IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2018-419-149
[2018] NZHC 1234

BETWEEN	WORLDCLEAR LIMITED Plaintiff
AND	T1 HOLDINGS LIMITED Defendant

Hearing: 28 and 29 May 2018

Appearances: T M Braun and J Morgan for the plaintiff
No appearance for the defendant

Judgment: 29 May 2018

ORAL JUDGMENT OF ASSOCIATE JUDGE SMITH

Solicitors:
Braun Bond & Lomas, Hamilton

[1] The plaintiff (Worldclear) applies without notice for an order appointing interim liquidators to the defendant (T1).

[2] Worldclear filed its substantive liquidation claim against T1 on 25 May 2018, and the application to appoint interim liquidators was filed the same day. The substantive liquidation claim alleges that T1 has been or is being used for fraudulent activity by its director, Mr Richard Whitham, and that it owes Worldclear at least $4 million. Worldclear says that T1 should be put into liquidation on the "just and equitable" ground at s 241(4)(d) of the Companies Act 1993 (the Act).

[3] I heard argument from counsel for Worldclear on 28 May 2018, and this morning Mr Braun submitted a form of consent to appointment by the proposed interim liquidators. He also submitted a corrected form of an affidavit sworn by Mr David Hillary on 25 May 2018. Although it appears that T1 has instructed a solicitor to act for it in respect of certain freezing orders made against it on 23 May 2018, the present application has proceeded on a without notice basis, primarily because of the perceived risk that T1 might dispose of assets if it was served with the application to appoint interim liquidators. I am satisfied that the application was properly made on an ex parte basis.

Background

[4] The facts on which the application is based are set out in Mr Hillary's affidavit. Mr Hillary is the managing director of Worldclear. I summarise Mr Hillary's evidence as follows.

[5] Worldclear is a financial services provider, incorporated by Mr Hillary in April 2014. It provides account, foreign exchange and payment services to personal, commercial and institutional customers, both inside New Zealand and outside New Zealand.

[6] In the latter part of 2017 Worldclear found that it was having difficulty establishing and maintaining relationships with the main trading banks in New Zealand. As Mr Hillary put it in his affidavit, "these trading banks consider that

financial service providers operating in the remittance sector (like Worldclear) are at risk of being unwittingly used to launder proceeds of crime".

[7] Worldclear employed Mr Richard Whitham in August 2017, and Mr Whitham was tasked with establishing relationships with the trading banks. As Mr Hillary put it, he was to "contact main trading banks to see whether he could develop a relationship with them, inform them about Worldclear and its business, and ask them to provide banking services to us – really we needed bank accounts to enable us to process transactions."

[8] Mr Whitham was unsuccessful in those endeavours, and in December 2017 Worldclear adopted a new approach. After discussions with Mr Whitham, it was decided to form a new company, T1, of which Mr Whitham would initially be sole director and shareholder. T1 would open bank accounts and conduct financial transactions on behalf of Worldclear.

[9] Mr Hillary says it was intended to appoint a second director, and Worldclear instructed Mr Whitham to ensure that all bank accounts operated by T1 had a "two to sign" control, and to appoint nominated employees of Worldclear as co-signatories, and as users in the commercial internet banking platforms.

[10] Before that process was completed, Worldclear urgently needed to process some financial transactions, and it used the accounts in the name of T1 to do that. Worldclear paid money into these accounts, and regularly instructed Mr Whitham to process outgoing payment transactions.

[11] Mr Hillary says that as far as he is aware, Worldclear was the only source of funds in T1's accounts.

[12] Worldclear agreed to pay Mr Whittam director's fees for his services as a director of T1, but it also continued to pay him on an hourly rate basis as an employee of Worldclear, with a bonus for every banking transaction he made (Mr Whitham had signed a form of employment agreement with Worldclear on 14 August 2017). At Mr Whitham's request, the payments he was entitled to under this arrangement were

made to a company Mr Whitham had established called Retail Guru Limited (Retail Guru).

[13] Mr Whitham opened accounts with banks in New Zealand, Singapore and Europe, and Retail Guru issues invoices to Worldclear for his services in that regard.

[14] The arrangements between the parties were formalised in a short agreement between Worldclear, T1, and Retail Guru, dated 18 January 2018. The agreement was primarily concerned with the provision of initial start-up funding for T1, and it provided for the initial start-up funding to be paid into a nominated bank account. The agreement provided that T1 would be charged bank fees by the respective banks involved, but that "remaining funds will remain in stasis unless required by Worldclear Limited, or utilised to pay necessary banking fees, or utilised to make payments upon written approval by Worldclear Limited".

