IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-929
[2013] NZHC 3043

IN THE MATTER	of the Companies Act 1993
AND IN THE MATTER	of the liquidation of Meadowlane Limited (in liquidation)
BETWEEN	BRUCE WEST Applicant
AND	DAMIEN GRANT and STEVEN KHOV Respondents

Hearing: 24 June and 11 July 2013

Counsel: RB Hucker for Applicant
BJ Norling and JK Boparoy for Respondents

Judgment: 18 November 2013

RESERVED INTERIM JUDGMENT OF ASSOCIATE JUDGE SARGISSON
(Orders under s 284 Companies Act 1993)

This judgment was delivered by me on 18 November 2013 at 4.30 p.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: *Hucker Associates, Auckland*
Waterstone Insolvency, Auckland

[1] The applicant, Bruce West, applies for an order under s 284 of the Companies Act 1993 replacing the liquidators of Meadowlane Limited with the liquidators of his choice and, alternatively, an order directing the current liquidators to take specified steps in the liquidation. As Mr West claims to be a creditor of Meadowlane, he requires and applies for, leave to bring the application.

[2] The respondents Damien Grant and Steven Khov are the liquidators of Meadowlane. They oppose the application.

Background

[3] Meadowlane was originally known as International Entertainment (NZ) Ltd. It was run by Eugene and Rosemarie McCarthy, its directors. Mr West was employed by International Entertainment (NZ) Ltd as its Chief Executive Officer.

[4] International Entertainment (NZ) Ltd ceased to trade on 31 March 2011 as a result of a shareholder dispute. The company was placed into voluntarily administration on 2 July 2012 and Damien Grant and Steven Khov were appointed administrators. That same day the company's name was changed to Meadowlane. Meadowlane was placed into voluntary liquidation on 30 July 2012.

[5] In the reorganisation spawned by the shareholders' dispute, Meadowlane's assets and business were divided by Eugene McCarthy and Rosemarie McCarthy and their respective companies, International Entertainment (Aust) Pty Limited and International Entertainment Limited.

[6] Mr West now works for Mr McCarthy's company, International Entertainment (Aust) Pty Limited in which he appears to have a proprietary interest through a company he owns. Mr West contends that he is a creditor of Meadowlane, claiming for holiday pay of approximately $9,000 and pay in lieu of notice amounting to just over $50,000; and that the liquidators are not conducting a proper investigation into the affairs of the company or willing to fund appropriate recovery action for the purpose of the liquidation.

[7] On 30 October 2012 Mr West lodged a proof of debt in Meadowlane's liquidation. The liquidators have not accepted or rejected his proof of debt which they say was lodged after the first creditors' meeting. Their position is that they await further supporting material from Mr West. On 19 February 2013, Mr West filed this application.

The Application

[8] In his application Mr West moves for orders appointing Mr Meltzer and Mr Lamacraft as replacement liquidators and, in the alternative, that directions be made requiring the liquidators to:

(a) Exercise their powers under s 261 of the Companies Act 1993 to:

(i) obtain explanations from Rosemarie McCarthy as to the whereabouts of the assets (including monies from the bank account) of Meadowlane; and

(ii) require the production of documents, file notes and minutes of Meadowlane and/or any other documentation that may assist with their investigations as to what happened to the assets (including any agreement for sale and purchase);

(b) Detail in a report to the Court all steps taken to date "to attempt to recover the assets of the business of Meadowlane and of any transactions identified by the liquidators" between Meadowlane and Rosemarie McCarthy of which the liquidators have become aware and/or investigated.

[9] The grounds set out in the application assert that Mr West is a creditor of Meadowlane and focus principally on the liquidators' investigation insofar as it relates to the conduct of Ms McCarthy. The focus is threefold:

(a) That the conduct of Ms McCarthy warrants further investigation. This is stated to be particularly so because Meadowlane's latest set of

financial statements shows significant assets, while the reports of the liquidators filed to date in the Companies Office show limited or no realisations available to creditors.

(b) That "to the extent the liquidators maintain they have no funding to investigate", they ought to be replaced by replacement liquidators who are prepared to carry out proper investigations into the whereabouts of Meadowlane's assets. For the purpose of such investigations, Mr West is prepared to fund alternative liquidators. Alternatively, directions are required to ensure a proper investigation into the affairs of Meadowlane is carried out and that the liquidators' duties under s 253 of the Companies Act are discharged.

