IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-916
[2016] NZHC 1394

UNDER	the Companies Act 1993
IN THE MATTER	of HIGH STREET MANAGEMENT LIMITED (In Receivership and Liquidation)
BETWEEN	DAVID ROSS PETTERSON Applicant
AND	GREGORY ALEXANDER HUTT AND FR TRUSTEE (HUTT) LIMITED First Respondents
AND	DAMIEN GRANT AND STEPHEN KHOV Second Respondents

Hearing:	26 May 2016; further submissions filed on 30 May 2016 and 1, 14 and 16 June 2016
Appearances:	GP Blanchard and T Refoy-Butler for applicant K Crossland and W Buckham for first respondents A Ho for second respondents
Judgment:	24 June 2016

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 24 June 2016 at 12:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Mr David Petterson, the applicant, is the liquidator of High Street Management Ltd (in receivership and in liquidation) ("HSM"). On 8 March 2016, HSM entered into two general security agreements ("GSAs") with the first respondents, Mr Gregory Hutt and FR Trustee Ltd. Five weeks later, on 18 April 2016, HSM was put into voluntary liquidation.

[2] On 3 May 2016, Mr Petterson issued a proceeding applying to have the GSAs set aside pursuant to ss 293 and 299 of the Companies Act 1993. The basis of the s 299 claim is that Mr Hutt was acting as a shadow director of HSM when the GSAs were issued. The s 293 claim rests on the contention that the GSAs are voidable because they were entered into at a time when HSM was unable to pay its debts. It is necessarily the case that, if the GSAs were voided, any appointment of receivers pursuant to the GSAs would also be of no effect. Mr Petterson, therefore, also sought an order that the second respondents, Mr Grant and Mr Khov, be made to retire as receivers of HSM.

[3] Pending the substantive decision on that proceeding, Mr Petterson sought an interim injunction (without formal notice but on a "Pickwick" basis) restraining the second respondents, in their capacities as receivers, from taking any steps to realise or recover any HSM asset, and preventing the first respondents from incurring any debt on behalf of HSM, pending a full hearing of the application for an interim injunction.

[4] Wylie J considered the urgent application on the papers and granted temporary relief pending a full interim injunction hearing. A fixture was allocated on an urgent basis, and I heard the matter on 26 May 2016. Mr Petterson asks the Court to maintain the interim orders which Wylie J imposed pending a substantive hearing on the voidability of the GSAs. The first respondents seek to have the interim orders set aside.

[5] So far as remains relevant, the interim orders made by Wylie J on 5 May 2016 pending a further order of the Court are:

(a) The first and second respondents are restrained from taking any steps to realise or recover any HSM asset, including real and personal property, debts and choses in action; and

(b) The first respondents are restrained from taking any steps to incur any debt on behalf of HSM.

Background

[6] The background facts surrounding this case need only to be stated briefly. HSM was a building and construction company that traded in Auckland.[1] Mr Hutt was a director of HSM from its incorporation in 2006 until 22 November 2010; its sole current director is Mr Martin Price.

[7] The first respondents, Mr Hutt and the FR Trustee (Hutt) Ltd, are the trustees of the Greg Hutt Family Trust. They hold 49 of the 99 shares in HSM; Mr Price holds 49 shares in the company. The single remaining share is held by Pocock Hudson Trustees Ltd.

[8] In May 2015, HSM successfully tendered for a contract with Kervus Symonds Ltd ("Kervus") relating to the conversion of a commercial building. During the course of its work on the project, HSM became indebted to one of its sub-contractors, Cavity Sliders Limited. It is said that, by January 2016, HSM owed Cavity Sliders $296,868.44. In February 2016, Cavity Sliders threatened HSM with the service of a statutory demand. Although Mr Hutt was no longer a director of HSM, he negotiated payment with Cavity Sliders on behalf of HSM.

[9] On 8 March 2016, the first respondents entered into a loan agreement in respect of advances which Mr Hutt had previously made to HSM. Through two GSAs, the loan agreement was secured by general security interests which HSM granted to the first respondents over all HSM's present and after-acquired property.

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[1] HSM traded as Hi-Tech Commercial Interiors (Auckland) Ltd from its incorporation on 1 September 2006 until the date of its liquidation on 18 April 2016. I will refer to it in this judgment as "HSM".

