

**IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY**

**CIV 2008-454-935**

UNDER Section 214 of the Companies Act 1993

BETWEEN GRAHAM JAMES FOX  
Plaintiff

AND JUBILEE MANAGEMENT LIMITED  
Defendant

Hearing: 2 March 2009

Appearances: G. Paine - Counsel for Plaintiff  
T.C. Montague - Counsel for Defendant

Judgment: 6 March 2009 at 3.00 pm

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**JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL**

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*This judgment was delivered by Associate Judge Gendall on 6 March 2009 at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.*

Solicitors: Matthew O'Byrne, Solicitor, PO Box 2079, Raumati  
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[1] The plaintiff seeks an order to place the defendant company into liquidation pursuant to s. 241(4)(d) *Companies Act 1993*.

[2] The defendant company, Jubilee Management Limited, has effectively taken no part in this proceeding. It has not filed any statement of defence or opposition to the order sought.

[3] Instead, a statement of defence has been filed by Boon Kee Fox (“Mrs Fox”) the separated wife of the plaintiff and co-shareholder and director of the defendant company.

[4] When this matter was called before me on 2 March 2009 Mr Paine appeared as counsel for the plaintiff and Mr Montague as counsel for Mrs Fox. There was no appearance for the defendant company.

### **Background Facts**

[5] The defendant company has as its directors the plaintiff and Mrs Fox. Its share capital is held as to 50% by the plaintiff and Mrs Fox jointly and as to the other 50% by another company Jabez Properties Limited. Mrs Fox contends that the 50% shareholding held by herself and the plaintiff represents shares held on trust for a Trust known as the Grace Jubilee Trust. I understand this is disputed by the plaintiff however. So far as Jabez Properties Limited is concerned, it seems that the sole shareholder and director of this company is Mrs Fox.

[6] The defendant company owns three properties:

- (a) “Coehaven” at 150 Rangiuuru Road, Otaki;
- (b) 79B Atkinson Avenue, Otaki; and
- (c) 2 Riverbank Road, Otaki.

[7] It appears that by agreement between the plaintiff and Mrs Fox the properties at 79B Atkinson Avenue and 2 Riverbank Road have been listed for sale with Harcourts Real Estate in Otaki.

[8] The third property at 150 Rangiuru Road, Otaki (“Coehaven”) remains. The plaintiff apparently operates a movie business under the name of Otaki Productions Limited from Coehaven and the defendant company operates a Weddings Function Centre at Coehaven. In addition it seems that the plaintiff and Mrs Fox, although separated, both live in (different) residential accommodation on the Coehaven property.

[9] Around November 2007 the plaintiff deposes that he and Mrs Fox who had been married since January 1991 decided to separate. Despite this separation, however, as I have noted it seems that up to now they have attempted to continue to operate the Weddings and Functions Centre at Coehaven and Otaki Productions Limited continues to operate its movie business there.

[10] Since November 1997 needless to say, the personal relationship of the plaintiff and Mrs Fox has deteriorated considerably. Numerous disputes have ensued between the parties and relationship property proceedings have been issued in the Family Court. In affidavits filed in this proceeding by both the plaintiff and by Mrs Fox it seems clear that the friction between them has steadily increased and a state of serious dysfunction has resulted.

[11] In this regard domestic violence proceedings have been issued and the plaintiff confirms that as a result both he and Mrs Fox have sought and obtained protection orders against the other through the Levin Family Court.

[12] It is apparent from the material before the Court that the situation between the plaintiff and Mrs Fox has become acrimonious in the extreme. Notwithstanding this, Mrs Fox has it seems made an offer to purchase the interest of the plaintiff in Coehaven but this has come to nothing.