(c) That the liquidators should report to the Court on the progress made in the liquidation to ensure transparency as to the extent of their investigations to date and to rectify their failure to provide a substantive report to the applicant despite request.

[10] In submissions filed shortly before the hearing counsel for Mr West set out proposed amended directions. These he refined further at the hearing. The proposed amended directions are that the liquidators:

(a) Exercise their powers under s 261 to:

(i) obtain explanations from Rosemary McCarthy as to the whereabouts and/or terms on which the assets of Meadowlane were transferred to International entertainment Limited.

(ii) require Mr Masterton and other professional advisors who acted for Meadowlane in relation to the transfer of assets from Meadowlane to International Entertainment Limited to produce any documentation that may assist the liquidators' investigations into what happened to Meadowlane's assets.

(b) Detail in a report to the Court all steps taken to date to attempt to recover the assets of the business of Meadowlane and identify any transactions between Meadowlane and Rosemarie McCarthy of which the liquidators have become aware and/or investigated.

[11] Additionally, counsel for Mr West proposed further supervisory directions to require the liquidators to:

(a) Make an application under s 113 of the Tax Administration Act 1994 to have the Inland Revenue Department reassess the tax obligations of Meadowlane with the objective of seeking to have the assessments that have been raised amended.[1]

(b) Obtain legal opinions as to:

(i) Whether an insolvent transaction notice should be issued against Diners Club;

(ii) The recoverability of Rosemarie McCarthy's current account debt and of any shortfall between the price she has paid for assets of Meadowlane and the value of those assets;

and to issue proceedings if recommended in the legal opinions.

(c) Obtain an independent valuation of the assets of Meadowlane and/or require payment for the assets of the company that Rosemarie McCarthy received, at their book value as at the date of acquisition.

(d) Serve a s 261 notice on Mr Masterton, to deliver copies of all documentation and advice that he provided to Meadowlane and to require him to attend and be examined on oath before the liquidator as to the payments received by him from the Company.

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[1] Section 113 of the Tax Administration Act 1994 states "subject to sections 89N and 113D, the Commissioner may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid."

(e) Review the proofs of debt lodged in the liquidation with a view to rejecting those where the services were not provided to Meadowlane but to Rosemarie McCarthy.

[12] Counsel also proposed that the grounds in support be amended:

(a) Mr West is a creditor (or arguably so) and has standing to make an application for directions.

(b) The liquidators have had carriage of Meadowlane's affairs, as administrators and then liquidators, for almost a year. They took very few steps in the liquidation until Mr West's application was filed and in particular took no steps to investigate the transfer of assets from Meadowlane to Ms McCarthy. Additionally, they failed to invoke the disputes procedure to challenge IRD's proof of debt and to make a proper assessment of dubious proofs of debt that appear to relate to claims against Ms McCarthy's new company which she set up shortly before Meadowlane was put into liquidation.

(c) There are recovery options available to the liquidators (including the options of pursuing recovery of Rosemary McCarthy's current account, claiming against IRD and issuing a voidable transaction notice against Diners Club). However, "for funding reasons the inference can be drawn" that the liquidators do not intend to prosecute recovery action.

(d) Mr West does not wish for meritorious causes of action to be lost and is prepared to provide funding to pursue them so that they are not lost. In such circumstances the appropriate step is for the liquidators to step to one side and allow replacement liquidators to pursue those actions.

[13] These amendments include fresh areas of criticism that Mr West has raised in the response to the liquidators' evidence and their challenge to Mr West's status as a creditor. The fresh criticisms include a claim that the liquidators are failing to deal

with proofs of debts adequately or in a timely way. They also refelct a shift from a suspicion that the liquidators are unwilling to fund the investigation of the company's affairs to some extent, to a claim that they will not fund a full investigation or recovery actions.

[14] The liquidators do not agree that grounds exist for their replacement or for supervision in the form of directions. Their position is essentially that:

(a) Mr West has not demonstrated that he is a creditor. Unless and until he does so he has no standing to make an application for directions.

(b) Replacement liquidators or supervisory directions are unnecessary. No case is made out. A proper investigation is being carried out which they are funding and their investigations are ongoing. Possible recoveries have been identified and some are being pursued. It is wrong to say that they do not intend to fund actions. Conversely, the Court should not attach weight to the suggestion Mr West is prepared to fund the liquidators he nominates. There is no evidence of Mr West's ability to fund.

