IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2019-412-61
[2019] NZHC 1709

UNDER	Part 16 of the Companies Act 1993
IN THE MATTER OF	an application under the Companies Act 1993 for liquidation of the defendant companies
BETWEEN	THE FINANCIAL MARKETS AUTHORITY Plaintiff
AND	FINANCIAL PLANNING LIMITED First Defendant
AND	IMPACT ENTERPRISES LIMITED Second Defendant

Hearing:	17 July 2019 (On the papers and by telephone conference)
Counsel:	J S Cooper QC for the Plaintiff
Reasons for Judgment:	19 July 2019

REASONS FOR JUDGMENT OF ASSOCIATE JUDGE LESTER

These Reasons were delivered by me on 19 July 2019 at 3.30pm
pursuant to rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
19 July 2019

[1] These are the Reasons for my judgment delivered on 17 July 2019.[1]

[2] On 15 July 2019 the plaintiff filed in the Dunedin High Court a statement of claim to put the defendant companies into liquidation together with a without notice interlocutory application for appointment of interim liquidators to each of the defendant companies, and an affidavit in support.

[3] The interlocutory application was referred to me on 17 July 2019 and after consideration at a telephone conference held at 4pm on 17 July 2019 I made orders appointing interim liquidators to each of the defendant companies, together with orders limiting and restricting the powers of the interim liquidators and reserving costs. I indicated that my Reasons for the decision would follow and I now set out those reasons.

[4] Recorded in the brief judgment I issued on 17 July 2019 were the steps taken by the plaintiff to have this application proceed on a Pickwick basis. The fact that the application was being made was brought to the attention of a solicitor who advised they acted for the sole director of the defendant companies, albeit that solicitor acted for the director in his personal capacity rather than in his capacity as a director of the defendant companies. That is a distinction more apparent than real when it comes to giving notice of the plaintiff's intention to seek the appointment of interim liquidators.

[5] Notice was given, albeit short notice, of the telephone conference being called on 17 July 2019, and other than advice that the solicitor was not in receipt of instructions to act for the defendant companies or the director in his capacity as director, no steps were taken.

Standing of the Financial Markets Authority ("FMA") to seek liquidation

[6] Section 241(2)(c)(va) of the Companies Act 1993 provides that the FMA may apply for liquidation if the company is a financial markets participant.

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1 *The Financial Markets Authority v Financial Planning Ltd* [2019] NZHC 1675.

[7] The submission made by the FMA is that each of the defendant companies is a "financial markets participant". That term is defined in s 4 of the Financial Markets Authority Act 2011. A financial markets participant:

> (a) means a person who is, **or is required to be**, registered, licensed, appointed, accredited, or authorised under, or for the purposes of, any of the Acts listed in Part 1 of Schedule 1 or any of the enactments made under those Acts… (my emphasis)

[8] The Acts listed in Part 1 of Schedule 1 relevantly include the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

[9] Section 11 of the Financial Service Providers (Registration and Dispute Resolution) Act prohibits a person from being in the business of providing financial services unless that person is registered for that service.

[10] The first defendant company is a financial markets participant within para (a) of the definition in s 4 of the Financial Markets Authority Act by virtue of the fact that it is a registered financial service provider under the Financial Service Providers (Registration and Dispute Resolution) Act, although it was not authorised to receive client money.

[11] The second defendant company is not registered under that Act but is nevertheless a financial markets participant under the definition in s 4 by virtue of the fact that it received client money for investment and was therefore **required** to be registered under that Act.

[12] I am satisfied the FMA has standing to bring this application.

Discussion

[13] The application to appoint interim liquidators was made pursuant to s 246 of the Companies Act. The application is supported by a detailed affidavit of Ms Harris of the FMA.

[14] The pre-conditions for the appointment of an interim liquidator are discussed in *Insolvency Law & Practice*.[2] There are three main pre-conditions:

(a) a liquidation application must have been filed in the Court disclosing good grounds for putting the company into liquidation, and the application must demonstrate a good prima facie case for liquidation;

(b) the Court must be satisfied there is the need for urgency. Normally ex parte applications will not be successful unless special circumstances can be demonstrated; and

(c) the circumstances must not only be urgent – they must also justify the appointment of an interim liquidator.