[15] Mr Hillary says that, until 17 May 2018, Mr Whitham, as part of his duties as an employee of Worldclear, facilitated through T1 the conversion and transfer of funds for payments required by Worldclear. At Worldclear's request, he also set up other employees of Worldclear as users to access bank accounts of T1. He was instructed to complete the "two to sign" forms for the bank accounts, and of the people who became signatories, none was ever employed or paid by T1 – they were all paid by Worldclear.

[16] As at 16 May 2018, there were 26 different bank accounts in the name of T1, with balances (recorded in Worldclear's accounting records) totalling $3,308,450.47.

[17] There were two further transactions on 17 May 2018, where Worldclear transmitted funds into an account or accounts operated by T1 at the ASB Bank. These two payments increased Worldclear's exposure to T1 to $4,611,535.

[18] The chain of events leading to the present application appear to have begun on 17 May 2018. On that day Mr Whitham was in the office, processing payments and transactions of Worldclear. However he said that he had to leave early to attend to a domestic matter, and did not expect to be back the following day.

[19] There was a payment of US$1,199,500 due to be made that day by Worldclear from T1's US dollar account with the ASB. Mr Hillary asked Mr Whitham to approve the transfer to Worldclear's payee, and at 2.43pm that day Mr Whitham sent an email with an attachment purporting to show that the payment was approved and was in "ASB processing" status. Mr Hillary's evidence is that the intended payee of these funds says that it never received them.

[20] On Friday 18 May 2018 Mr Hillary sent Mr Whittam a text message, advising him that Worldclear had two large foreign exchange transactions to be processed that morning. Mr Whitham replied saying that he was at the doctor, but would hopefully be back to his house soon. Mr Hillary had found that his staff were unable to access T1 accounts at the ANZ, BNZ, and ASB banks that morning, and he raised that by text with Mr Whitham. Mr Whitham sent a text message back saying "that is weird", and that he would check his own access to the accounts when he got back from the doctor. There were two further text messages from Mr Hillary to Mr Whitham that morning, in which Mr Hillary said "we need to talk", and asked Mr Whitham:

> "what is happening?"

[21] It appears that there was no response to those messages.

[22] Mr Hillary then instructed his staff at Worldclear to call the banks and ask for assistance. The response from the banks was that Worldclear staff had been deleted as users by the administrator of the accounts, Mr Whitham. Mr Hillary said:

> "We then called ANZ and asked to access the transaction information, and were informed that [Mr Whitham] had ordered the transfer of almost all of the available funds to his personal account in ASB."

[23] Mr Hillary then went to an address he understood to be Mr Whitham's home address, but found that it was not occupied by any family. He then went to another address, at which Mr Whitham had previously told him he had been staying with an uncle. There was no one there, so Mr Hillary returned to the first address and made enquiries of a neighbour. He was told that the Whitham family had moved about 3 months earlier.

[24] Mr Hillary then reported the matter to the Police. He was told at about 1.30pm on 18 May 2018 that Mr Whitham had left the country.

[25] Also on 18 May 2018, Mr Hillary noted that Dropbox files used by Worldclear were being changed. He checked the activity log, and found that someone had logged in from a Singapore IP address at 4.30pm, and was deleting files from the employment file for Mr Whitham, and from a project folder that included Mr Whitham's work matters and matters relating to the setting up of the bank accounts.

[26] That evening, Mr Hillary returned to the address he understood to be Mr Whitham's uncle's address. He found some people there who told him that they had purchased some goods and furniture from Mr Whitham's wife. The people showed Mr Hillary Facebook messages, apparently from Mrs Whitham, one of which said:

> "I am running out of time if we go tomorrow not Friday."

[27] Another Facebook message said:

> "If we leave Thursday you can come Friday…"

[28] From all of the foregoing, Mr Hillary concluded that Mr Whitham had fled the country, and that remaining funds of Worldclear held in T1's accounts were in jeopardy.

Undertaking as to damages

[29] With its application for appointment of interim liquidators, Worldclear filed an undertaking to comply with any order the Court might make as to damages sustained as a result of the appointment of interim liquidators.

The freezing order

[30] The freezing order was made in this Court on 23 May 2018. Subject to certain conditions, which are not relevant for present purposes, the order froze:

(a) All assets, including bank accounts, in the name of or under the control of Mr Whitham;

(b) All assets, including bank accounts, in the name of or under the control of T1;

(c) All assets, including bank accounts, in the name of or under the control of Retail Guru.

