IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-002749

BETWEEN	PENG GUAN GOH Applicant
AND	RIDGEVIEW PROPERTIES LIMITED (IN LIQUIDATION) First Respondent
AND	COMMISSIONER OF INLAND REVENUE Second Respondent

Hearing: 13 July 2009

Counsel: DB Hickson for Applicant
SC Lomas for First Respondent
KP Nordstrom and Eilika for Second Respondent

Judgment: 17 July 2009

JUDGMENT OF ROBINSON AJ

This judgment was delivered by me on 17 July 2009 at 5.00 p.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Castle Brown, P O Box 9670, Newmarket, Auckland for Applicant
Martelli McKegg Wells & Cormack, P O Box 5745, Auckland 1141 for First Respondent
KP Nordstrom, Inland Revenue, P O Box 76198, Manukau 2241 for Second Respondent

[1] On 22 April 2009 Ridgeview Properties Limited was put into liquidation at the hearing of proceedings issued by the Commissioner of Inland Revenue. Those proceedings were not opposed. The order for liquidation was made on the ground set forth in the Commissioner's statement of claim that Ridgeview Properties Limited was insolvent and unable to pay its debts. The evidence relied upon by the Commissioner in establishing that Ridgeview Properties Limited was insolvent included failure of Ridgeview Properties Limited to comply with a statutory demand which the Commissioner alleged had been served on Ridgeview Properties Limited on 21 January 2009. The Commissioner relied on the presumption created by s 287(a) of the Companies Act 1993, arising from the company's failure to comply with the terms of the statutory demand.

[2] Evidence produced at the hearing of the Commissioner's claim for liquidation of the company included an affidavit of the process server, Peter John Cains, who stated that he served the company with a statutory demand by delivering the statutory demand to the company, c/o Castle Brown, Level 5, 5 Short Street, Newmarket, Auckland, being the registered office address of the company. Mr Cains also said in his affidavit that he handed the statutory demand to Nicole, the receptionist, who identified herself prior to service and accepted receipt of the statutory demand. Counsel for the Commissioner also supplied the Court with a certificate confirming that as at 22 April 2009 the sum of $869,203.08 was owing by the company to the Commissioner. The amount claimed in the statutory demand was $808,300.26.

[3] The applicant, Peng Guan Goh, is a director of Ridgeview Properties Limited and a trustee of the Ridgeview Trust which is the sole shareholder of Ridgeview Properties Limited. He acknowledges becoming aware of the statutory demand following service of that document on Ridgeview's solicitor, Mr Colin Girven of Castle Brown on 21 January 2009. However, he denies being aware of the Commissioner's proceedings for the liquidation of Ridgeview Properties Limited, claiming such documents were never served on him or the company. He says his first knowledge of the liquidation proceedings was a phone call from Mr Girven on

24 April 2009 advising of contact from the liquidators of Ridgeview Properties Limited.

[4] Mr Goh brings these proceedings by way of originating application for an order setting aside the order made on 22 April 2009 putting Ridgeview Properties Limited into liquidation. Pursuant to a decision of Associate Judge Abbott, delivered on 29 May 2009, leave was granted to Mr Goh to bring these proceedings.

[5] The Commissioner opposes the application. Counsel for the first respondent, namely, Ridgeview Properties Limited (In Liquidation) advises that the liquidators neither oppose nor consent to the application. They do, however, wish to be heard on the question of costs in the liquidation and in connection with the application.

Case for the applicant

[6] The applicant acknowledges that according to the records of the Companies Office, the registered office of Ridgeview Properties Limited, prior to its liquidation on 22 April 2009, was c/o Castle Brown, Solicitors, at Level 5, 5 Short Street, Newmarket. The applicant accepts that as a result of an unfortunate oversight, the solicitors for Ridgeview Properties Limited overlooked changing the address of Ridgeview's registered office to the new address of Castle Brown after moving to Level 4, 19 Morgan Street in June 2006.

[7] The process server employed by the Commissioner was Mr Peter John Cains who, from time to time, has received instructions from Castle Brown to attend to service of documents. Consequently, the applicant claims that Mr Cains was aware of Castle Brown's change of address from Short Street to Morgan Street.

