

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

CIV-2007-404-4525

IN THE MATTER OF Section 284(1)(b) of the Companies Act
1993

BETWEEN KEVIN J M BLACK
Applicant

AND SELWYN DEVELOPMENTS LIMITED
(IN LIQUIDATION)
First Respondent

AND BRYAN EDWARD WILLIAMS
Second Respondent

Hearing: 9 August 2007

Appearances: D Grove for Applicant
No appearance for Respondents

Judgment: 20 August 2007

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 20 August 2007 at 2:30 pm
pursuant to Rule 540(4) of the High Court Rules

Registrar / Deputy Registrar

Date.....

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Introduction

[1] The applicants are plaintiffs in District Court proceedings brought to recover losses resulting from damage to their property sustained in early 2002. They say that the damage was caused by landscaping work being undertaken on a neighbouring property. The District Court proceedings were commenced in mid-2003. One of the defendants in the District Court proceedings (only joined in 2007) is Selwyn Developments Limited (in liquidation). However, that company was placed in voluntary liquidation in December 2003 and has since been removed from the Register.

[2] The plaintiffs now apply under s 284(1) Companies Act 1993 for an order restoring the company to the Register and revoking the liquidator's final report so that they can advance the District Court proceedings. Because of the criticisms levelled at the original liquidator they also seek to have new liquidators appointed.

[3] The basis for the application is essentially that the company was the subject of a voluntary liquidation on the basis that it was solvent whereas, to the knowledge of the company's director, Mr Kells, it was still facing a claim by the plaintiffs. Further, it is asserted that the liquidator, Mr Williams, failed to make any effort to adequately investigate the circumstances of the company before completing his final report and had he done so he would have discovered the existence of the claim, even though the company was not actually named as a party to the proceedings at that stage.

[4] Mr Williams was served with the present application but did not appear at the hearing of it.

Relevant principles

[5] Section 284(1) confers wide powers of supervision in relation to a liquidation. A liquidator or liquidation committee may apply as of right while other specified persons, including creditors, may only do so with the leave of the Court. As plaintiffs asserting a liability on the subject company the applicants are creditors

within the definition of s 240 and may therefore apply under s 284 with the leave of the Court.

[6] The application is similar to that determined in *Ocean Shipping Limited (in liquidation)*¹, under the corresponding provision of the Companies Act 1955 where liquidators filed their final report notwithstanding the wish of a major creditor to have certain matters investigated further and the subsequent removal of the company from the Register notwithstanding a notice of objection to that step.

[7] Fisher J first observed that, although the right to object to the removal of the company under s 304 Companies Act 1955 had not been pursued, the Court nevertheless had the power to order that the company be restored under s 304(1)(b), which permits such an order where “for any other reason it is just and equitable” to do so. This same provision has been carried through in s 329 Companies Act 1993.

[8] Fisher J also accepted that the Court’s power under the equivalent of the current s 284 to reverse any act of a liquidator included reversing the filing of the liquidator’s final report, thereby abrogating the completion of the liquidation. As to whether the Court’s discretion should be exercised the Judge said this:

It does seem to me, however, that there is a very strong presumption that the creditors of a failed company are entitled to a full and thorough investigation of the financial history and status of the company, that is especially the case where they are prepared to fund the exercise. Orient Shipping have been denied that opportunity in the present case, it may be that at the end of the day, as Mr Bourgogne alleges, the further investigation will prove fruitless but for my part I would be very slow to see a creditor denied at least the opportunity.

[9] I respectfully agree with this approach in the context of the current Act. I therefore turn to consider the circumstances of the present case.

The District Court proceedings

[10] The District Court proceedings were commenced in 2003 against a single defendant, Selwyn Mews Limited, on the basis that it was the owner of a property at

¹ HC AK M348/96 16 July 1996 Fisher J

88-92 Selwyn St, Onehunga. The plaintiffs claim that their property was damaged as a result of landscape works undertaken at the Selwyn Street property in March – April 2002.

[11] In September 2005 Selwyn Mews Limited's counsel, Mr Smythe, wrote to the plaintiffs' counsel advising that Selwyn Mews Limited was not the correct defendant, as it had not been the owner of the property at Selwyn Street. He advised that the company which should have been the defendant was originally incorporated as Selwyn Mews Limited but had subsequently changed its name to Selwyn Developments Limited and therefore Selwyn Developments Ltd that was the correct defendant. However, by that time Selwyn Developments Limited was in liquidation.