[10] It is evident that Cavity Sliders did not receive payment for its debt and, on 21 March 2016, it served a statutory demand on HSM requiring payment of the $296,868.44 owed. HSM did not comply with the demand and it was voluntarily placed into liquidation on 18 April 2016. The second respondents were appointed as the initial liquidators. However, at the first creditors' meeting on 28 April 2016, HSM's creditors resolved they would not confirm the appointment of the second respondents as the liquidators. Instead, through a contested vote, the creditors appointed Mr Petterson as the liquidator. On 29 April 2016, Mr Petterson was notified by one of the receivers, Mr Khov, that the second respondents had been appointed receivers by Mr Hutt pursuant to the GSAs.

The relief sought

[11] By his application filed on 5 May 2016, Mr Petterson seeks, in effect, the continuation of the particular orders made by Wylie J on 5 May 2016.[2]

The parties' submissions

[12] Mr Petterson's application is based on his view that the GSAs entered into on 8 March 2016 are likely to be voidable securities under ss 293 or s 299 of the Companies Act and are liable to be set aside. The interim relief is sought, therefore, to prevent the receivers, whose appointment was made pursuant to a document which may well be set aside by the Court, from taking actions such as embarking on legal proceedings against debtors and other targets; realising and distributing the assets; accruing receivers' fees; and putting the first respondents in a position preferential to other creditors.

Applicant's undertaking

[13] Mr Petterson has provided an undertaking as to damages in the event that his substantive claim is not successful. Counsel for the first respondents, Mr Crossland, contends that Mr Petterson's undertaking is insufficiently fortified; he alleges that Mr Petterson has significantly exaggerated his ability to pay damages or costs. After

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2 At [5] above.

reviewing Mr Petterson's affidavit in support of his undertaking, however, I am satisfied that he has sufficient means to honour it.

[14] Counsel have indicated that the earliest fixture available for a substantive hearing, if it were to be granted on a non-priority basis, would be in February 2017. A priority fixture has been sought by the parties.

Opposition

[15] The first respondents oppose Mr Petterson's application for the interim restraining orders. Their counsel, Mr Crossland, submits that neither of the limbs of Mr Petterson's substantive claim poses a serious question to be tried. The respondents also emphasise that the receivers have offered an undertaking that the receivership, in respect of the GSAs, will effectively be put on hold pending the substantive hearing. Given this undertaking, Mr Crossland submits that the balance of convenience runs against the granting of the injunction because the unsecured creditors will suffer no injury. The receivers, who are the second respondents, do not formally oppose Mr Petterson's application. It is evident, however, that they support the first respondents' opposition because they consider steps should taken to recover sums said to be owed to HSM by Kervus.

Principles of interim injunctions

[16] The principles relating to the grant of interim injunctions are well established. The plaintiff must satisfy the Court that: [3]

(a) There is an arguable case, a serious question to be tried in a substantive proceeding;

(b) The balance of convenience favours granting the relief; and

(c) The overall justice of the individual case justifies the granting of interim relief.

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[3] *American Cyanamid Co. v Ethicon Limited* [1975] AC 396 (HL); *Klissers Farmhouse Bakery v Harvest Bakeries* [1985] 2 NZLR 129 (CA).

[17] In this case, the interim orders made by Wylie J on a 'Pickwick' basis are still in place. Mr Crossland has raised issues about whether the applicant made full and frank disclosure when applying for the initial orders. He submits that this should be considered as a factor militating against granting or continuing interim orders. There has now been further disclosure, however, and I have the benefit of more information than did Wylie J when he considered the matter. I have also benefited from hearing full argument by the parties. It is appropriate for me to approach the matter afresh.

Has Mr Petterson established that there are serious questions to be tried?

Section 299

[18] Section 299 of the Companies Act empowers the Court to set aside securities and charges made in favour of certain insiders if it is just and equitable to do so. The relevant insiders to which the section applies are:[4]

> (a) A person who was, at the time the security or charge was created, a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
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> (b) A person, or a relative of a person, who, at the time when the security or charge was created, had control of the company; or
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> (c) Another company that was, when the security or charge was created, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

[19] Mr Blanchard submits that, at the time the GSAs were entered into, Mr Hutt was acting as a shadow director. He points to various facts surrounding the level of control that Mr Hutt has exercised on behalf of the company, including the fact that he purported to negotiate with creditors on behalf of HSM earlier this year.

[20] Mr Crossland contests both the factual and legal foundations on which Mr Petterson relies in his allegation that Mr Hutt was a shadow director of HSM. A large volume of evidence comprising various affidavits and accounts, as well as a significant number of cases, was produced in order to rebut the allegations of a

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4 Section 299(1).

shadow directorship. At the hearing, however, counsel conceded responsibly that the threshold for an arguable case is low and that, although he maintained the position that Mr Petterson's case has little merit, there is probably sufficient material to meet that low threshold.

