

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

**CIV-2013-404-004578
[2014] NZHC 2789**

BETWEEN DAMIEN GRANT and STEVEN KHOV
as liquidators of HUNTER CAPITAL
LIMITED (IN LIQUIDATION)
Plaintiffs

AND ROSEBUD CORPORATE TRUSTEE
LIMITED
Defendant

Hearing: 10 November 2014

Appearances: B J Norling and J K Boparoy for Plaintiffs

Judgment: 10 November 2014

ORAL JUDGMENT OF VENNING J

Solicitors: Waterstone Insolvency, Auckland

[1] In these proceedings the liquidators of Hunter Capital Limited (Hunter Capital) seek to recover against Rosebud Corporate Trustee Limited (Rosebud), sums totalling \$125,000 being payments made by Hunter Capital to Rosebud between 20 May 2011 and 3 February 2012.

[2] The proceedings are pursued by the liquidators of Hunter Capital against Rosebud. The proceedings were actively defended until as recently as 31 October 2014 when Rosebud was put into liquidation by this Court. The liquidators of Hunter Capital were also appointed as liquidators of Rosebud. As liquidators of Rosebud they do not oppose this proceeding continuing.

[3] Although there is no longer an active defence or appearance in opposition to the liquidators of Hunter Capital's claim the matter has proceeded by way of formal proof this morning. It is for the liquidators to satisfy the Court that judgment should be entered against Rosebud accordingly.

[4] I start with the statement of claim. Essentially Hunter Capital alleges that it participated in the development of a number of properties in Albany. There were a number of individuals in the role of directors or managers of the companies involved in the project, including, importantly for present purposes, Messes Nielsen, Chevin, Bublitz and Cook. A company was established in Singapore trading as Raine and Horne. That company sought investment from members of the public. A number of investors made investments which were ultimately transferred through law firms to either Hunter Gills Road Limited or Albany Heights Villas Limited.

[5] Some of the investors' funds were then transferred to Hunter Capital from Hunter Gills Road Limited and Albany Heights Villas Limited and ultimately some of the funds, namely the \$125,000 referred to, were transferred to Rosebud. The liquidators of Hunter Capital say the funds were transferred for no consideration. The funds were effectively used for the purposes and benefit of Mr Nielsen's wife, Ms Sirene Nielsen.

[6] The plaintiff liquidators raise three causes of action:

- (a) first, transactions at an undervalue: s 297 of the Companies Act 1993 (the Act);
- (b) second, unjust enrichment; and
- (c) third, money had and received.

[7] I address the first cause of action. To make out the claim under s 297 of the Act in this case the liquidators must establish that:

- (a) Rosebud received a transaction from Hunter Capital; and
- (b) Rosebud provided no value to Hunter Capital for that transaction; and
- (c) the transactions were entered into within two years prior to the liquidation of Hunter Capital; and
- (d) Hunter Capital was unable to pay its due debts when it entered the transactions.

[8] In relation to those issues in the statement of defence filed on behalf of Rosebud, Rosebud admitted that it received the \$125,000 from Hunter Capital and also admitted that the payments occurred within two years prior to the liquidation of Hunter Capital. The pleadings put in issue that Hunter Capital received no value for the payments from the defendant by a denial and put the plaintiff liquidators to proof that Hunter Capital was unable to pay its due debts when it made the payments.

[9] The application for formal proof judgment is supported by affidavits by Mr Damien Grant, one of the liquidators and Ms Prashika Chand, who works in the liquidators' office.

[10] Mr Grant has confirmed in his affidavit that his investigation of the various entities involved in the development at Albany reveal that a company was established in Singapore called Hunter Sterling & Company Pte Limited, set up to operate a joint venture, the Hunter Sterling Agreement. Raine and Horne Projects

Hong Kong Limited (Raine and Horne) was set up to operate in Hong Kong as part of the joint venture scheme.

