BUDDLE FINDLAY

Legal update on insolvency law - September 2015

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Liquidators found personally liable for costs

Asia Pacific Hotel Investments Limited & Ors v Grant & Khov [2015] NZHC 1460 was an application for costs against liquidators personally. The liquidators, Messrs Grant and Khov, rejected three proofs of debt on the basis that they were time barred. The creditors applied to have that decision set aside. Following service of the application, the liquidators reversed their decision. That reversal effectively brought the proceeding to an end because it gave the creditors the relief they had been seeking.

The applicant creditors had been successful in achieving the result sought in their application. In these circumstances, the liquidators were held personally liable for the creditors' costs.

See Court decision here.

Liquidators' appointment challenged

In *Grant & Khov v ML Trustees 2711 Limited* [2015] NZHC 1503 Messrs Grant and Khov were appointed as liquidators of Easy Group Limited by special resolution of the shareholders.

The special resolution had been signed by one of the two trustees of the 99% shareholder. Trustees must act unanimously and the trustee who signed the special resolution did not have authority of the other trustee. Against this background, the liquidators applied for a declaration that their appointment was valid. The application was opposed.

The evidence filed by one trustee in opposition to the application included an assertion that the trustee had researched liquidation reports for 400 of the applicants' prior appointments, including 224 completed liquidations and 176 other liquidations. The trustee claimed that his research concluded that after a review of the 224 liquidation reports, $4,917,594.08 was paid out to the liquidators as their fees, disbursements and other costs when only $102,689.39 was paid out to unsecured creditors.

However, the Court concluded that the appointment was valid because it had been subsequently ratified by the other trustee.

High Court provides no guidance on setting aside a security interest post realisation

The liquidator of Polyethylene Pipe Systems Limited (PPS) applied to have payments made to the owner and secured creditor of the company, Mr Browne, set aside under section 299 of the Companies Act 1993. PPS was notified in June of defective work that it had done for McConnell Dowell Constructors Limited and ultimately resulted in adjudication for $2,996,924.49. However, on 28 July PPS borrowed from Mr Browne and granted a general security agreement in his favour. One month later Mr Brown appointed a receiver to PPS under his general security agreement and recovered the claimed sums.

The requirements for a security interest to be set aside under section 299 are generally that the beneficiary of the charge is in some way related to the company and that it is just and equitable to do so. However, the court also questioned whether section 299 could be applied after a secured creditor has already realised assets. The court noted that:

- Heath and Whale and Insolvency Law & Practice both opine that the secured party should be entitled to retain the benefit of its security
- That there did not appear to be any guiding case law in New Zealand or England.

However, the court refused to comment further on the basis that PPS was solvent at the time that the security was given and it was therefore neither fair nor just to set aside the security. The application of section 299 in these situations therefore remains an

open question in New Zealand.

See Court decision here.

Relief against forfeiture available but not granted

It is common for long-term leases to include forfeiture clauses granting the lessor powers of re-entry if the lessee is placed in receivership. Relief against forfeiture is a well-established equitable doctrine designed to prevent the lessor from unconscionably enforcing such clauses as a way to secure performance of a primary obligation under a lease.

Greenshell v Kennedy Bay tested the Court's jurisdiction and discretion to grant relief when the lessee/sub-licensee had rights to use and occupy mussel farms under a coastal permit. Several months after Greenshell (lessee/sub-licensee) was placed in receivership, KBMC purported to exercise its contractual rights to re-enter and terminate both the lease and sub-licence. Greenshell sought equitable relief.

The Court of Appeal held that forfeiture would cause Greenshell to lose proprietary and possessory rights under the permit. The Court therefore had jurisdiction to grant relief. However, the Court in a 2:1 split decision declined to exercise its discretion to grant relief against forfeiture in the circumstances. There was nothing to suggest that permitting KBMC to enforce its rights would be unfair, let alone unconscionable. The minority decision favoured discretionary relief on the facts and would have allowed the appeal.

See Court decision here.

Guidance on drafting PLA notices

Two recent Court of Appeal cases consider the requirements for compliance with sections 119 to 121 of the Property Law Act 2007 (PLA).