## Counsel's Arguments and My Decision

[13] The present application is brought by the plaintiff pursuant to s. 241(4)(d) *Companies Act 1993* which states:

“(4) *The Court may appoint a liquidator if it is satisfied that - ...*

*(d) It is just and equitable that the company be put into liquidation.”*

[14] In considering this “*just and equitable*” ground for liquidating a company, *Brookers Company & Securities Law* at para. CA 241.03(4) states in part:

“(4) ***Just and equitable grounds***

*Section 241(4)(d) empowers the Court to appoint a liquidator on just and equitable grounds. Ebrahimi v Westbourne Galleries Ltd [1973] AC 360; [1972] 2 All ER 492 (HL) established influential guidelines. Lord Wilberforce emphasised that the Court should not be too timorous in giving full force to the words of the provision. His Lordship commented (at p 379; p 500) that a company is more than a legal entity and that the rights, expectations, and obligations of individuals within the company should be recognised:*

*“The ‘just and equitable’ provision does not ... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”*

*In Jenkins v Supscaf Ltd 26/4/06, Heath J, HC Auckland CIV-2005-404-5222, Heath J conducted a review of case law relevant to the application of s 241(4)(d) (in the context of a small joint venture company where one party had lost trust and confidence in the other) and held that s 241(4)(d) places no fetter upon the discretion of the*

*Court, either in relation to the factors justifying an order, or in relation to the circumstances where an order must be refused. The Court proceeded on the basis that it must balance all relevant factors available for consideration at the time the order was sought.*

*A party who wishes to rely on the “just and equitable” provision must come to Court with clean hands. Thus, if the breakdown in trust or the deadlock is caused by the conduct of the petitioner, he or she will not be able to rely on s 241(4)(d). In *Vujnovich v Vujnovich* [1989] 3 NZLR 513; (1989) 4 NZCLC 65,186 (PC), Lord Oliver pointed out that this rule applied where the misconduct was the cause of the breakdown in confidence and not merely where it is a symptom of the breakdown. Where there is no clear cut apportionment of blame, the real determinant for granting relief should be the existence of the breakdown, not the cause of it: *Re Rongo-ma-tane Farms Ltd* (1987) 3 NZCLC 100,145.*

*In the past, if the Courts believed a remedy other than liquidation was reasonably available to the applicants, it would decline to order liquidation: s 220(2) unamended 1955 Act; *Re Gerard Nouvelle Cuisine Ltd* (1981) 1 NZCLC 95,016. Although this is no longer a requirement under the Act, it is likely that the Courts will regard the question of whether the applicants are acting unreasonably in seeking liquidation rather than another remedy, as a factor in evaluating whether liquidation would be just and equitable. In *Cornes v Taylor (t/a Kawerau Hotel (1994) Ltd)* (1999) 8 NZCLC 261,815, the Court held that neither justice nor equity to the plaintiff required liquidation of the defendant company while his position could be satisfactorily protected by the making of orders under s 174. The more recent case of *The Orthodontic Centre Ltd v M D Courtney Orthodontics Ltd* 14/9/07, Gendall J, HC Palmerston North CIV-2006-454-238; CIV-2006-454-365; CIV-2007-454-419, came to the same result. Gendall J quoted the observations of Regan J in *Marryatt v PC Home Hire Ltd* [2002] 9 NZCLC 263,033 with approval: “[A]n order for the liquidation of a company [on just and equitable grounds] is seen as something of a last resort and if it is more appropriate that an order*

*under s 174 requiring the purchase of shares because it is just and equitable to do so, then it is to be preferred.”*

[15] In the present case there is no argument between the parties that the relationship between the plaintiff and Mrs Fox has broken down in a major way. The break down in their personal relationship coupled with the developing dysfunction in their commercial relationship has meant that they have fallen out totally.

[16] It is difficult on the material before the Court to isolate the origins of the breakdown in that relationship. It is suffice to say that the fact that the parties once married have now separated, has in large measure brought about the difficulties which they are experiencing.

[17] Before me Mr Montague for Mrs Fox raised two main arguments. First he attempted to argue that the present proceeding had jurisdictional difficulties in that it was an attempt by the plaintiff to subvert the parties’ current relationship property proceedings in the Family Court.

[18] With respect I disagree. From the recent Court of Appeal decision in *Kerridge v Kerridge & Ors* [2009] NZCA14 (18 February 2009) at para [52] it is clear that the *Property (Relationships) Act 1976* while it is:

*“... a code in respect of transactions between spouses in respect of property, it is not a code in respect of all available remedies between spouses for all possible legal disputes that may arise between them.”*

[19] And at para [66] of *Kerridge* the Court of Appeal indicated that it was satisfied that s. 4 *Property (Relationships) Act 1976* does not operate as a bar to tortious or other proceedings such as the present case. Further, in this case the relationship property held by the plaintiff and Mrs Fox relating to the defendant company at most would constitute a shareholding in that company. Although the dispute between the plaintiff and Mrs Fox no doubt overlaps other relationship property complaints, the present application before the Court relates purely to the

defendant company, and therefore affects its own assets and liabilities and the question whether an order for liquidation of the company should be made.