[31] The freezing order expressly stated that it did not affect anyone outside New Zealand.

Applications to appoint interim liquidators – legal principles

[32] Section 246 of the Act provides:

> **246 Interim liquidator**
>
> (1) If an application has been made to the court for an order that a company be put into liquidation, the court may, if it is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a named person, or an Official Assignee for a named district, as interim liquidator.
>
> (2) Subject to subsection (3), an interim liquidator has the rights and powers of a liquidator to the extent necessary or desirable to maintain the value of assets owned or managed by the company.
>
> (3) The court may limit the rights and powers of an interim liquidator in such manner as it thinks fit.
>
> (4) The appointment of an interim liquidator takes effect on the date on which, and at the time at which, the order appointing that interim liquidator is made.
>
> (5) The court must record in the order appointing the interim liquidator the date on which, and the time at which, the order was made.
>
> (6) If any question arises as to whether on the date on which an interim liquidator was appointed an act was done or a transaction was entered into or effected before or after the time at which the interim liquidator was appointed, that act or transaction is, in the absence of proof to the contrary, deemed to have been done or entered into or effected, as the case may be, after that time.

[33] Rule 3.23 of the High Court Rules states:

31.23 Power to appoint interim liquidator

(1) When a proceeding for putting a company into liquidation has been commenced under rule 31.3, the plaintiff and any person entitled to apply to the court for the appointment of a liquidator under section 241(2)(c) of the Companies Act 1993 may apply to the court for the appointment of an interim liquidator.

(2) If the court is satisfied, upon proof by affidavit, that there is sufficient ground for the appointment of an interim liquidator, it may make the appointment, and may limit the rights and powers of the interim liquidator in any manner it thinks just.

[34] Generally, a Court dealing with an application for appointment of an interim liquidator must be satisfied:[1]

(a) That the company's assets are in jeopardy;

(b) Whether the status quo should be maintained;

(c) Whether the interests of creditors are safeguarded.

[35] In *Truck & Trailer Holdings Ltd v Skelly Holdings Ltd*, Associate Judge Osbourne said:[2]

> [7] Beyond the statutory criteria it has been recognised that there are three main preconditions to an interim liquidation:
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> (i) There must be a valid winding up application underway;
>
> (ii) The application will in all probability succeed;
>
> (iii) The circumstances must be not merely urgent, but also justify the appointment of an interim liquidator.
>
> [8] The Court has recognised three important factors:
>
> (a) Whether the company assets are in jeopardy;
>
> (b) Whether the status quo should be maintained;
>
> (c) Whether the interests of creditors are safeguarded.
>
> [9] These various formulations are ways of measuring whether necessity or expediency are established. They are a "litmus test", not exhaustive.

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1 *Robert Bryce & Co Ltd v Chicken & Food Distributors* (1990) 5 NZCLC 66 at 648.

2 *Truck & Trailer Holdings Ltd v Skelly Holdings Ltd* HC Christchurch, CIV 2012-409000541, 11 May 2012.

[36] The Court must be satisfied as to the need for urgency, and normally ex parte applications for the appointment of an interim liquidator will not be successful unless special circumstances are demonstrated.[3] An undertaking as to damages is usually required.

Discussion and conclusions

Is there a valid winding up application underway?

[37] I am satisfied that there is. A winding up claim may be made by a creditor, including any contingent or prospective creditor,[4] and in this case there is evidence that T1 (through Mr Whitham) transferred at least some money owned by Worldclear which was in an account with the ANZ Bank, to Mr Whitham's own personal account with the ASB Bank. On the face of it, that appears to be a conversion of funds owned by Worldclear in which T1 participated. Also, on the evidence of Mr Hillary it seems clear that the funds held by T1 in various bank accounts have been held by T1 for Worldclear, and that Worldclear was and is entitled to direct what is to happen to those funds, including that they be returned to it. In those circumstances, I think that Worldclear is at least a contingent or prospective creditor of T1.[5] In this case, I think there is no doubt that Worldclear is either an existing creditor of T1 (if there was a conversion by T1 of Worldclear's funds), or at very least a prospective creditor of T1.

[38] In those circumstances, I am satisfied that there is a valid winding up claim made by Worldclear.

Will the winding up claim in all probability succeed?

[39] Worldclear says that T1 was used as a vehicle for perpetrating a fraud on it. It says that the principle perpetrator was its own employee, and the only money involved appears to have been owned by Worldclear. Worldclear's allegations appear to have

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3 *Keet v Hidden Valley Ltd* [2016] NZHC.