In *Burgess,* the Court of Appeal held that a section 119 Notice that required further calculation by the customer, rather than containing a statement of an exact sum for payment, was a departure from the form required to comply with the PLA. The bank's inclusion of estimated amounts for legal fees was criticised, but was ultimately found to be a minor defect, and the notice issued was not invalidated by the error.

Similarly, the Court of Appeal found that the inclusion in the section 119 Notice of amounts not yet due and owing at the date of service of the notice would be contrary to the specifications of the Act, because sections 119 and 120 require that the defaults specified in the Notice must be in existence at the time the Notice was issued. On the facts, the Court found that the bank's section 119 Notice did not contain demands for payment of sums not due at the time they were issued, and was not misleading.

In *Koroniadis,* the Court of Appeal was asked to consider whether a section 121 Notice to the guarantor had been delivered "*as soon as possible"* as required by the PLA, in circumstances when Mr Koroniadis, the guarantor, was served after the date for compliance with the s119 Notice. The Court of Appeal noted that the PLA provides for service by personal service or registered post. The bank could have posted the Notice to Mr Koroniadis to ensure compliance with the Act, given Mr Koroniadis appeared to have been evading attempts at personal service. That observation notwithstanding, the Court of Appeal found there was no prejudice to Mr Koroniadis resulting from the delay in service. On the evidence, Mr Koroniadis could not remedy the default specified in the section 119 Notice in any event.

The judgments provide a useful reminder to all lenders and solicitors of the requirements when drafting section 119 and 121 Notices under the PLA.

See the Burgess Court decision here.

See the Koroniadis Court decision here.

Benefit of joint life insurance policy forms part of bankrupt's estate

In *Miah v The National Mutual Life Association of Australasia Limited*, the Court considered whether an interest in a joint life insurance policy formed part of a bankrupt's property.

Miah and his wife took out a joint life insurance policy payable on the death of the wife. Miah was later adjudicated bankrupt and his wife subsequently died.

Miah argued that the benefit (or part of the benefit) of the policy did not form part of his property in bankruptcy as the policy was

owned by him and his wife as tenants in common and her interest in the policy passed to her estate on her death. He also agreed that, alternatively, the interest in the policy was not an item of property forming part of his estate in bankruptcy.

The Court accepted the presumption that the benefit of a joint life insurance policy is payable solely to the survivor and noted there was nothing in this case to rebut this presumption. Accordingly, the Court held that the benefit of the joint life insurance policy was held by Miah alone and formed part of his estate in bankruptcy.

The Court did not agree that the policy was not property for the purposes of the Act - the right of the survivor to claim under the policy is a "thing in action" which is property, and the benefit of the policy was not personal to Miah.

See Court decision here.

Court refuses application to assign cause of action from Official Assignee to bankrupt

In *Goodwin v Copland* [2015] NZHC 2124, the Court dismissed an application by a bankrupt, Goodwin, to assign his cause of action against Copland from the Official Assignee to himself, and declined to set aside the Assignee's notice of discontinuance.

Goodwin relied on two *distinctly different* provisions of the Insolvency Act 2006 (Act): sections 119 (loss caused by disclaimer of onerous property) and 221 (Official Assignee may assign right to sue).

The Court concluded that a disclaimer of onerous property under section 117 requires a formal decision to disclaim the property, followed by notice of that decision to every person affected by it. As the Assignee had not properly disclaimed the property in this case (the proceeding against Copland), the Court had no jurisdiction under section 119 to vest the cause of action in Goodwin.

As for section 221, the Court concluded that the right to sue in section 221(1) must have been conferred on the Assignee by the Act, as opposed to a right formerly held by the bankrupt that vested in the Assignee on bankruptcy (which could be assigned without leave of the Court).

In addition, in *OA v Henshaw*, the High Court again considered the issue of whether the Court can, under section 221(1) of the Act, approve the Official Assignee to assign to a bankrupt a right to sue that vested in the Official Assignee on bankruptcy.

As in *Goodwin v Copland*, the High Court held that, on a plain reading of section 221(1), it could only apply to a right to sue conferred on the Official Assignee by the Act and not a right to sue vested in the Official Assignee under section 101 or 102 of the Act.

See the Goodwin Court decision here.

See the Henshaw Court decision here.