[15] The text notes a requirement for an undertaking in damages if special circumstances justify granting an ex parte application for the appointment of interim liquidators, as here. However, given the circumstances in this case that I set out below, and the fact that the FMA is a Crown Entity fulfilling its statutory role, I dispense with the need for an undertaking in damages.

[16] Whether there is a need for interim control essentially turns on:

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

(b) whether the status quo should be maintained; and

(c) whether the interests of creditors are safeguarded.

[17] A common theme in relation to these factors is the need to maintain the value of the assets owned or managed by the company.

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2 *Insolvency Law & Practice* (online loose-leaf ed, Thomson Reuters) at [CA 246.02].

Background and context

[18] The FMA has conducted an investigation into the conduct of the sole director and shareholder of the defendant companies, Barry Kloogh. Mr Kloogh was an Authorised Financial Adviser ("AFA") prior to his status as an AFA being suspended on 6 June 2019.

[19] The FMA commenced an investigation into the activities of Mr Kloogh and his related companies after receiving a complaint in December 2018.

[20] As set out in the affidavit of Ms Harris filed in support of the application, the documents obtained by the FMA show that:

(a) Mr Kloogh was offering brokering services to clients through the first defendant, Financial Planning Ltd, and the second defendant, Impact Enterprises Ltd, although neither they nor he were registered to offer broking services.

(b) Clients' funds were paid into bank accounts held by the defendant companies on the understanding that they would then be held by FNZ Custodians Ltd and invested through either Consilium NZ Ltd or its predecessor, Discovery Portfolio Services Ltd.

(c) Between 1 May 2012 and 16 April 2019, $15,699,917.83 of client funds was deposited into accounts held by the defendant companies. A further $450,000 of client funds was deposited directly to Mr Kloogh's personal bank account. However, only $7,428,032.94 was passed on by the defendant companies to be held by Consilium NZ Ltd or Discovery Portfolio Services Ltd.

(d) While a full analysis of what became of the funds not deposited with Discovery Portfolio Services Ltd or Consilium NZ Ltd has not been completed, it appears that substantial funds have been used for personal expenditure by Mr Kloogh.

Financial position of the defendant companies

[21] The FMA, using its statutory powers, investigated the financial position of each defendant company. Using those powers, the plaintiff obtained updated bank balances and financial statements for the defendants, along with some details of Mr Kloogh's personal financial position. Each of the defendant companies is at best in a relatively modest financial position based on their statement of financial position.

[22] The financial statements for the defendant companies give no hint as to what has become of the in excess of $8,000,000 of client funds unaccounted for.

[23] Ms Harris' affidavit provides an example of a client who I will refer to as "Client A". The example discloses how Client A in February 2014 deposited $101,000 into the bank account of Impact Enterprises Ltd. Of that $101,000 the sum of $41,000 was paid to Discovery Portfolio Services Ltd (of course the full amount should have been paid). Just over $35,000 went to pay credit card debts or financing relating to Mr Kloogh personally, $9,000 was used to repay other investors and other amounts were used to pay accounts associated with Mr Kloogh or to unrelated entities.

[24] Client A went on between March 2014 and September 2016 to pay regular monthly amounts totalling just over $54,000.

[25] In February 2016, Client A deposited $37,000 into a bank account of Impact Enterprises Ltd. Of that amount $33,700 was paid to other investors, $2,000 was applied to a credit card relating to Mr Kloogh, and the balance transferred to Mr Kloogh's ANZ business account.

[26] In November 2016, Client A advised that they wanted $100,000 from their account to repay bills, it seems related to renovations to a house.

[27] The analysis undertaken by the FMA shows that amounts drip-fed to Client A were withdrawn from accounts held for other investors.

