take possession of, and realise or otherwise deal with, property of the company over which that creditor has a charge002E

302 Application of bankruptcy rules to liquidation of insolvent companies

(1) Subject to this Part, the rules in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt apply in the liquidation of a company that is unable to pay its debts to—

(a) the rights of secured and unsecured creditors:

(b) claims by creditors:

(c) the valuation of annuities and future and contingent liabilities—

and all persons who in any such case would be entitled to make claims and receive payment in whole or in part are so entitled in the liquidation.

(2) In applying in a liquidation the rules in force under the law of bankruptcy, a claim made under section 304 and admitted by a liquidator is to be treated as if it were a debt proved in accordance with the requirements of the Insolvency Act 2006.

304 Claims by unsecured creditors

(1) A claim by an unsecured creditor against a company in liquidation must be made in the prescribed form and must—

(a) contain full particulars of the claim; and

(b) identify any documents that evidence or substantiate the claim.

(2) The liquidator may require the production of a document referred to in subsection (1)(b).

(3) The liquidator must, as soon as practicable, either admit or reject a claim in whole or in part, and if the liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, may revoke or amend that decision.

(4) If a liquidator rejects a claim, whether in whole or in part, he or she must forthwith give notice in writing of the rejection to the creditor.

(5) The costs of making a claim under subsection (1) or producing a document under subsection (2) must be met by the creditor making the claim.

(6) Every person who—

(a) makes, or authorises the making of, a claim under this section that is false or misleading in a material particular knowing it to be false or misleading; or

(b) omits, or authorises the omission, from a claim under this section of any matter knowing that the omission makes the claim false or misleading in a material particular—

commits an offence, and is liable on conviction to the penalties set out in section 373(4).

305 Rights and duties of secured creditors

(1) A secured creditor may—

(a) realise property subject to a charge, if entitled to do so; or

(b) value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance due, if any; or

(c) surrender the charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

(2) A secured creditor may exercise the power referred to in paragraph (a) of subsection (1) whether or not the secured creditor has exercised the power referred to in paragraph (b) of that subsection.

(3) A secured creditor who realises property subject to a charge—

(a) may, unless the liquidator has accepted a valuation and claim by the secured creditor under subsection (6), claim as an unsecured creditor for any balance due after deducting the net amount realised:

(b) must account to the liquidator for any surplus remaining from the net amount realised after satisfaction of the debt, including interest payable in respect of that debt up to the time of its satisfaction, and after making any proper payments to the holder of any other charge over the property subject to the charge.

(4) If a secured creditor values the security and claims as an unsecured creditor for the balance due, if any, the valuation and any claim must be made in the prescribed form and—

(a) contain full particulars of the valuation and any claim; and

(b) contain full particulars of the charge including the date on which it was given; and

(c) identify any documents that substantiate the claim and the charge.

(5) The liquidator may require production of any document referred to in subsection (4)(c).

(6) Where a claim is made by a secured creditor under subsection (4), the liquidator must—

(a) accept the valuation and claim; or

(b) reject the valuation and claim in whole or in part, but—

(i) where a valuation and claim is rejected in whole or in part, the creditor may make a revised valuation and claim within 10 working days of receiving notice of the rejection; and

(ii) the liquidator may, if he or she subsequently considers that a valuation and claim was wrongly rejected in whole or in part, revoke or amend that decision.

(7) Where the liquidator—

(a) accepts a valuation and claim under subsection (6)(a); or

(b) accepts a revised valuation and claim under subsection (6)(b)(i); or

(c) accepts a valuation and claim on revoking or amending a decision to reject a claim under subsection (6)(b)(ii),—

the liquidator may, unless the secured creditor has realised the property, at any time, redeem the security on payment of the assessed value.

(8) The liquidator may at any time, by notice in writing, require a secured creditor, within 20 working days after receipt of the notice, to—

(a) elect which of the powers referred to in subsection (1) the creditor wishes to exercise; and

(b) if the creditor elects to exercise the power referred to in paragraph (b) or paragraph (c) of that subsection, exercise the power within that period.

