

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-723
[2018] NZHC 754**

IN THE MATTER of the Court's inherent jurisdiction

IN THE MATTER of an application by FORESTLANDS
(No.2) LIMITED
FORESTLANDS (No.3) LIMITED
FORESTLANDS (No.4) LIMITED
FORESTLANDS (No.5) LIMITED
FORESTLANDS (No.6) LIMITED
FORESTLANDS (No.7) LIMITED
FORESTLANDS (No.8) LIMITED
FORESTLANDS (No.9) LIMITED
FORESTLANDS (No.10) LIMITED
FORESTLANDS (No.11) LIMITED
FORESTLANDS (No.12) LIMITED
FORESTLANDS (No.14) LIMITED
FORESTLANDS (No.15) LIMITED
FORESTLANDS (No.16) LIMITED
FORESTLANDS (No.17) LIMITED
FORESTLANDS (No.18) LIMITED
FORESTLANDS (No.19) LIMITED
FORESTLANDS (No.20) LIMITED
Applicants

Hearing: On the papers and teleconferences 20 April 2018 at 11.00 am and
3.30 pm

Appearances: L H George for Applicants
H M McKee for the Financial Markets Authority

Judgment 23 April 2018

JUDGMENT OF MUIR J

This judgment was delivered by me on Monday 23 April 2018 at 9.00 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:

[1] On 19 April 2018 the Court received an application by the applicant companies (the Forestlands Companies) to commence proceedings by way of originating application, which I granted as Duty Judge that day. I directed that the originating application, together with the supporting affidavits, memorandum of counsel and a copy of my Minute be served on the Financial Markets Authority (FMA). I dispensed with service on the shareholders of the applicant companies (numbering approximately 4,400) for reasons identified in that Minute.

[2] The requirement for service on the FMA derives from the fact the Forestlands Companies have been under active investigation by it for some time and that on 19 March 2017 it filed an application to place them into liquidation. The application was served on 29 March 2018.

[3] The application for liquidation proceeds on multiple grounds, including delay on the part of the companies' director Mr Kearns in notification to the shareholders of the sale of the companies' forestry assets, lack of progress with regard to distribution of the proceeds, failure to maintain an accurate share register, failure to keep adequate accounting records and what is alleged to be persistent failure to comply with the relevant reporting requirements. Accordingly the FMA asserts that it would be just and equitable for the companies to be placed in liquidation.

[4] The originating application arises out of the crystallisation of ten of the companies' liabilities to the Inland Revenue Department (IRD).¹ The total amount involved is \$1,529,203 plus interest of \$112,586. Payment of this sum is now currently overdue. If such sum is not paid through an identified tax pooling agent by midday Monday 23 April 2018, penalties in the amount of \$157,316 will accrue.

[5] As a result of the investigation undertaken by the FMA (the results of which are at least in part reflected in its liquidation application), it sought from the companies undertakings that the net proceeds of sale of their forestry assets, totalling \$18 million, together with interest thereon be held in the trust account of the companies' solicitors, Anthony Harper. The gross proceeds of sale were \$23.5 million from which various deductions were made. Some of those deductions include repayment of advances

¹ Forestlands Nos 2, 10, 11, 12, 14, 16, 17, 18, 19 and 20 Ltd.

made by entities associated with Mr Kearns and may be in issue. They are currently the subject of investigation by accountants KordaMentha on instructions from the companies. There are also issues as to whether such related entities are themselves indebted to the Forestlands Companies. This is likewise being investigated by KordaMentha.

[6] In any event, the undertakings given by the companies to retain the net proceeds of sale mean that payment to the IRD cannot be made from the Anthony Harper account absent the consent of FMA.

[7] FMA has declined to give such consent on the basis that, since the liquidation proceedings are currently before the Court, it is appropriate that any such payment be made pursuant to Court order. The FMA's position in relation to the application is that it abides the decision of the Court. It does, however, draw my attention to two issues in particular.

[a] It raises the question of whether having regard to the matters identified in [5] above, the tax payments might be made from other sources, including companies related to Mr Kearns.

[b] It says that the FMA is not confident it yet has all relevant information about the Forestlands Companies and it is possible some could be insolvent.

[8] As to the first point, Ms George acknowledges that the sale proceeds were in part applied to loans made by Mr Kearns or related entities and that KordaMentha are reviewing both the appropriateness of this and whether there are, in turn, any debts owed by such entities to the Forestlands Companies. No concessions are made in that regard. I am not therefore in a position to direct payment of the IRD debts from any source other than the sum on deposit. Whether in due course money will flow back into the Forestlands Companies from other sources is to be resolved either by KordaMentha or on application by the liquidators, if the FMA's application in that respect is granted.

[9] However, as a precaution I sought and obtained a supplementary affidavit from the accountant to the Forestlands Companies Mr Anderson. He confirms that each of the 10 tax paying entities have substantial net asset positions after payment of core tax liabilities and interest. That position is unsurprising given that the tax liabilities have arisen on account of substantial profits derived by such companies on sale of relevant forestry assets. Accordingly he confirms:

- (a) the tax liabilities assessed for the relevant Forestlands Companies and associated interest costs can be met from the net assets available to each of those companies; and
- (b) those companies would be able to pay their debts in full as they fall due.

[10] Having reviewed the evidence in support of the application and having heard from counsel I consider that the originating application is properly granted. I do so for the following reasons:

- [a] The penalties which, as a result, will be avoided are substantial – \$157,316.
- [b] It is demonstrably in the interests of the shareholders of the tax paying entities that such penalty payments not be incurred.
- [c] There is no other available source of funds acknowledged as owing to the companies, from which the payment can be made. If such sums are ultimately found to be owing and are recoverable then they will in due course flow back to the companies, whether that be on a liquidator's application or otherwise. In that respect nothing in this judgment changes the status quo.
- [d] There is no evidence of insolvency on the part of any one or more of the tax paying companies sufficient to suggest that payment from the current aggregated sum held by Anthony Harper is inappropriate or to suggest that IRD is obtaining preferential status among creditors. The evidence is in fact to the contrary.

[11] In coming to this conclusion I am fortified by the fact that the FMA, which has been fully appraised of the companies' affairs for some time does not oppose the orders sought.

Result

[12] I accordingly order:

[a] That the income tax liabilities of the Forestlands Companies identified in footnote 1 above and in the amount of \$1,529,203 plus interest of \$112,586 (total \$1,529,203) may be paid from the funds currently held on trust by Anthony Harper.

[b] The costs of this application are reserved.

Muir J

Counsel/Solicitors:
L H George and D M Hughes, Anthony Harper, Auckland
H M Mckee, Meredith Connell, Auckland