[28] In June 2017, Client A deposited a further $300,000 into the Impact Enterprises Ltd account. These funds received by the second defendant were used to

pay other investors, credit cards relating to Mr Kloogh and other accounts controlled by him.

[29] The evidence provided by the FMA in relation to the misapplication of Client A's funds is comprehensive and compelling.

[30] The scale of the missing client funds accrued and the circumstances set out in the evidence in relation to Client A by way of an individual example create a compelling case for the appointment of interim liquidators.

[31] It is well established that fraud or misconduct can support an application to appoint an interim liquidator.

[32] The liquidation application seeks liquidation on the basis that both defendant companies are insolvent, that is they are each unable to pay their debts taking into account their liability to repay the funds they received from clients and which are unaccounted for. As a separate ground it is pleaded that it is just and equitable that the defendants be put into liquidation given that each defendant company received client funds despite not being registered to do so and each defendant company did not hold those funds in appropriate trust accounts, resulting in excess of $8,000,000 of client funds being applied for the defendant companies' own expenses or for Mr Kloogh personally.

[33] I am satisfied there is a good prima facie case for liquidation of each of the defendant companies.

[34] The FMA referred the matter to the Serious Fraud Office ("SFO") on 13 May 2019 and the SFO executed a search warrant of Mr Kloogh's private residence and that of the businesses associated with him.

[35] Given the circumstances, I consider it appropriate that the FMA proceeded on a without notice basis. The need to safeguard such client funds as remain is urgent and justifies the appointment of interim liquidators.

[36] The conduct set out in Ms Harris' affidavit in relation to Client A indicates that there is a real risk to the companies' assets, or at least the funds of client investors. Given that there is clear evidence that Mr Kloogh has inappropriately used investors' funds for personal expenses there is a need to safeguard the interests of investors. The need to maintain the value of assets managed by the two defendant companies is a compelling, indeed an overwhelming factor.

[37] The interim liquidators' powers will assist them to investigate where the unaccounted for client funds have gone and may assist with steps they consider appropriate to recover client funds or value for the clients.

[38] Under s 246(1) of the Companies Act, the Court may appoint an interim liquidator if it is necessary or expedient for the purpose of maintaining the value of the assets owned or managed by the company.

[39] *Insolvency Law & Practice* notes, with reference to *Carter Holt Harvey Ltd v Timbalock New Zealand Ltd*,[3] that the reference to "expedient" as an alternative to the word "necessary" conveyed a relatively low threshold.[4]

[40] I consider the threshold for the appointment of interim liquidators is met and met by a wide margin.

Conclusion

[41] It follows from what I have said that it was necessary for interim liquidators to take charge of and locate the two defendant companies' financial and other records, to exercise control over and maintain the value of the companies' assets and the assets they control and to, at the very least, prevent further losses and hopefully use the powers they hold to trace further client funds.

[42] The liquidators nominated by the FMA are very experienced liquidators routinely appointed by this Court.

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3 *Carter Holt Harvey Ltd v Timbalock New Zealand Ltd* (1997) 11 PRNZ 435, (HC).
4 *Insolvency Law & Practice*, above n 2, at [CA 246.03].

[43] Orders were sought preventing the publication of details of Ms Harris' affidavit relating to the client details of the two defendant companies and I consider that appropriate, hence the manner in which I have referred to the client example given by Ms Harris.

[44] The full terms of the orders made are set out as Appendix A to this Reasons for Judgment.