(9) A secured creditor on whom notice has been served under subsection (8) who fails to comply with the notice, is to be taken as having surrendered the charge to the liquidator under subsection (1)(c) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for the whole debt.

(10) A secured creditor who has surrendered a charge under subsection (1)(c) or who is taken as having surrendered a charge under subsection (9) may, with the leave of the court or the liquidator and subject to such terms and conditions as the court or the liquidator thinks fit, at any time before the liquidator has realised the property charged,—

(a) withdraw the surrender and rely on the charge; or

(b) submit a new claim under this section.

(11) Every person who—

(a) makes, or authorises the making of, a claim under subsection (4) that is false or misleading in a material particular knowing it to be false or misleading; or

(b) omits, or authorises the omission, from a claim under that subsection of any matter knowing that the omission makes the claim false or misleading in a material particular—

commits an offence, and is liable on conviction to the penalties set out in section 373(4).

395 Regulations

(1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

(a) prescribing forms for the purposes of this Act; and those regulations may require—

(i) the inclusion in, or attachment to, forms of specified information or documents:

(ii) forms to be signed by specified persons:

(b) …

(c) regulating, in a manner not inconsistent with this Act, the conduct of liquidations:

…

(d) providing for such other matters as are contemplated by or necessary for giving effect to the provisions of this Act and for its due administration.

(2) Different forms for the purposes of this Act may be prescribed for different classes of persons.

Companies Act 1993 Liquidation Regulations 1994

6 Claim by unsecured creditor

A claim by an unsecured creditor under section 304(1) of the Act shall be in form 1 of the Schedule.

7 Secured creditor valuing security and claiming as unsecured creditor for balance due

A valuation and claim by a secured creditor under section 305(4) of the Act shall be in form 2 of the Schedule.

19 Creditors entitled to vote

A person shall not be entitled to vote as a creditor unless, by the time the vote is taken, the creditor has made a claim under section 304(1) or section 305(4) of the Act and either—

(a) the liquidator has admitted the claim wholly or in part either for payment or for voting purposes; or

(b) the chairperson of the meeting of creditors allows the person to vote in accordance with regulation 20.

20 Admission and rejection of claims by chairperson of meeting of creditors for purposes of voting

(1) The chairperson of a meeting of creditors shall have power to admit or reject a claim for the purposes of voting at that meeting, but his or her decision shall be subject to appeal to the court.

(2) If a chairperson is uncertain whether a claim may be admitted or rejected, he or she must allow the creditor to vote subject to the vote being declared invalid in the event of the claim being rejected for the purposes of voting.

21 Cases in which creditors may not vote

A creditor shall not vote in respect of—

(a) any claim that is subject to a contingency or that is for damages or that is, for some other reason, of an uncertain amount unless the value of the claim has been estimated by the liquidator or determined by the court in accordance with section 307 of the Act:

(b) a debt on or secured by a current bill of exchange or promissory note held by him or her unless the creditor treats the liability to him or her thereon of every person who is liable thereon antecedently to the company, and who has not been adjudged bankrupt, as a security in his or her hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his or her claim.

22 Votes of secured creditors

(1) A secured creditor shall be entitled to vote—

(a) for the whole debt if he or she surrenders the charge to the liquidator for the general benefit of creditors; or

(b) in respect of the balance of the debt if he or she values the charge and claims as an unsecured creditor under section 305(4) of the Act for the balance due; or

(c) in respect of the balance of the debt if he or she realises property subject to a charge and claims as an unsecured creditor under section 305(3)(a) of the Act for any balance due after deducting the net amount realised.

(2) Subject to the Act, if a secured creditor votes in respect of the creditor's whole debt, the creditor shall be taken to have surrendered his or her charge.

(3) A creditor who is not entitled to vote may with the leave of the liquidator attend and speak at a meeting of creditors.