

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

**CIV 2015-404-002169
[2016] NZHC 1143**

UNDER the Companies Act 1993

IN THE MATTER OF the liquidations of CHK Hospitality (In Liquidation) and Bucklands Beach (In Liquidation)

BETWEEN **CHK HOSPITALITY LIMITED (IN LIQUIDATION)**
First Plaintiff

BUCKLANDS BEACH LIMITED (IN LIQUIDATION)
Second Plaintiff

DAMIEN GRANT and STEVEN KHOV AS LIQUIDATORS OF CHK HOSPITALITY LIMITED (IN LIQUIDATION)
Third Plaintiffs

Hearing: 30 May 2016

Appearances: A Cherkashina and A Ho for the Applicants
K Wakelin and G Campbell for the Commissioner of Inland Revenue

Judgment: 30 May 2016

ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

**DAMIEN GRANT and STEVEN
KHOV AS LIQUIDATORS OF
BUCKLANDS BEACH LIMITED (IN
LIQUIDATION)**
Fourth Plaintiffs

**COMMISSIONER OF INLAND
REVENUE**
Fifth Plaintiff

RAJWINDER SINGH GREWAL
First Defendant

JOTI JAIN
Second Defendant

Matters for review

[1] Today's hearing was scheduled by Judge Doogue on 29 April 2016. At that time Judge Doogue granted the application of the Commissioner of Inland Revenue (the Commissioner) to be joined as a plaintiff.

[2] Ahead of this morning's call of the strike out application the Court received a memorandum of counsel on behalf of the Commissioner. Attached to that was a copy of the statement of claim intended by the Commissioner to be filed. As counsel explains and as is apparent from the Commissioner's statement of claim the Commissioner is essentially a plaintiff in the alternative and does not wish to derail the present plaintiff's application for strike out or to delay the proceeding. Accordingly the Commissioner seeks directions regarding the appropriate procedure for filing its statement of claim, particularly the form of the notice of proceeding required by r 5.22.

[3] As counsel for the Commissioner notes, in the first to fourth plaintiffs' statement of claim, the first four causes of action are based on the phoenix company provisions set out in ss 386A to 386F of the Companies Act 1993 (the Act). These provisions have yet to be discussed in detail by the Courts in New Zealand. However, similar provisions have been considered and addressed in the United Kingdom.

[4] Counsel refers to the decision in *Re Prestige Grindings Limited*¹ wherein the Court considered who had the requisite standing to bring an action under s 15 of the Company Directors Disqualification Act 1986 which, like both the United Kingdom and equivalent New Zealand phoenix company provisions, makes the director personally liable for the company's debts. In that case the Court found that the cause of action belonged to the creditors of the company, not the company itself and that accordingly a liquidator did not have the requisite standing.

[5] Counsel refers to commentary on that case suggesting that the United Kingdom phoenix company legislation, by analogy, would be interpreted in the same

¹ [2006] BCC 421.

manner.² It appears this principle has not yet been adopted in New Zealand. Counsel for the Commissioner submits that in the event the Court finds the plaintiffs do not have the requisite standing to bring a claim under the phoenix company provisions for the debts owed to the company by the second plaintiff, the Commissioner seeks to bring a claim as a creditor of the second plaintiff. Accordingly, the Commissioner intends to adopt the first to fourth plaintiffs' pleadings in respect of the first and third causes of action as a plaintiff in the alternative. The Commissioner does not make any additional allegations in its claim.

[6] Counsel for the Commissioner is concerned that if the Court proceeds today upon the strike out application and if that is successful then the matter will proceed by way of formal proof. The Commissioner is concerned that it will delay matters if it is required to serve a notice of proceeding which gives the defendants a further 25 working days to respond to essentially identical allegations as contained in the existing statement of claim, to which the defendants have failed to plead adequately.

[7] The Commissioner requests a direction dispensing with the requirements to serve a notice of proceeding on the defendants or that she should serve an amended notice of proceeding reducing the number of working days which the defendants have to respond to the statement of claim.

Decision on issue regarding requirement for Commission's statement of claim to be served

[8] In the circumstances, and as it will appear later in this judgment, the Court has concluded that the defence ought to be struck out. Therefore it is the Court's view that no further delay ought to occur and that service of the Commissioner's statement of claim is not required. Clearly that statement of claim simply adopts some elements of that proceeding which has already been served on the defendants, and to which no sufficient pleading in response has been filed.

[9] However the Commissioner is required to file a statement of claim and will have to pay any fee required.

² Simon Duncan "The Creditors' Claims (4)" (2014) 164 (7614) NLI 15; "The Creditors' Claims" (2012) 162 (7530), 1175.

The application for strike out

[10] For the purpose of the judgment reference to “the plaintiffs” is a reference to those named as plaintiffs in the original proceeding filed and served.

[11] The plaintiffs apply to strike out the statement of defence of the first and second defendants. Alternatively they seek directions that the defendants serve a statement of defence that complies with the High Court Rules and provides initial disclosure as those rules direct.

[12] It is the plaintiffs’ case that the statement of defence filed on behalf of the defendants discloses no reasonably arguable defence because those pleadings are ‘inexplicit and unparticularised’; is unintelligible; and “is clearly untenable”.

[13] The plaintiffs say that on 30 November 2015 the defendants were served with a notice pursuant to High Court Rule 5.1 requiring a more explicit statement of defence giving further and better particulars, and at the same time were served with a notice requiring initial disclosure to be provided. The plaintiffs say that the defendants have not since either provided a more explicit statement of defence or initial disclosure.