[8] Consequently, the applicant points out that service of the statutory demand by delivering the demand to the receptionist of Castle Brown could not have taken place at 5 Short Street on 22 January 2009 because Castle Brown were not at 5 Short Street on that day but had been at 19 Morgan Street from June 2006. Consequently, Mr Cains' statement on oath that he had delivered the documents to Castle Brown at 5 Short Street cannot be true.

[9] The applicant is not in a position to contradict Mr Cains' evidence to the effect that the liquidation proceedings were served on Ridgeview Properties Limited at Level 5, 5 Short Street, Newmarket by affixing those documents to the front door. The applicant acknowledges that no one would have been present because the offices were unoccupied. Counsel for the applicant submits that service of the liquidation proceedings at 5 Short Street, while possibly amounting to technical service, did not achieve the underlying purpose of the service provisions of the Companies Act, which is to bring the proceedings to the attention of Ridgeview Properties Limited. Consequently, it is submitted that such service is ineffective. In support of this submission, counsel for the applicant relied upon *Re Samoana Press Company Ltd* (1988) 4 NZCLC 64119. In that case the Court concluded a winding up order to be a nullity because the proceedings which ought to have been served, never came to the notice of the defendant company.

[10] It is further submitted on behalf of the applicant that if there has been effective service of the liquidation proceedings, the service of the statutory demand was not in accordance with s 387 Companies Act 1993 and, in particular, the statutory demand had not been served on a director, as required by s 387(1)(a); on the company's head office, as required by s 387(1)(b); at the registered office of the company or address for service of the company, as required by s 387(1)(c); or in any other of the methods set forth in that section. Consequently, as service of the statutory demand was defective, the Commissioner is unable to rely upon the presumption contained in s 287 Companies Act 1993 resulting in there being no evidence to establish that Ridgeview Properties Limited was insolvent and unable to pay its debts when the matter came on for hearing on 22 April 2009.

Case for the Commissioner

[11] The Commissioner could not dispute the applicant's claim as to irregularity in the service of the statutory demand. However, the Commissioner pointed out that the purpose of service of the statutory demand had been achieved because the statutory demand came to the notice of the applicant, who immediately contacted the Commissioner to discuss the statutory demand with the Commissioner.

[12] It is further submitted that service of the liquidation proceedings on the company was in accordance with s 387(1)(c) because service was effected by leaving the documents at the company's registered office. Although there may be a defect insofar as the liquidation proceedings were not brought to the attention of the company following service at the registered office, such defect did not render the proceedings a nullity. Consequently, the circumstances in this case differ from those in cases where there has been no service. In cases where there has been no service, the proceedings are a nullity.

[13] It was submitted on behalf of the Commissioner that as there had been service, the fact such service did not result in the proceedings being brought to the attention of Ridgeview Properties Limited, was a factor to be taken into account when considering whether there had been a miscarriage of justice which would justify setting aside the order for liquidation.

[14] In considering whether there was a miscarriage of justice, the Court could take into account the lack of any evidence from the applicant as to whether Ridgeview Properties Limited was solvent and the evidence of the liquidators to the effect that they estimate a shortfall of assets over liabilities of between $1.356m and $931,000 which establishes that the company is insolvent and unable to pay its debts. Furthermore, there is evidence to justify the conclusion the Court can have no confidence in the way in which the applicant is conducting and managing the company. Consequently, even if the Commissioner could not establish that the company was unable to pay its debts, there was substantial evidence to establish that it would be just and equitable for the company to be put into liquidation.

Decision

[15] If, as is contended by the applicant, the liquidation proceedings were not served on the company in the prescribed manner, then the proceedings have not been served, resulting in the order liquidating the company being invalid. In *Re Samoana Press Company Ltd*, Wylie J concluded that the liquidation proceedings in that case had not been served where the process server deposed that he served the proceedings by leaving the same personally at the registered office of the company. In that case

the relevant provision relating to service was contained in r 18 Companies Winding Up Rules 1956 which provides:

> Service of petition – Every petition shall, unless presented by the company, be served upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a sealed copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a sealed copy at that registered office or principal place of business, or by serving it on such member, officer, or servant of the company as the Court may direct; and where the company is being wound up voluntarily, the petition shall also be served on the liquidator (if any) appointed for the purpose of winding up the affairs of the company.