Court appoints receivers as liquidators

In *Graham & Jackson v Arena Capital Limited (In Rec)* the High Court dealt with an application brought by Grant Graham and Neale Jackson to place Arena Capital Limited (Arena) into liquidation.

Messrs Graham and Jackson brought the liquidation application as receivers of Arena on the ground that Arena was unable to pay its debts and on just and equitable grounds. The unusual feature of this case was that the receivers also sought to have themselves appointed as the liquidators.

In the circumstances, the Court agreed to appoint the receivers as liquidators. In particular, the receivers had been appointed by the Court pursuant to an application by the FMA, there was no conflict of interest and they were in the best position to be appointed as liquidators given their recent dealings and knowledge of the complex affairs of Arena. The successful application effectively gave the receivers broader powers to investigate Arena and recover funds on behalf of creditors.

See Court decision here.

Director found liable for reckless trading

Mr Grant, in his capacity as a liquidator of Railmark New Zealand Limited (Railmark), sought orders for Railmark's directors, to contribute to the company's assets pursuant to section 301 of the Companies Act 1993. Mr Grant claimed that the directors breached their duties to Railmark by engaging in reckless trading, and agreeing to Railmark incurring obligations which, as directors, they did not have reasonable grounds to believe the company would be able to perform.

The Court held that one of the director's actions or inactions were such that they created substantial risk of serious loss to the company's creditors and that he agreed to the company incurring debt when he did not, or could not on reasonable grounds believe that the company would be able to repay the debt. As such, he was held to be liable for the whole amount of Railmark's total debt.

See Court decision here.

No saving SOS from summary judgment

SOS Investments Limited v FM Custodians Limited [2015] NZCA 380 concerned an appeal against summary judgment on grounds that a creditor had agreed not to enforce a debt.

SOS Investments Limited (SOS) appealed against summary judgment granted in favour of FM Custodians Limited (FM). The principal of SOS, Mr Robert (aka 'Rocky') Cribb explained that the basis of SOS' claim was that FM had agreed not to pursue SOS because FM had agreed instead to pursue a foreign judgment that had been granted in favour of SOS.

The foreign judgment that apparently formed the basis of the alleged agreement was most unusual. It was a judgment for $33.2m against a Croatian and Austrian entity (and an individual) that had been registered in the UK and was potentially enforceable through the European Union. However, there was no evidence of the basis on which the judgment had been obtained, why it had not been paid or what steps had been taken to enforce the judgment over the two year period since it had been registered.

The Court dismissed all of SOS's claims, finding that there was insufficient evidence of an agreement by FM to forebear from enforcement, and that it was improbable that FM would have entered into any such agreement.

See Court decision here.

High Court grants conditional stay of enforcement of judgment awarded to insolvent creditor

The High Court in *AAI Ltd v 92 Lichfield Street* (in receivership and in liquidation) [2015] NZHC 2190 granted a stay preventing:

- Enforcement of a judgment upholding a statutory demand served on AAI (an insurer) by Lichfield for $6,500,000
- Liquidation proceedings brought by Lichfield against AAI when the $6,500,000 was not paid.

In determining whether to grant a stay of enforcement, the Court had to weigh a number of factors to decide how to best do justice between the parties. The main factor in support of a stay was that AAI had appealed the judgment: if the full judgment sum was paid to Lichfield, it would render the appeal nugatory because Lichfield was insolvent.

The Court concluded that enforcement of only part of the judgment should be stayed. The rest ($4,627,000) should be paid to Lichfield immediately, because:

- Regardless of the outcome of the appeal, only the amount of $1,873,000 and costs was in dispute
- The receivers required some funds to meet the ongoing costs of pending the determination of the appeal.

Given the decision to stay enforcement, the Court also found it appropriate to also stay the liquidation proceedings and any advertising relating to the liquidation proceedings pending the determination of the appeal.

The decision is being appealed.

See Court decision here.

Receivers' personal liability for BC levies - Supreme Court grants leave to appeal

Recently we provided a case update on *Body Corporate v Gilbert and Anor* [2015] NZCA 185 (see here). In that case Mr Gilbert had been appointed as receiver of a company that had leased five units within a large building complex on Queen Street, Auckland. The Body Corporate imposed levies in respect of the five units, and sought summary judgment against Mr Gilbert to recover those levies from him personally, as receiver.