(c) A report to the Court is unnecessary at this stage.

Legal Principles

[15] Section 284 authorises a Court to supervise a liquidation.[2] Section 284(1)(a) allows the Court to "give directions in relation to any matter arising in connection with the liquidation." The jurisdiction under s 284(1)(a) extends to one of removal of a liquidator in favour of another.[3]

[16] An application under s 284 by a creditor, shareholder, director, or other entitled person may be made only with the Court's prior approval. The following

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2 The liquidation is not a Court appointed liquidation. There is no difference in the application of the principles of supervision between Court appointed and non-Court appointed liquidations.

3 This is a distinct and independent jurisdiction exercisable separately from the s 286 jurisdiction and does not require any finding of misconduct on the part of a liquidator *Katavich v Meltzer* [2011] NZCCLR 8 at [38] and [39].

extracts from the commentary in *Brooker's Companies Law* to section 284 are apposite:

> **CA284.02 Applications under s 284**
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> ..
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> The Court in *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263,917 held that a creditor seeking leave under s 284 must do more than merely demonstrate that its claim is sustainable. A creditor must show that it has an arguable case. In this context, an arguable case has two characteristics: first, it must have a credible factual basis; secondly, there must be a reasonable likelihood that, if the claim is established, the Court will disturb the act or decision in question. The Court is likely to take this step only if the act or decision is unreasonable.
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> This test was affirmed on appeal in *Trinity Foundation (Services No 1) Ltd v Downey* (2006) 3 NZCLC 401, where the Court of Appeal held that **substantive relief should only be granted if the decisions of the liquidators in issue can be shown to have been wrong or unreasonable.** [Emphasis added].
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> ...

[17] As a matter of general principle, the creditors of a failed company are entitled to have a thorough investigation of the company's affairs to learn whether it has any assets, or the liquidator has any rights of recourse, that might repay them.[4] Where a liquidator or a creditor is prepared to fund such investigation the Court will not lightly deny them the opportunity that it represents.[5]

[18] The following statement in *Re: Ocean Shipping Ltd* is apposite:

> ... that there is a very strong presumption that the creditors of a failed company are entitled to a full and thorough investigation of the financial history and status of the company. That is especially the case where they are prepared to fund the exercise.

[19] In circumstances where there is no funding available the proper course is for the liquidator to stand aside in favour of the Official Assignee.[6]

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4 *Re Ocean Shipping Limited* HC Auckland M348/96, 16 July 1996; cited with approval in *Grant v CP Asset Management Limited & Ors* [2013] NZCA 452.

5 *Re Ocean Shipping Limited* at 2 – 3; *Grant* at [48].

6 *Katavich v Meltzer,* above n 3 at [42]-[45], [47] and [49].

[20] The case of *Levin v Lawrence* is relevant to the Court's supervision of liquidation. Toogood J states:[7]

> [54] The Court is required to exercise a supervisory jurisdiction over liquidations and to intervene when it is appropriate to do so.[8] But the statutory regime under the Companies Act favours allowing liquidators to make business decisions which they, as the persons appointed to exercise statutory responsibilities, are better qualified than the Courts to make. Without abrogating its supervisory obligations, the Court should be slow to intervene where matters of judgment and assessment on commercial matters are concerned. That includes assessing how far to investigate possible avenues of recovery of funds for distribution. Weighing the likely cost of pursuing such avenues against the prospects of success and the amount which may be recovered are matters for judgment which are squarely within a liquidators' domain.
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> [55] It would be inconsistent with the statutory scheme to provide opportunities for the automatic review of a liquidator's decisions by permitting any creditor or shareholder to inspect the accounts or records of the company and the liquidation merely because they wish to do so.

[21] The funding of recovery actions cannot be ignored. In general terms, it could be contrary to the interests of creditors if a potential recovery action having some merit is not pursued.[9] That is not to say that the liquidator must pursue potential recovery actions at all costs. Venning J points to a series of prerequisites before prejudice would result to creditors: the liquidators must identify potential recovery action warranted on a cost-benefit basis; they must fail to secure creditor or third party funding to pursue such an action; and finally, they must decide not to pursue the action without funding.[10]

Issues for determination

[22] The issues that arise for determination are broadly these:

(a) Whether Mr West is a creditor or is arguably so - in which case he has standing to seek leave to bring his application.