[16] Wylie J analysed that rule at p 64,122 as follows:

> That rule can be analysed as directing service:
>
> 1. At the registered office or if there is no registered office, then at the principal or last known principal place of business, in either case by **leaving a sealed copy with a member**, officer, or servant of the company there; or
>
> 2. If no member, officer, or servant can be found then by leaving a sealed copy of the petition at the registered office or principal place of business; or
>
> 3. By serving it on such member, officer, or servant as the Court may direct.
>
> (Emphasis added.)

[17] The Companies Winding Up Rules 1956 no longer apply. The current law is contained in s 387 of the Companies Act 1993. That section provides:

> **Service of documents on companies in legal proceedings**
>
> (1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on a company as follows:
>
> (a) By delivery to a person named as a director of the company on the New Zealand register; or
>
> (b) By delivery to an employee of the company at the company's head office or principal place of business; or
>
> (c) By leaving it at the company's registered office or address for service; or

(d) By serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

(e) In accordance with an agreement made with the company; or

(f) By serving it at an address for service given in accordance with the rules of the court having jurisdiction in the proceedings or by such means as a solicitor has, in accordance with those rules, stated that the solicitor will accept service.

(2) The methods of service specified in subsection (1) of this section are the only methods by which a document in legal proceedings may be served on a company in New Zealand.

[18] Rule 31.12 High Court Rules, which applies to liquidation proceedings, provides:

(1) Every statement of claim filed under rule 31.3 must, unless the defendant company has brought the proceeding, be served, together with the verifying affidavit and notice of proceeding, upon the defendant company.

(2) Service under this rule must be effected not less than 15 working days before the date of hearing appointed or fixed under rule 31.6.

[19] Rule 6.12 High Court Rules provides for personal service on New Zealand corporations. That rule provides:

(1) A document may be served on a company incorporated under the Companies Act 1993 in accordance with section 387 of that Act.

[20] It is significant to note that unlike the provision considered by Wylie J in *Re Samoana Press Company Ltd*, there is no requirement under s 387(1)(c) requiring the process server to leave a sealed copy of the documents being served on a member, officer or servant of the company or, in case no such member, officer or servant can be found there, then by leaving a sealed copy at the registered office. It follows therefore that under the existing law, all the process server need do is leave a sealed copy of the liquidation proceedings being served on the company at the company's registered office.

[21] Section 186 Companies Act 1993 requires a company to have a registered office in New Zealand. Section 186(3) provides:

(3) The description of the registered office must—

(a) State the address of the registered office; and

(b) If the registered office is at the offices of any firm of chartered accountants, barristers and solicitors, or any other person, state—

(i) That the registered office of the company is at the offices of that firm or person; and

(ii) Particulars of the location in any building of those offices; or

(c) If the registered office is not at the offices of any such firm or person but is located in a building occupied by persons other than the company, state particulars of its location in the building.

[22] Pursuant to s 187 Companies Act 1993, any change in the registered office takes effect on a date stated in Notice of Change not being a date that is earlier than five working days after the notice is registered.

[23] A company, pursuant to s 214 Companies Act 1993, is required to file an annual return each year. In terms of Schedule 4, the information contained in the annual return includes the address of the registered office of the company and the address for service of the company. Section 214(10) provides that if the board of a company fails to file an annual return, every director commits an offence and is liable to the penalties set forth in s 374(2) Companies Act 1993.

[24] The provisions of the Companies Act 1993, to which I have referred, emphasise the importance placed by the legislature on companies having a registered office and needing to file with the Registrar of Companies any change in the registered office. The combined effect of s 387(1)(c) of the Companies Act 1993 and rr 31.12 and 6.12 High Court Rules is to permit service by delivery of the documents to the registered office of the company. If the office is unattended, or has in fact been changed without proper notice, that is not the problem of the process server. Consequently, it is extremely important for those in charge of the management of a company to ensure that proper notice is given of any change in the company's registered office. Failure to do so could result in important documents, such an application to liquidate the company on the ground that the company cannot

pay its debts, being left at the old registered office and not brought to the attention of the company's management.