4 Section 241(2)(c) of the Companies Act 1993.

5 In *Re Austral Group Investment Management Ltd* [1993] 2 NZLR 692, Holland J considered that a contingent creditor was a person towards whom, under an existing obligation, the company might or would become subject to a present liability on the happening of some future event or at some future date. A prospective creditor is a person in respect of whom there is a real prospect of it being a creditor.

substantial support in the apparently abrupt departure of Mr Whitham without any notice to Worldclear, the instructions given by Mr Whitham to the banks to terminate access to T1 accounts by Worldclear employees, and the apparent removal of Worldclear money from a T1 account with the ANZ Bank to Mr Whitham's personal account with the ASB Bank. If there was indeed fraudulent activity of the kind Worldclear alleges, I consider its prospects of success in obtaining a liquidation order on the just and equitable grounds to be reasonably strong. I take into account also the fact that T1 appears to have been established as a "special purpose" company to carry out particular objectives for Worldclear, and that in those circumstances the relationship between Worldclear and T1 was not an ordinary arms length commercial relationship. I take into account also in that context that Mr Whitham was and appears to have remained an employee of Worldclear. Also, if the allegations of fraud are established, there would be a public interest in a liquidator being appointed as soon as possible, to ensure that such assets as remain in T1 are not dissipated or removed, but are held for the benefit of Worldclear and any other creditors.

Are the circumstances urgent?

[40] I am satisfied that they are, and that there are in this case special circumstances that justify the interim liquidators being appointed on an ex parte basis.

[41] It is clear from Mr Hillary's evidence that T1 operated bank accounts, which contained money owned by Worldclear, not only in New Zealand, but also in Singapore and Europe. The banks and others who might presently have custody of that money in the overseas jurisdictions would appear not to be affected by the freezing orders made by this Court on 23 May 2018, and in those circumstances there appears to be nothing that would secure the funds and ensure that the overseas banks are not instructed to remove the funds from T1's control.

[42] The present application might have proceeded on a *Pickwick* basis, with service on T1 and/or the solicitor who has apparently been involved on its behalf in connection with the freezing orders. However in my view that solicitor would have been obliged to notify Mr Witham and/or T1 immediately of the application being made for an order appointing interim liquidators, and I accept Mr Braun's submission that, in light of the

events of 17 and 18 May 2018, there would have been a very significant risk of funds owned by Worldclear in an account in, say, Singapore or Europe, being immediately removed.

Are T1's assets in jeopardy?

[43] I am satisfied that they are. The movement of funds from T1's ANZ account to Mr Whitham's personal account with the ASB Bank provides sufficient evidence of that, and if further funds are moved from T1's accounts (including funds owned by T1, and not owned by Worldclear) there is a significant likelihood that T1's assets will be depleted, depriving Worldclear and any other creditors of the ability to recover from T1.

Should the status quo be maintained?

[44] I do not consider this to be a significant factor in this case, where, as I have said, T1 appears to have been created as a "special purpose" company to effect certain objectives of Worldclear. Nor is it clear whether T1 has any creditors other than Worldclear.

Are the interests of creditors of T1 safeguarded?

[45] Again, this does not appear to be a significant factor, as the only known creditor is Worldclear, and it appears that Worldclear would probably be the most substantial creditor. I am satisfied that its interests call for the immediate appointment of interim liquidators.

[46] Weighing all those factors, I am satisfied for the purposes of s 246 of the Act that it is expedient for the purpose of maintaining the value of assets owned or (important in this case) managed by T1, to appoint interim liquidators.

Orders

[47] I make the following orders:

(a) Roger Sanderson and Ian McLennan are appointed jointly and severally as interim liquidators of T1 on the basis of the liquidators' consents dated 29 May 2018.

(b) The rates of remuneration included in the interim liquidators' form of consent to appointment are approved, pending further order of the Court.

(c) The Court limits and restricts the powers of the interim liquidators to the following acts:

(i) To get in and preserve all bank accounts and other assets of T1 and to meet all continuing expenses necessary to preserve the value of T1.

(ii) To trade the business of T1 to the extent that the interim liquidators consider that it is necessary and consistent with the need to preserve the assets of T1.

(iii) To obtain books, records, documents or information from T1 from its directors, accountants, solicitors and any other person or institution who may have these items in their possession as provided for under s 261 of the Act.

(iv) To examine on oath as provided for by ss 265 and 266 of the Act.

[48] The foregoing orders are timed at 11.58am.

Associate Judge Smith