[20] In dealing with his second argument, before me, Mr Montague acknowledged without question that as a result of their relationship break down, there had developed a complete impasse between the plaintiff and Mrs Fox and a deadlock in the management and operation of the defendant company had arisen. The second major ground advanced for Mrs Fox in opposition to the liquidation order sought however, related simply to the likely costs of liquidation and a query as to whether these were indeed necessary here, given that Mrs Fox was keen to purchase out the plaintiff's interest in the Coehaven property.

[21] Again, with respect, the issue of the costs of liquidation in my view does not provide a complete answer to the present application based as it is on a complete dead lock between the parties and a state of total dysfunction in the operation of the defendant company.

[22] There is no fetter upon the Court's discretion when considering applications under s. 241(4)(d) *Companies Act 1993* in relation to the factors justifying an order for liquidation – *Jenkins v Subsaf Limited*. There are a range of authorities which support the position that an order for liquidation under this 'just and equitable' ground can be made where a serious dead lock has arisen between directors and shareholders of a company. A break down in personal relations between those parties has been seen to justify the making of a liquidation order – *Re: Gerrard Nouvelle Cuisine Limited* (1981) 1 NZCLC95, 016 and *Re: Rongo-Mä-Tane Farms Limited* (1987) 3 NZCLC 100,145. This appears to be just such a case. It seems to be undisputed that on all levels, relationships between the plaintiff and Mrs Fox have irretrievably broken down.

[23] Finally, however, I turn to consider the contention by Mrs Fox that liquidation should be resisted here as there is another alternative given that she has made an offer to purchase the plaintiff's interest in the Coehaven property. In this regard as I have noted above, the Courts have seen the liquidation of a company on just and equitable grounds as something of a last resort and if a possible purchase of

shares is available as an alternative than this is to be preferred – *The Orthodontic Centre Ltd* and *Marryatt v PC Home Hire Ltd*.

[24] In the present case, however, no evidence is before the Court of what the offer advanced by Mrs Fox entailed and whether it was reasonably based. That offer would obviously have to be made to the defendant company as Coehaven is owned by it, and the offer appears to relate only to the purchase of the Coehaven property. The defendant company however also owns the Function Centre business operating from Coehaven. Whether this was included in any possible purchase is entirely unclear.

[25] Further, the plaintiff in his affidavit has indicated that a number of complications have arisen regarding a range of other entities held by the parties which also may operate from Coehaven. And he raises additional issues over attempts which he claims Mrs Fox has made to reduce the value of the Coehaven property in order that a purchase price may be reduced.

[26] In any event, the Coehaven property, owned as it is by the defendant company, if it is to be sold, needs to be properly marketed and realised at its best value in the interests of the company and all its shareholders. In my view, given the dysfunctional state of the relationship between the plaintiff and Mrs Fox, and the dead lock which has arisen, this is an appropriate case for an independent liquidator to be appointed to take charge of the defendant company's business and all its assets.

[27] Given the impasse which has developed between the directors and shareholders of the defendant and given that all parties agree the company is entirely solvent, I reach the conclusion here that it is just and equitable for an order for liquidation of the company to be made under s. 241(4)(d) *Companies Act 1993*.

[28] A consent to act as liquidators from Roderick Thomas McKenzie and Lyn Marie Carey has been filed. Mr Montague confirmed that if liquidators are to be appointed, Mrs Fox takes no issue with the appointment of Mr McKenzie and Ms Carey.



[29] The plaintiff's application therefore succeeds.

[30] The following orders are now made:

- (a) An order is made placing the defendant company, Jubilee Management Limited into liquidation.
- (b) Roderick Thomas McKenzie and Lyn Marie Carey are appointed liquidators.
- (c) As to costs, the plaintiff has succeeded in his application and is entitled to costs. Costs are awarded to the plaintiff against the defendant company (as to a one-half share) and against Mrs Fox (as to the other one-half share) on a Category 2B basis plus disbursements as fixed by the Registrar.

[31] This order is timed at 3.00 pm today, 6 March 2009.

**'Associate Judge D.I. Gendall'**