[11] Raine and Horne advertised and held seminars and conferences to present to potential investors the details of the development in Albany. Overseas investors entering the agreement would pay over sums of up to \$65,000. Those funds were then transferred to law firms in New Zealand and one at least of those law firms then transferred the investors' funds to either Hunter Gills Road Limited or Albany Heights Villas Limited. From there the funds were transferred to Hunter Capital. Mr Grant is able to confirm that the funds were then transferred to Rosebud, which on his analysis provided no value to Hunter Capital for those funds.

[12] On Mr Grant's analysis the ultimate effect is that Mr Nielsen used the group companies to take investors' funds and to transfer them to Rosebud for the use of his wife, Ms Sirene Nielsen.

[13] The project began in 2010 when Messrs Cook, Bublitz, Nielsen and Chevin entered the Hunter Sterling Agreement.

[14] Mr Grant also confirms that from 20 May 2011 to 3 February 2012 Hunter Capital paid Rosebud a total of \$125,500. On his review of the books and records of Hunter Capital he was not able to identify any legitimate reasons why Rosebud would be entitled to receive the payments. The payments were coded as advances, which also tends to suggest they were not for value but were some kind of undocumented loan or advance.

[15] On Mr Grant's analysis Mr Nielsen had engineered a situation where Rosebud was paid ahead of legitimate creditors. He notes that in a decision of this Court the Rosebud Trust, of which the defendant is trustee, has been found to be a sham.¹

¹ *Rosebud Corporate Trustee Ltd v Bublitz* [2014] NZHC 2018.

[16] Ms Chand confirmed that, having reviewed the financial position of Hunter Capital, at relevant times Hunter Capital was insolvent and unable to pay its due debts as and when they fell due.

[17] She notes for example that in the period ended 31 March 2012 Hunter Capital had assets totalling in excess of \$2.744 million. Its liabilities however totalled in excess of \$3.176 million. For the period ended 4 March 2013 Hunter Capital had assets totalling negative in excess of \$2,934 million with additional liabilities in excess of \$646,000. The net asset position was a negative, in excess of \$3.580 million.

[18] Proof of debts received by the liquidators to date total \$122,788. Principal creditors are the Inland Revenue Department, the ANZ Bank and Telecom. In addition Hunter Capital has substantial potential liability to other parties, including investors.

[19] From Ms Chand's investigations the funds advanced to Rosebud were advanced without any provision of services in return.

[20] In response to interrogatories in this proceeding Ms Sirene Nielsen Millar deposes (as a director of Rosebud), that Rosebud had provided the following services to the development:

- (a) resource consent;
- (b) marketing;
- (c) funding the purchase and raising the funds;
- (d) project assistance;
- (e) general advice; and
- (f) attendances regarding the purchase and funding of Stage 2 79-95 Gills Road, Albany.

[21] Apart from the fact that Hunter Gills Road Limited was the owner rather than Hunter Capital of the last property there are a number of other difficulties with Ms Millar's statement. She goes on to suggest that the arrangement between the parties had not been documented. Significantly, in its pleading, Rosebud had said that it had no knowledge of the arrangements and background to the developments which led to the transactions in issue, despite Ms Nielsen's assertions in the pleading.

[22] For present purposes, however, in the absence of any further evidence or documents supporting Ms Millar's deposition I am not prepared to accept it as credible or reliable. I put it to one side, particularly given the evidence of Mr Grant and Ms Chand and the documents prepared by the plaintiffs and referred to by those deponents, which supports their evidence.

[23] Returning to the claim I accept Mr Norling's submission that the payment of money can be regarded as a transaction for the purposes of s 297. The Court is required to consider the difference between the value of the transaction and what value was received in return. The formula provided in the section contemplates that there may be no value at all. I note the reference to the use of the words "if any". At the time Rosebud received the transactions, the payments, it no longer had an interest in the Hunter Sterling Agreement, if indeed it did at any point have any interest in the Agreement underlying the development.

[24] In his decision delivered on 25 August 2014 Wylie J concluded that Mr Nielsen himself was a party to the Hunter Sterling Agreement rather than Rosebud.² Further and importantly the Judge concluded the Trust was a sham, accepting that the evidence suggested Mr Nielsen controlled the Trust and that he effectively made all decisions for it. While Ms Nielsen became a director as from 24 July 2012 she was not treated by anyone as a proper director or trustee and had little or no knowledge of the accounts she signed for the Trust.