[21] In view of that concession, and because I am by no means sure that it is necessary or appropriate to do so in determining an application for interim relief, I have not undertaken a detailed factual analysis of the large quantity of material put before the Court. I am satisfied nevertheless that Mr Petterson has raised a serious question about whether Mr Hutt was as an insider of HSM at the time the GSAs were entered into. Although the factual circumstances of this case and the relevant case law have some complexity, there is sufficient evidence to satisfy me that there is at least an arguable case as to whether the GSAs are voidable under s 299 on account of Mr Hutt acting as a shadow director. I accept the force of the submissions for the applicant that:

(a) Mr Hutt was able to obtain the GSAs from HSM on 8 March 2016 to secure past, not new advances; this is said to evidence the control he has over HSM.

(b) Mr Hutt is an authorised signatory of HSM, and he executed the GSAs on behalf of the HSM as the debtor. Since the liquidation has proceeded, he has also executed documents on HSM's behalf.

(c) Mr Hutt was a founding director of HSM until he had to resign in 2010, after which his relatives have at times been appointed to the role. He has remained heavily involved in the company.

(d) In late 2015 and early 2016, Mr Hutt attended meetings with Kervus and negotiated on HSM's behalf to obtain payment directly from Mr Hutt, in spite of the fact that Mr Hutt is no longer a director.

Section 293

[22] Section 293 of the Companies Act gives a liquidator the ability to set aside a charge if certain circumstances are proved. The relevant provisions of the section are:

> (1) A charge over any property or undertaking of a company is voidable by the liquidator if—
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> (a) the charge was given within the specified period; and
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> (b) immediately after the charge was given, the company was unable to pay its due debts.
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> (2) Unless the contrary is proved, a company giving a charge within the restricted period is presumed to have been unable to pay its due debts immediately after the giving of the charge.
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> …
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> (6) For the purposes of subsection (1) of this section, **specified period** means–
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> (a) The period of 2 years before the date of the commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed;
>
> …
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> (7) For the purposes of subsection (2) of this section, **restricted period** means–
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> (a) The period of 6 months before the date of the commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed ….

[23] If both limbs in subs (1) are met, a charge will be voidable at the election of the liquidator, unless the charge holder proves that one of the statutory exceptions applies.

[24] Mr Blanchard submits that the first limb of the test appears to be met, given that the GSA was entered into only five weeks before HSM was placed into liquidation. It is also submitted that there must be a prima facie case that the second limb will be met, given the rebuttable presumption in subs (2) that a company is unable to pay its debts within the "restricted period". It is argued for Mr Petterson

also that the insolvency is self-evident given the short time period between the GSA and the liquidation.

[25] Mr Crossland, however, submits that the GSAs come under the statutory exception to s 293 because they were granted for valuable consideration in good faith.[5] He makes the point that a temporary lack of liquidity does not equal insolvency, and that it is common for companies to require funding from their shareholders.[6]

[26] Nevertheless, the timing of the granting of security under the GSAs triggers the presumption that the company was unable to pay its debts at the relevant time, a factor that weighs heavily in favour of an arguable case. The Court is not in a position to make findings, on the basis of untested evidence, about whether the presumption is likely to be rebutted, or whether the exception applies; those are matters to be determined at trial.

Where does the balance of convenience lie?

[27] Mr Blanchard submits that the unsecured creditors could suffer considerable harm if the interim injunctions are not maintained. They would face the prospect of having their rankings displaced, as well as seeing funds which would be otherwise available for creditors consumed by receivers appointed under a document that is at risk of being set aside by the Courts. In that regard, the applicant points to a fees invoice from the receivers for approximately $34,000 for a week's work. I accept the submission that the incidence of professional fees for both a liquidator and receivers is likely to diminish the company's assets. I do not think that disadvantage is answered by the receivers' agreement that they would give the liquidator five working days' notice of any intention to enter into an agreement to bind the company (including any settlement agreement with a debtor), or make any distributions, including to themselves by way of receivers' fees, pending the determination of the substantive application. The receivers have not said they would waive their fees in the event the GSAs under which they were appointed were set aside.

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5 Section 293(1A)(a).

6 *Yan v Mainzeal Property and Construction Ltd (in receivership and in liquidation)* [2014] NZCA 190 at [58] and [86].

[28] Mr Blanchard submits the first respondents will not in any way be prejudiced before the substantive hearing if the interim injunctions are left in place. He argues that the current orders simply preserve the positions of both the secured and unsecured creditors. Mr Petterson's application for a priority fixture indicates he could be ready for trial in August 2016.

