IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-002749

UNDER	the Companies Act 1953
BETWEEN	PENG GUAN GOH Applicant
AND	RIDGEVIEW PROPERTIES LIMITED (IN LIQUIDATION) First Respondent
AND	COMMISSIONER OF INLAND REVENUE Second Respondent

Hearing: 27 May 2009

Counsel: D B Hickson for applicant
S C Lomas for first respondent
K P Nordstrom for second respondent

Judgment: 29 May 2009 at 5:00pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 29 May 2009 at 5:00pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Castle Brown, PO Box 9670, Auckland 1149 for applicant
Martelli McKegg Wells & Cormack, PO Box 5745, Auckland 1141 for first respondent
K P Nordstrom, Inland Revenue, PO Box 76198, Manukau 2241 for second respondent

[1] This judgment addresses a preliminary issue raised by the second respondent (the Commissioner) that this proceeding has been commenced incorrectly and should not be allowed to proceed. The issue comes before the Court as an application for leave.

Background

[2] Pen Guan Goh is a director of the first respondent (Ridgeview). Ridgeview was put into liquidation by order of this Court on 22 April 2009, on the application of the Commissioner. That was the first hearing of that application. Ridgeview did not appear at the hearing.

[3] Mr Goh has applied by originating application for leave to bring this application and for an order setting aside the order made on 22 April 2009. The first hearing of the application was in the miscellaneous companies list at 11:45am on 27 May 2009.

[4] The liquidators filed an appearance prior to the hearing stating that they neither opposed nor consented to the application, but wished to be heard in relation to the costs that they have incurred in the liquidation.

[5] Counsel for the Commissioner appeared in opposition to the application. Although there was no notice of opposition by the Commissioner on file (counsel filed a copy in Court) I understand a copy had been served on Mr Goh. In any event, counsel for Mr Goh did not contest the Commissioner's entitlement to be heard.

[6] Counsel for Mr Goh argued that the application was misconceived, and invited the Court to strike it out summarily. At counsel's request the matter was stood down to the end of the list to be heard if time permitted. The Court heard counsel for the Commissioner and for Mr Goh by sitting into the lunch adjournment, but had to reserve a decision as there was insufficient time to deliver a judgment before the afternoon list was due to commence.

The application

[7] The essence of Mr Goh's application is that Ridgeview was denied an opportunity to challenge the making of the order because due process was not followed. He contends that neither the statutory demand nor the application for liquidation were served on Ridgeview in accordance with s 387 of the Companies Act 1993, but alternatively that even there was technical compliance with that section the service was ineffective as it did not bring the documents properly to the attention of Ridgeview.

[8] Mr Goh says that the order is a nullity, relying inter alia on *Re Samoana Press Company Limited* (1988) 4 NZCLC 64, 119 and *Argyle Estates Limited v Bowen Group Limited* (2003) 17 PRNZ 57 and the inherent jurisdiction of the Court. He contends that this is an appropriate case for the Court to give leave to bring by way of originating application rather than as an interlocutory application in the liquidation, as the liquidation cannot have commenced if the order for liquidation was a nullity.

The opposition

[9] The Commissioner contends that Mr Goh should not be allowed to use the originating application procedure because a specific procedure for termination of liquidation is provided by s 250 of the Companies Act 1993. Counsel argued that Mr Goh should be required to use that procedure and satisfy the specific criteria under it for terminating a liquidation order, relying on *Watercare Services Limited v Registrar of Companies* (2004) 17 PRNZ 191.

Is it arguable that the order is a nullity?

[10] The difference between the parties, in my view, turns on whether or not Mr Goh has an arguable case that the order was a nullity. If so, I consider that leave to commence by way of origination application should be granted because s 250 of the Companies Act 1993 can only apply where there is a valid order, even if that order is

capable of being reversed under s 250. If the liquidation order proves to be a nullity there is no liquidation to terminate. *Watercare Services Limited v Registrar of Companies* does not assist the Commissioner on this point.

[11] In *Re Samoana Press Company Limited* a director of Samoana Press Company Limited sought an order to set aside or stay an order for winding up of the company on various grounds, including failure to effect service of a statutory demand and of the petition for winding up in accordance with provisions of the Companies Act 1955 and the Companies (Winding Up) Rules 1956. Wyllie J stated (at 64,124-5):

> I am satisfied that, even though it seems not to have been considered as a possibility in the cases and texts that I have cited (and I say this with some trepidation considering their authority), this Court has an inherent jurisdiction to set aside any order made by it whether sealed or not which is shown to be a nullity. In support of that proposition I need only refer to *R v Nakhla* (No 2) [1974] 1 NZLR 453.
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> ….
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> To demonstrate that the order is indeed a nullity I turn to *Re Pritchard* (supra) and the judgment of Upjohn LJ therein where at p 883 he defined three classes of nullity (without precluding the possibility of there being others), the first of which fits the present case exactly. It is that where proceedings which ought to have been served never come to the notice of the defendant at all.
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> ….
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> In invoking the inherent jurisdiction of the Court I do not overlook that I am dealing here with a statutory function of the Court conferred on it by the Companies Act. But I do not think that makes any difference. The Court has an inherent jurisdiction to ensure that its processes whatever their origin, are not abused in such a way as to cause injustice and I am satisfied that to permit this winding up to proceed would be likely to cause a grave injustice to the company and its members.
>
> ….
>
> If the notice was not served, as seems probable, and because the petition was not properly served, as is clear, the company has been deprived of the opportunity of avoiding winding up by paying the debt or disputing its liability in other proceedings.