[14] The plaintiffs say the form of statement of defence filed in the absence of initial disclosure is causing them justifiable prejudice and delay to them and to their creditors. The application is made in reliance upon:

- (a) Rules 5.21, 5.48, 8.4 and 15.1 of the High Court Rules 2008.
- (b) Parts 7, 8 and 14 of the High Court Rules 2008.

[15] The defendants’ statement of defence was filed on 25 November 2015 through the office of Mr M W Tolhurst. At that time Mr Tolhurst was a practising barrister and solicitor. Since then he has applied to the Court requesting he no longer act for or provide the address for service of the defendants, he having ceased practice as a barrister and solicitor at the end of 2015.

[16] Mr Tolhurst advised the Court he informed the defendants that they would have to find other solicitors to act for them. Mr Tolhurst is aware that another barrister had been contacted by the defendants. He notes however that he remains on the record.

[17] The Court has granted Mr Tolhurst's request to withdraw.

The claim

[18] The first plaintiff (CHK) was incorporated on 1 February 2012 from which time it commenced trading as "Masala Bucklands Beach". On 1 April 2013 CHK sold that business to the second plaintiff (BBL). On 2 September it was placed into liquidation and on 2 December 2013 the third plaintiffs were appointed joint and several liquidators of CHK by its shareholders.

[19] On 11 November 2013 BBL ceased trading as it sold the Masala Bucklands Beach business to One Hospitality Limited.

[20] On 3 March 2014 Mr J M Gilbert was appointed liquidator of BBL by its shareholders. On 28 March 2014 Mr Gilbert resigned as liquidator of BBL and the third plaintiffs were appointed joint and several liquidators of that company also. Mr Grewal was a director of CHK from its inception. He owned all shares of CHK. Mr Grewal was also the director and sole shareholder of BBL.

[21] The plaintiffs plead the second defendant (Ms Jain) whilst not officially recorded as a director of CHK was nevertheless a de facto director or in the alternative a shadow director of CHK because she occupied the position of a director and was held out by CHK and purported to act as a director of CHK because she was a person who exercised or was entitled to exercise, controlled or was entitled to control the exercise of powers which would fall to be exercised by the board of CHK.

[22] Ms Jain was a director of BBL from 21 March 2013 until 1 April 2013 during which time PKS Trustees Limited owned all shares in BBL. Ms Jain was a director of PKS Trustees Limited from 21 March 2013 until 24 February 2014 and was a

shareholder of PKS Trustees Limited during that time. It is pleaded Ms Jain at all material times undertook management functions in respect of both CHK and BBL.

[23] The plaintiffs plead BBL was a phoenix company having been known as Masala Bucklands Beach, the pre liquidation business name of CHK – within five years of CHK's liquidation; that Mr Grewal having been a director of CHK was prohibited from being a director of BBL or from directly or indirectly taking part in the management of BBL, or from carrying on the business using the same name as had CHK.

[24] The third plaintiffs claim Mr Grewal is personally liable for the debts of BBL which total \$297,643.82 of which sum \$245,000 was payable by BBL to CHK in relation the sale of the business from CHK to BBL.

[25] Under various separate causes of action it is pleaded that due to the actions of the defendants they are bound to pay that sum of money to CHK or to BBL.

[26] Of the amount claimed a sum of \$117,270.33 is for liquidator fees and disbursements in the liquidation of CHK, and \$79,133.07 for liquidator fees and disbursements in the liquidation of BBL.

[27] By the statement of defence filed the defendants plead they are not required to respond to those paragraphs of the statement of claim regarding ownership by CHK and BBL of the business Masala Bucklands Beach or in relation thereto the appointment of liquidators. Likewise they say they are not required to respond to claims of ownership of shares or about claims that BBL was a phoenix company and in regard thereto that Mr Grewal acted as he should not have done.

[28] Likewise with the balance of allegations against them the defendants deny all claims.

[29] The statement of defence is barely one page long and contains a bare denial of all claims.

Considerations

[30] The Court's view is that the statement of claim of the plaintiffs has clearly and carefully detailed the operation of a food supply business, the transfer of which was effected by the defendants from one company to another in their control. In that process BBL failed to pay the sum of \$245,000 agreed to be paid to CHK. Also BBL incurred a number of debts including to the Inland Revenue Department a sum of about \$15,000. BBL creditors totalled not less than \$52,000. As well the liquidators seek payment for fees in connection with the liquidation of both CHK and BBL.

[31] The defendants have long since been made aware of deficiencies with their pleading and failure to provide sufficient initial discovery. In the circumstances it is appropriate to strike out the statement of defence.

Result

[32] This matter will require a hearing upon claims of formal proof. In the mix of those the liquidators will have to consider their position regarding the comments earlier made herein about their standing to pursue phoenix company claims.

[33] The Registry is requested to schedule a **half day** hearing before me but not sooner than mid-July 2016. Meanwhile the liquidators are to file submissions addressing issues of standing. In support of claims of formal proof the liquidators will be required to give evidence by affidavit.

[34] Submissions and evidence should be filed and served by **17 June 2016**. Any submissions in response on behalf of the Commissioner are to be filed and served by **1 July 2016**. Any reply submissions are to be filed and served by **8 July 2016**.

[35] The Registry will advise counsel in due course of a hearing date to conclude this matter.

[36] Costs upon the strike out application are awarded to the plaintiffs and are fixed on a 2B basis together with disbursements as approved by the Registrar.

Associate Judge Christiansen