[25] There is no evidence as to whether the company complied with its statutory obligations to file an annual return. If it did not, then the applicant would have been committing an offence. Furthermore if, when the annual returns were filed, the company maintained its registered office as being at Castle Brown, Level 5, 5 Short Street, Newmarket, when in fact the registered office was at Castle Brown, Level 4, 19 Morgan Street, then the person completing the annual return could have been committing an offence under s 377 Companies Act 1993.

[26] In the circumstances of this case, it appears that the company had not resolved formally to change the situation of its registered office to 19 Morgan Street when the liquidation proceedings were served. If the registered office had been changed, then the director and possibly others involved in the management of the company were committing offences in failing to notify the Registrar of Companies of the change of address and including the address of the old registered office in the company's annual returns.

[27] Consequently, in the absence of any evidence that the registered office of the company had been changed to 19 Morgan Street, service was effected according to law at the registered office situated at Level 5, 5 Short Street, by leaving the documents attached to the door of those premises.

[28] The evidence for the applicant, however, establishes that the process server, Mr Cains, must have known that Castle Brown had changed its premises from Short Street to Morgan Street. However, as the formal registered office was stated as being at Short Street, it was not necessary for the process server to serve the solicitors at Morgan Street.

[29] Consequently, this is not a case where there has been no service but a case where there has been service in accordance with the law. However, because of the applicant's or the company's solicitors' omission to change the registered office of the company, the applicant has not had notice of service of the proceedings. The

distinction is important because in cases where there has been no service, the order made is a nullity and cannot be validated. Where there has been no service resulting in the proceedings being a nullity, an application to set the order aside will be granted *ex debito justitiae*, namely, as a matter of right, the Court having no jurisdiction and, in particular, having no power to consider validating the proceedings by taking into account such matters as to whether the applicant – being the company in this case – has a valid defence to the liquidation proceedings.

[30] Where, as in this case, service was effected at the nominated address for the registered office of the company but the proceedings have not come to the notice of the company, the Court has a discretion as to the relief to be granted. In *Argyle Estates v Bowen Group* 17 PRNZ 57 at p 67 para [33], Laurenson J states:

> I am quite satisfied that the service of the proceedings at 41 Porterfield Rd, in this case complied with s 387. This was the nominated address for both the registered office and address for service as recorded in the Companies Office at the relevant time. Accordingly the applicant is not entitled to have the judgment set aside on the basis that it had been obtained irregularly.

[31] In *Argyle Estates v Bowen Group* Laurenson J considered three factors when determining whether the judgment liquidating the company should be set aside. In doing so he applied the principles set forth by the Court of Appeal in *Russell v Cox* [1983] NZLR 654. Those matters are:

a) Whether the defendant had a substantial ground of defence;

b) Whether the delay is reasonably excusable; and

c) The plaintiff will not suffer irreparable injury if the judgment is set aside.

[32] Those considerations, however, are subject to the following qualifications referred to by McMullin J in *Russell v Cox*:

> But it should not be regarded as laying down a general rule that an application to set aside a judgment must satisfy these conditions as a necessary prerequisite to the exercise of the discretion; it should be taken as doing no more than highlight factors which on any application to set aside a

> judgment may generally be regarded as relevant to an inquiry which will determine where the justice of the case will lie.
>
> The relative importance of the various factors will vary from case to case. For these reasons we think that what Williams J said in *Union Bank of Australia v Chesney* must be read against the facts of that case (which might be decided in the same way today) and not taken as authority for a principle of universal application. The test against which an application to set aside a judgment should be considered is whether it is just in all the circumstances to set aside the judgment, and the several factors mentioned in the judgments discussed should be taken, not as rules of law, but as no more than tests by which the justice of the case is to be measured, in the context of procedural rules whose overall purpose is to secure the just disposal of litigation.

[33] In the circumstances of this case, the company has been deprived of the opportunity to bring into question the validity of service of the statutory demand. On the evidence available, the Commissioner cannot suggest the company has no defence because the evidence produced by the company establishes the statutory demand was not served in accordance with s 387 of the Companies Act 1993.