[29] Mr Crossland submitted that, rather than maintaining the interim orders, it would be preferable for the Court to give directions under s 284 of the Companies Act as to how the liquidation should proceed. Counsel accepts that the current arrangement of having a liquidator and receivers involved in the administration of the company is not an efficient use of resources, and invites the Court to direct the receivers and liquidators to collaborate. Such directions, he submits, would be likely to produce a better commercial outcome for all parties and would tip the balance of convenience strongly in favour of not continuing the interim relief.

Discussion

[30] I acknowledge that s 284 requires the Court to exercise a supervisory jurisdiction over liquidations and to intervene when it is appropriate to do so. But the statutory regime under the Companies Act favours allowing liquidators to make business decisions which, as the persons appointed to exercise statutory responsibilities, they are better qualified than the Courts to make. Without abrogating its supervisory obligations, the Court should be slow to intervene where matters of judgment and assessment on commercial matters are concerned.[7] That includes assessing how far to investigate possible avenues of recovery of funds for distribution. Weighing the likely cost of pursuing such avenues against the prospects of success and the amount which may be recovered are matters of judgment which are squarely within a liquidator's domain.[8]

[31] No challenge is made to the validity of the appointment of the liquidator and I am not prepared to speculate about what decisions might have been made at a creditors meeting if certain interested parties had not exercised their voting rights.

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7 *Commissioner of Inland Revenue v Hulst* (2000) 19 NZTC 15,693 at [25].
8 *Levin v Lawrence* [2012] NZHC 1452.

The creditors voted to appoint Mr Petterson as the liquidator and he is the person charged with making commercial judgments about what is in the creditors' interests. I am not persuaded that it would be appropriate for me to interfere with the creditors' decision to give Mr Petterson the powers of a liquidator. Mr Petterson and the receivers appear to have different views about the avenues for recovery of funds in the interests of creditors; those are matters for commercial judgment. Although the proposition that the GSAs should be set aside is untested, it is not fanciful and I see no reason to interfere with the liquidator's decision to pursue the claim. And I am in no position at this stage of the proceeding to judge the merits of the prospective claim against Kervus advocated by the receivers.

[32] I was told during the hearing that there then appeared to be no real prospect of the parties reaching agreement as to what appropriate steps might be taken in the overall interests of creditors. There is no reason, however, why the interested parties and their legal representatives should refrain from continuing dialogue and exchanges of views and information pending the substantive hearing. It was not suggested to me that Mr Petterson is incapable of keeping an open mind about any reasonable suggestion as to how he might best fulfil his statutory duties.

[33] I do not consider Mr Petterson's decision to challenge the GSAs to be so devoid of merit that it runs an unjustified risk of detrimentally affecting the creditors. Aside from his submission that the liquidator has no prospect of success in the substantive hearing, and that it will be a costly and wasteful exercise for all parties involved, Mr Crossland has not pointed to any material which would tip the balance of convenience against continuing the orders which Mr Petterson has obtained.

[34] I am satisfied that the balance of convenience lies in favour of maintaining the interim relief granted by Wylie J.

Overall interests of justice

[35] Although counsel for the first respondents have raised various matters — factual, legal and commercial — which they say indicate that the liquidator's

challenge to the validity of the GSAs is not sound, I consider that the overall interests of justice warrant maintaining the interim relief granted by Wylie J.

Result

[36] The orders made by Wylie J on 5 May 2016 shall remain in effect pending a substantive hearing, unless earlier revoked by the Court.

[37] I direct the Registrar to set the substantive application down for hearing, with an estimated hearing time of five days, on the first available date. That direction may be affected by further orders of the Court, following consideration of the application for a priority fixture by Heath J in a case management conference to be held at **9am on Tuesday 28 June 2016**.

Costs

[38] Rule 14.8 of the High Court Rules provides that costs on an opposed interlocutory application, unless there are special reasons to the contrary, must be fixed in accordance with the Rules when the application is determined. A principle to be applied to the determination of costs is that a party who fails with respect to an interlocutory application should pay costs to the party who succeeds.[9] It follows that, unless the Court determines otherwise, the applicant is entitled to costs and that they should be fixed without undue delay.

[39] Costs shall be determined on a category 2B basis. Unless the parties agree otherwise:

(a) any application for costs shall be by memorandum filed and served not later than **4pm on Friday, 8 July 2016**;

(b) memoranda in response shall be filed and served by **4pm on Friday, 22 August 2016**; and

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[9] High Court Rules, r 14.2(a).

(c) any memorandum strictly in reply shall be filed and served by **4 pm on Friday, 29 August 2016**.

Costs shall then be determined on the papers unless the Court directs otherwise.

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Toogood J