Associate Judge Lester

Solicitors:
Charlotte Allan, Financial Markets Authority, Auckland
Copy to counsel: J S Cooper QC, Auckland

APPENDIX A

IN THE HIGH COURT OF NEW ZEALAND **CIV-2019-412-000061**

DUNEDIN REGISTRY

I TE KOTI MATUA O AOTEAROA
ŌTEPOTI ROHE

UNDER	Part 16 of the Companies Act 1993
IN THE MATTER OF	An application under the Companies Act 1993 for liquidation of the defendant companies
BETWEEN	**The Financial Markets Authority** an independent crown entity established under s 6 of the Financial Markets Authority Act 2011
	Plaintiff
AND	**Financial Planning Limited**, an incorporated company with its registered office at Yardley Lo, 25 Mailer Street, Mornington, Dunedin 9011
	First Defendant
AND	**Impact Enterprises Limited**, an incorporated company with its registered office at Yardley Lo, 25 Mailer Street, Mornington, Dunedin 9011
	Second Defendant

Orders of Associate Judge Lester (a) appointing interim liquidators to Financial Planning Limited and Impact Enterprises Limited; and (b) restricting publication of certain information and access to the court file

17 July 2019

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$80

To: Financial Planning Limited and Impact Enterprises Limited (the defendant companies)

1. The interlocutory application without notice (Pickwick basis) for the appointment of interim liquidators and ancillary orders as to confidentiality made by the Financial Markets Authority (**FMA**) on 12 July 2019 was determined by Associate Judge Lester on 17 July 2019.

2. The determination was made after hearing from Ms J S Cooper QC for the FMA. There was no appearance for the defendant companies.

3. The following orders were made on 17 July 2019 at 4.15pm:

    a. Appointing Vivien Judith Madsen-Ries and David Sean Webb as interim liquidators of:

        i. Financial Planning Limited (**FPL**), an incorporated company with its registered office at Yardley Lo, 25 Mailer Street, Mornington, Dunedin 9011; and

        ii. Impact Enterprises Limited (**IEL**), an incorporated company with its registered office at Yardley Lo, 25 Mailer Street, Mornington, Dunedin 9011.

    b. That the interim liquidators have the powers and authorities given to liquidators under the Companies Act 1993 (**Act**) that are necessary to maintain the assets of the defendant companies, including:

        i. The power under section 248(1)(a) of the Act to take custody and control of assets of the defendant companies, and any assets of the defendant companies that may be held by third parties;

        ii. In relation to assets managed by the defendant companies, the power under section 246(2) of the Act to exercise any

right or power of the defendant companies to require Consilium NZ Limited, FNZ Custodians Limited and any other third party to:

1. Hold/freeze those assets;

2. Not to pay out any of those assets to investors; and

3. Provide all records and information held regarding those assets to the interim liquidators.

iii. The powers under section 261 of the Act to obtain documents and information;

iv. The powers under sections 261, 265 and 266 of the Act to examine on oath;

v. The powers under section 266 of the Act to obtain orders for the production of books, records or documents; and

vi. The power under section 274 of the Act to require identification and delivery of property.

c. The interim liquidators shall not have any power to:

i. Realise, trade, manage or distribute the assets of the defendant companies except for the payment of fees and expenses as provided in sub-paragraph (h) below; and

ii. Realise, trade, manage or distribute assets managed by the defendant companies except as provided in sub-paragraph (b)(ii) above.

d. The interim liquidators are to investigate the affairs of the defendant companies and provide an initial report to the court, to be copied to the FMA, within 4 weeks of the date of their appointment.

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e. The interim liquidators may exercise their powers individually pursuant to section 242 of the Act.

f. With effect from the commencement of the interim liquidation, unless the interim liquidators agree or the court orders otherwise, a person must not:

   i. Commence or continue legal proceedings against the defendant companies; or

   ii. Exercise or enforce or continue to exercise or enforce any right or remedy against property of the defendant companies.

g. That the interim liquidators be entitled to charge their usual rates of remuneration as set out in their forms of consent to act, filed with the interlocutory application.

h. That the fees and expenses of the interim liquidators and of employees of their firm be treated and paid in accordance with section 278 and paragraph 1 of the Seventh Schedule of the Act.

i. That there be no publication of the information identified in the Schedule to the interlocutory application.

j. That leave be reserved to the interim liquidators and any party to this application to apply for directions if needed.

k. That the costs of this application be reserved.

l. That the court file not be searched without leave.

Date: 17 July 2019

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Signature: John David McMillan

(Deputy) Registrar