[34] In support of his contention that the Court could treat service of a statutory demand in this case as complying with s 387 Companies Act 1993, counsel for the Commissioner relied on *Valda Video Ltd v United Video Franchising Ltd*, decision of Master Gambrill, 27 July 2000, HC AK M762-IM00. The circumstances in that case differ from the circumstances in the present case. In particular, the statutory demand in the *Valda Video* case was served on the registered office of the company as ascertained by a search note on 12 April. An application had been filed to change the registered office of the company on 29 March. In that application the change in registered office was to take effect from 7 April. However, the notice of change of registered office was processed on 13 April. Consequently, at the time when the creditor searched the Companies Office, the registered office of the company had been changed but because the change had not been processed, the search disclosed the old registered office of the company. Furthermore, the Master held the company had not been without notice of the issue of the statutory demand and was able to make an application to set the demand aside within the required time. In deciding that there had been proper service, the learned Master emphasised that her decision was based on the very unusual circumstances. At para [7] of the decision she states:

> However, I caution that this is a very rare instant and the normal criteria over correct service and the stringent conditions of the Act must be complied with.

[35] Even if the Court does have the power referred to by the learned Master in *Valda Video Franchising Ltd*, to accept as valid service of a statutory demand that does not comply strictly with s 387 Companies Act 1993, I am perfectly satisfied that the circumstances of this case do not justify the Court sanctioning such departure by concluding service to be appropriate. There are very strict time limits that cannot be extended that apply to companies seeking to set aside statutory demands. Consequently, it is most important that statutory demands are served in accordance with s 387 of the Companies Act. Whilst I accept that in the circumstances of this case strict compliance with s 387 would have been less likely to bring notice of the proceedings to the attention of the company, I am still satisfied that the Court should not, in liquidation proceedings, treat such service as valid.

[36] Consequently, the company clearly has a defence in that the presumption that it is unable to pay its debts, arising from its failure to comply with the statutory demand, cannot apply in this case because of the defect in service of the statutory demand.

[37] The Commissioner can, however, rely on other evidence to establish that the company is unable to pay its debts. In particular, there is evidence of a discussion between Miss Hunt, who is employed by the Commissioner, and the applicant, Mr Goh. She says that on 29 January 2009 Mr Goh phoned her and stated as follows:

a) He did not have any money to pay the Inland Revenue Department Ridgeview Properties Limited's current outstanding tax debt.

b) That he had not filed a challenge to any of the default assessments.

c) That he had received two statutory demands issued by the Inland Revenue Department against Ridgeview Properties Limited.

d) That he will be in contact with his solicitor, Colin Girven, to obtain legal advice on how to address the statutory demands.

e) That he understood the consequence of a failure to satisfy the statutory demands would be the commencement of liquidation proceedings against his companies.

[38] There is evidence that the company has not been filing income tax or GST returns. Miss Hunt deposes that after Ridgeview Properties Limited was advised that the Commissioner was commencing a GST audit, it sold three properties which required GST outputs to be paid to the Inland Revenue Department. Despite knowing that Ridgeview Properties Limited needed to pay GST on these properties, it has failed to do so. Consequently, Miss Hunt is concerned that Ridgeview Properties Limited will not meet its GST and income tax obligations upon the sale of its remaining properties should the applicant retain control of Ridgeview Properties Limited.

[39] If a rehearing is granted, the Commissioner can also rely on the evidence of the liquidator to the effect that there is an estimated shortfall of assets over liabilities of between $1.356m and $931,000.

[40] The applicant has not produced any evidence to establish that it is solvent. Having regard to the evidence adduced by the Commissioner, I conclude that the company does not have a valid defence in that the Commissioner, without relying on the statutory demand, has ample evidence establishing the company is unable to pay its debts.

[41] The company still owns properties which it is in the process of attempting to sell so that it can meet its commitments. If I discharge the liquidation order, the applicant will be able to take over the day to day management of the company and continue with efforts to sell the properties. Having regard to his past conduct in not accounting for GST, there must be some justification for the Commissioner's concern that any GST payable on the sale of the properties will not be paid to the

Commissioner and in this way the Commissioner could be prejudiced by granting the application.

[42] In the circumstances, therefore, as the applicant has failed to establish that the company has a valid defence to the liquidation proceedings and because of the prejudice that could occur to the Commissioner if the application is granted, I have concluded that the application should be dismissed.

[43] As counsel wish to be heard on the question of costs, I direct the Registrar to arrange a fixture for one hour before me for that purpose.

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MD Robinson
Associate Judge