[25] In light of the above and given the evidence I have referred to of Mr Grant and Ms Chand, I am satisfied that Rosebud provided no value to Hunter Capital for

² *Rosebud Corporate Trustee Ltd v Bublitz & Ors*, above n 1.

the transactions it received. As noted it is admitted in the pleadings that the transactions were entered into within two years prior to liquidation.

[26] The remaining issue for the Court is whether Hunter Capital was unable to pay its due debts at the time the transactions were made.

[27] While a summary of the internal records of Hunter Capital from 20 May 2011 through to 3 February 2012, the relevant dates, disclosed that at some times Hunter Capital had a positive net asset position it operated a significant negative net asset position for substantial periods during the relevant time, at times being in excess of \$570,000 in negative asset position.

[28] Further as Ms Chand has noted, as at 30 March 2012 it had a substantial minus net asset position and as at 4 March 2013 it had a substantial negative net asset position.

[29] A further relevant factor is that included in the advances in the internal accounts supporting the assets of Hunter Capital are advances made from Talman Trust, Rosebud Trust, PD Trust, H Sterling Asia and other entities associated with the joint venture projects. From the liquidators' investigations the advances from the Rosebud Trust at least are questionable.

[30] On balance, I am satisfied that Hunter Capital's lack of liquidity disclosed from the information before the Court was more than a temporary glitch. It was ongoing throughout the time the transactions were made. I accept Mr Norling's submission that the significant shortfall of assets in comparison to liabilities is ultimately indicative of this.

[31] Mr Norling has properly drawn the Court's attention to the decision of *Blanchett v Joinery Direct Ltd*³ that an analysis of assets over liabilities is not of itself necessarily sufficient to illustrate a company's inability to pay its debts but having regard to the cash flow position of the company as disclosed in the evidential material before the Court and the date range of the debts due to the creditors who

³ *Blanchett v Joinery Direct Ltd* HC Hamilton CIV-2007-419-001690, 23 December 2008.

have proved, namely the Inland Revenue Department, Telecom and ANZ, I am satisfied of the long and ongoing inability of Hunter Capital to pay debts as they fell due.

[32] In particular it is relevant that the debt to the Inland Revenue Department accrued during the period of 30 September 2011 to 30 September 2012. As noted by Heath J in the case of *Syntax Holdings (Auckland) Ltd (in liq) v Bishop* the failure to pay GST and PAYE on a regular basis is a sure sign of a company in trouble as the funds are only ever meant to be held for a short time prior to payment.⁴

[33] For those reasons I am satisfied that the company was unable to pay its due debts at the time the payments were made.

[34] I turn briefly to consider s 296(3) of the Companies Act 1993. Mr Norling accepts that given the decision of the Court of Appeal in *Grant v Lotus Gardens Limited*⁵ the Court should address itself to s 296(3). In the present case again, there is no evidence before the Court which would enable Rosebud to satisfy the Court that it:

- (a) had acted in good faith; or
- (b) that a reasonable person in its position would not have suspected and it did not have reasonable grounds for suspecting Hunter Capital was insolvent at the time; or
- (c) that Rosebud gave value for the property or altered its position in the reasonably held belief transfers to it were valid.

[35] Rosebud is unable on the evidence before the Court to satisfy any one of those considerations, let alone all three as is required.

⁴ *Syntax Holdings (Auckland) Ltd (in liq) v Bishop* [2013] NZHC 2171 at [12].

⁵ *Grant v Lotus Gardens Limited* [2014] NZCA 127.

Result

[36] For those reasons I find the plaintiffs' claim against Rosebud on the first cause of action made out. It is unnecessary in the circumstances to consider the alternative causes of action.

[37] There will be judgment for the plaintiffs against the defendant in the sum of \$125,000 together with costs on a 2B basis and disbursements as fixed by the Registrar.

Venning J