[12] I accept that this case provides authority for Mr Goh's argument that the order for liquidation of Ridgeview was a nullity if the statutory demand and

application for liquidation were not properly served. I turn now to consider whether he has an arguable case in that respect.

Is there an arguable case that the documents have not been properly served?

[13] Mr Goh relies on *Argyle Estates Limited v Bowen Group Limited* for the requirements for service on a company. In that case the Court was asked to set aside a judgment entered against the defendant company by default. The grounds for the application were that the judgment had been irregularly obtained because the address at which the documents were served although still recorded as the registered office was no longer used as the office of the company, and the process server was aware of this at the time of service.

[14] After reviewing authorities as to service (including s 387 of the Companies Act 1993) Laurensen J summarised his view of the requirements as follows (at para [32]):

> In my view the position which emerges is quite clear:
>
> (a) Service at a nominated registered office of a company complies with s 387 regardless of whether the office is in fact at the given address or not. Accordingly a default judgment entered following service in this manner cannot be said to have been obtained irregularly.
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> (b) Notwithstanding that service may comply with s 387, there remains an issue as to whether that service is effective, ie in achieving the underlying aim of the section to ensure that the company being served is, in fact, aware of the particular matter which requires service on it. Ineffective service is an issue in such instances as where the service details are inadequate, or where it is known or suspected that the service address has been abandoned.
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> (c) If there is doubt as to whether the service was effective then the Courts can intervene in order to ensure that there has been no miscarriage of justice.

[15] In the present case, a process server provided affidavits of service of both the statutory demand and the application for liquidation. In each case he said that he effected service by delivering them to the offices of the law firm Castle Brown at Level 5, 5 Short Street, Newmarket. He says that he handed the statutory demand to the receptionist (who acknowledged receipt). He says that he affixed the application

for liquidation and related documents to the front door of the premises as there was no one present at the time.

[16] Mr Goh has filed affidavits in support of his application attesting to the following facts (amongst others):

a) At the time Ridgeview was incorporated (November 2005) Castle Brown's offices were given as Ridgeview's registered office. At that time Castle Brown's offices were at Level 5, 5 Short Street, Newmarket;

b) At all times since June 2006, Castle Brown's offices were at Level 4, 19 Morgan Street, Newmarket;

c) Ridgeview's registered office was not changed when Castle Brown moved its offices in June 2006;

d) The statutory demand was delivered to Castle Brown's offices in January 2009 (and was forwarded to Ridgeview at that time), but it was not served on Ridgeview in accordance with any of the methods prescribed by s 387 Companies Act 1993;

e) The process server knew that Castle Brown had moved its offices at the time that he affixed the application for liquidation and related documents to the door of the former offices in March 2009 (the process server regularly served documents for Castle Brown and had, of course, delivered the statutory demand to their offices in January 2009);

f) No steps were taken to alert Castle Brown or to let Ridgeview know that the documents had been left at Level 5, 5 Short Street (which although vacant remained Ridgeview's registered office).

[17] Although I do not express any concluded views on the matter, given the early stage of the proceeding, I have come to the view that there is an arguable case that

the documents were not properly served. I do not consider it appropriate given the truncated nature of the hearing and the potential for further evidence on the point, to determine that point or the effect of the improper service on the order made. It is sufficient for the moment for me to find that there is an arguable case for nullity, and for the granting of leave.

[18] Counsel for the Commissioner submitted that the originating application should not be used where the application was opposed. However, many originating applications are opposed. I suspect counsel had in mind that the procedure was not appropriate for resolving contested facts. That is so where there is contest over material facts which can only be resolved by use of the procedures available on any ordinary action. I do not regard this as such a case. There is no allegation that the process server deliberately falsified his affidavits. It seems more likely that any errors in them are through oversight. I consider it unlikely that any dispute of fact will arise which cannot be readily accommodated under the originating application procedure.

Decision

[19] This case involves a challenge to the validity of an order for liquidation. If the grounds are made out the order is likely to be a nullity. The matter is not one of those for which the originating application procedure is expressly permitted, but is one for which leave to use the procedure is appropriate. The procedure under s 250 of the Companies Act 1993 for terminating a liquidation does not appear to be appropriate where there was no basis for the making of the liquidation order.

[20] Counsel did not address me on the effect of a finding of nullity on the liquidators' claim for costs. That will have to be addressed as part of any substantive finding. I am not aware of any reason that it could not be addressed by the Court as part of the exercise of its inherent jurisdiction.

[21] I grant leave to Mr Goh to commence this proceeding by way of originating application.

[22] I make the following orders with a view to bringing the application to hearing:

a) The Commissioner is to file and serve any amended notice of opposition (in light of the fact that the present notice of opposition is limited to the procedural point), together with any affidavits in support of that opposition, by 5 June 2009;

b) Mr Goh is to file and serve any affidavit in reply by12 June 2009;

c) The application is to be listed for further mention in the miscellaneous list at 11:45am on 24 June 2009 to ascertain whether the matter is ready for hearing and, if so, to allocate a defended hearing date.

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Associate Judge Abbott