The Court of Appeal had held that Mr Gilbert was personally liable as receiver for the levies imposed by the Body Corporate from the date of his appointment as receiver, and that he had no arguable defence to the claim by the Body Corporate.

Mr Gilbert has since sought the leave of the Supreme Court to appeal this decision. In its decision of *Gilbert and Anor v BC 162791* [2015] NZSC 133 the Supreme Court has granted leave for this appeal. The Supreme Court will consider the following issues:

- Whether Mr Gilbert was personally liable for the Body Corporate levies under the Receiverships Act 1993
- Whether Mr Gilbert had no arguable defence to his claim for relief from personal liability under the Receiverships Act 1993.

See Court of Appeal decision here.

See the Supreme Court decision here.

Ship and Bunker: International disagreement on validity of interpleader applications following O.W. Bunker bankruptcy

Two recent conflicting decisions in respect of interpleader applications have highlighted the difficulties that may arise in the insolvency setting where maritime lien claims and contractual claims interact.

The High Court of Singapore and the Federal District Court in New York arrived at opposite conclusions when asked to consider the validity of interpleader applications in the series of litigation that resulted from the 2014 bankruptcy of O.W. Bunker, a marine fuel giant.

The plaintiffs were owners and charterers of various shipping vessels that contracted with one or more of the O.W. entities, either directly or through a broker, for the supply of fuel. In both jurisdictions, vessel owners and charterers sought protective interpleader after becoming targeted by the competing claims of third party suppliers of fuel, O.W. entities and ING, a bank that was assigned O.W.'s rights under certain fuel supply contracts. Some suppliers had attempted to enforce maritime liens directly against vessels, including in some cases when the vessel owners or charterers had already paid for the fuel provided to the O.W. entities.

An interpleader application can be made by a person who is under a liability in respect of a debt or in respect of any money or chattels, and has been (or expects to be) sued for or in respect of the debt, money, or chattels by two or more parties making adverse claims. In that case, the applicant may apply to the court for relief, including asking the Court to adjudicate on the competing claims.

The Singapore Court, which focused more on the technical dissimilarity of the debtor's claims, concluded that ING's contractual claim for payment and the third-party supplier in rem claims were different, "did not concern the same debt and, as such, could not be the subject of an interpleader application". The New York Court however took a more practical approach, and concluded that the contractual and vessel claims were "alternative procedural devices to obtain the same relief".

See the Singapore Court decision here.

See the New York Court decision here.

Nortel insolvency orders made in the UK

The Chancery Division of the High Court of England and Wales has recently handed down another decision in the Nortel cross-border insolvencies. In June (see here) we provided an update on the joint decision of the Ontario and US Bankruptcy courts to approve an allocation protocol for the Nortel sale proceeds, which were being held in escrow following various assets sales. At the time of those judgments, the UK administrator had not instituted a formal claims procedure in relation to UK, Europe, Middle East and African Nortel companies as, under UK law, it had no right to do so until there were funds available for distribution.

Accordingly, the UK administrator sought various orders for the commencement of the claims process and distribution of funds amongst creditors. Recently appointed insolvency specialist judge, Sir Richard Snowden, made several orders to accommodate the UK administrator's in instituting "fair and efficient procedures" for creditors to make claims and for the distribution of the funds.

See Court decision here.

New Maximum Priority Amount for employee preferential claims

The Companies (Maximum Priority Amount) Order 2015 came into force on 20 September this year. The new order adjusts the cap on employee preferential claims under the Company Act's seventh schedule. The order increases that amount from $20,340 to $22,160 to reflect the overall percentage increase in average weekly earnings in the private sector over the three year period

starting on 1 July 2012 and ending on 30 June 2015.

See the legislation here.

Further English legal woes

Forster Dean, a Liverpool personal injury firm, has announced that it is planning to close a further three offices to reduce costs. This follows its recent decision to close eight other offices. The firm is reported to have been forced to do so due to the fall in revenue as a result of legal reforms implemented by Lord Justice Jackson, which capped the winning party's capacity to reclaim costs and the fees that lawyers could charge on conditional fee agreements.

See the source here.

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