[12] If Selwyn Developments Ltd (in liquidation) was the correct defendant the plaintiffs would have been left without a remedy. However, the plaintiffs did not necessarily accept that they had sued the wrong company; throughout the various interlocutory steps taken in the District Court proceedings there had never been any suggestion by Mr Kells, the director of both the companies, that the wrong company had been sued. Nevertheless they obtained leave to join Selwyn Developments Limited (in liquidation) as a second defendant, on the basis that it was unclear which company owned the property at Selwyn Street. Mr Kells was also joined as a defendant.

The liquidation of Selwyn Developments Limited

[13] Selwyn Developments Limited was placed in voluntary liquidation pursuant to s 243(9) Companies Act 1993 in December 2003. Mr Bryan Edward Williams was appointed liquidator. His initial (undated) report recorded the reasons for the liquidation as:

The Director submit [sic] that the company has ceased to carry on business, all creditors having a claim on the company have been satisfied, or provision is made for the settlement of their claim, and no contingent liabilities or contestable rights exist between the company and any other party. The Directors have also certified that the company is solvent and the grounds for their belief. A copy of that certification has been filed with the Registrar of Companies.

Their [sic] being no further economical legal use for the company, the shareholder has resolved to appoint a liquidator.

[14] Annexed to the initial report was a certificate dated 27 December 2003 by Mr Kells, pursuant to s 243(9) Companies Act 1993. The certificate records the company number as AK/958765, incorporated in 1999. In the certificate Mr Kells certified as to the grounds for his belief as to the ability of the Company to pay its debts as being that as at 30 November 2003 it had more than \$1.00 of book value of realisable assets for every \$1.00 of known non-shareholder liabilities.

[15] However, the plaintiffs maintain that Mr Kells and Mr Williams either knew or were on notice as to the possibility of a claim against the company. Mr Kells, of course, was aware of the proceedings against Selwyn Mews Ltd in his capacity as its director. Since he was also a director of Selwyn Developments he could be expected to know which of the companies owned the land from which the alleged nuisance had arisen.

[16] However, it is also asserted that the liquidator had sufficient information to be on notice. On 8 March 2005, well before Mr Smythe wrote asserting the wrong company had been sued, the plaintiffs' counsel, Mr Dale, wrote a letter addressed to "the liquidators of Selwyn Mews Limited" in which he outlined the nature of the District Court proceedings and sought to have the claim admitted in the liquidation.

[17] It is unclear what prompted this letter and it contained an obvious error in that Selwyn Mews Limited was not in liquidation. However, one could expect a competent liquidator to have realised that the letter was probably referring to the liquidation of Selwyn Developments Limited, given the similarity of name. Even a cursory enquiry would have revealed the common directorship of Mr Kells. That would have strongly indicated that the letter was directed at the company in liquidation, regardless of the name being used. At the least, one could have expected some enquiry to be made of Mr Dale. However, the liquidator did not respond to the letter and appears to have made no enquiries of the plaintiffs to ascertain whether it was Selwyn Developments Limited that was the intended subject of the claim. Instead, the liquidator proceeded to file his final report dated 10 March 2005.

[18] Subsequent enquiries of the liquidator have similarly been ignored, as has advice of this application.

Determination of application

[19] Mr Black applies in this proceeding to have the final liquidator's report for Selwyn revoked and the company restored to the Register to enable the claim against it to proceed.

[20] There is clearly a real issue as to whether Selwyn Developments Limited (in liquidation) should have been the correct defendant or whether the correct defendant is the original defendant, Selwyn Mews Limited. If it transpires that Selwyn Developments Limited was the correct defendant then there must be questions over the resolution that the company be placed in liquidation and Mr Kells certificate, given Mr Kells' knowledge about the basis for the plaintiffs' claim.

[21] I am also satisfied that, even if the liquidator had no information other than Mr Dale's letter 8 March 2005, that was sufficient to put him on enquiry as to whether there was a creditor whose claim required to be investigated. The similarity of names between Selwyn Developments Limited and Selwyn Mews Limited should have caused him to at least respond to Mr Dale's letter with some basic questions. With that issue outstanding the company should not have been removed from the Register. I am therefore satisfied that it is just and equitable that the company should be restored to the Register and the liquidator's final report revoked.

[22] Given the lack of interest shown by Mr Williams to date I accept that it is also appropriate for new liquidators to be appointed. Bernard Spencer Montgomerie and Stuart James Cunningham have consented to appointment and I accept that their appointment would be appropriate.

[23] I therefore make the following orders:

- a) The plaintiffs have leave to bring this application

- b) Selwyn Developments Limited (in liquidation) is to be restored to the Register;
- c) The final report of the liquidator of Selwyn Developments Limited (in liquidation) is to be revoked;
- d) Bernard Spencer Montgomerie and Stuart James Cunningham are appointed as liquidators of the company;
- e) The costs of this application are to be costs in the liquidation.

P Courtney J