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7 *Levin v Lawrence* [2012] NZHC 1452 at [54] – [55].
8 Companies Act 1993, s 284.
9 *Grant & Khov v CP Asset Management Ltd & Ors* [2012] NZHC 3488 at [32].
10 At [30].

(b) Whether for the purpose of granting leave, Mr West has an arguable case that the liquidators acted unreasonably or failed in their duties in the respects claimed – in which case leave should be granted.

(c) If leave is granted, whether Mr West has made out a case on the material presently before the Court for intervention and if so should there be an order for replacement or an order for supervisory directions.

[23] I begin with Mr West's status and the question of leave.

Is Mr West (arguably) a creditor?

[24] First it must be determined whether Mr West has standing as a creditor to bring this application. In *Grant* the Court of Appeal said:[11]

> A creditor means a person entitled to make a claim for an unsecured debt or liability for a company in liquidation – see ss 245A, 240(1), and 303.

[25] Mr West made his claim to the liquidators after the date the liquidators fixed to claim but he says that the lateness of the claim was because the notice of the day fixed did not come to his attention. Irrespective of the reason, Mr West is entitled to make a claim for debts allegedly due to him for holiday pay and pay in lieu of notice under s 303 of the Companies Act arising from his claim that the employment with Meadowlane was unilaterally terminated. [12]

[26] Mr West argues that, contrary to the liquidators' contention, there was no agreement that his employment would be transferred to International Entertainment (Aust) Pty Limited. Mr West says he is entitled to be paid the notice period together with other entitlements under his contract with Meadowlane.

[27] Counsel for Mr West submits that his evidence in support of his proof of debt stands uncontradicted and thus that he has standing to bring the application under s 284. However, the evidence for the liquidators (even excluding affidavit evidence

[11] At [40] - [41]
[12] Companies Act 1993 Liquidation Regulations 114, reg 13.

that the liquidators sought to file at the hearing) suggests the possibility that Mr West, in his capacity as Chief Executive Officer, was party to arrangements to transfer certain employees to Mr McCarthy's company, including himself.

[28] Counsel for the liquidators urged that I give leave to allow late affidavit evidence which they say is determinative of Mr West's status as a creditor. I agree with counsel for Mr West that such evidence came too late to be admitted at the hearing. Mr West could not be expected to respond to it. I expressly do not rely on it.

[29] The result is that I am unable to rule definitively on Mr West's status as a creditor. Realistically, counsel for Mr West conceded that without the late evidence, Mr West has an arguable claim to be a creditor though he submits the claim is not strong. In arriving at this position counsel for the liquidator stressed that this acknowledgment is not determinative of the decision the liquidators have yet to make as to whether to accept or reject Mr West's proof of debt.

[30] I make no finding that is determinative of Mr West's status. For present purposes only I accept that there is sufficient evidence to conclude that Mr West is arguably a creditor and that absent a rejection of his proof of debt by the liquidators which he could challenge, I ought to treat him as a person who is a creditor for the purposes of this application. I also accept that the liquidators should not further delay a decision to accept or reject his proof of debt. It is not reasonable to continue to defer a decision indefinitely. The liquidators should take steps to seek what further information they require from him or others to make a decision. Then, Mr West can accept the decision or take appropriate steps to seek to challenge it.

For the purpose of granting leave, does Mr West have an arguable case that the in the respects claimed?

[31] The grounds that Mr West relies on in support of leave are essentially the grounds that Mr West relies on for substantive relief – an order for the appointment of replacement liquidators or, in the alternative, an order for supervisory directions.

[32] I therefore approach the issue of leave on the basis that if grounds are made out for substantive relief, grounds will be made out for leave.

[33] I turn then to the third issue and to whether there are grounds for intervention.

Is there a case for intervention? If so should the Court exercise its discretion to order the replacement of the liquidators or give directions to the respondents to take specified steps?

[34] Turning to the case for intervention, the main criticisms of the liquidators essentially come down to: a delay in fully investigating Ms McCarthy's conduct and the transfer of assets to her, a failure to get independent valuation of such assets, a delay in assessing the validity of proofs of debts that appear to be made by persons who have done work for Ms McCarthy or her company and not Meadowlands, and a delay in pursuing certain possible avenues of recovery or a refusal to fund and prosecute possible actions for the purpose of recovery. These criticisms, although not expressly set out in the grounds of the application are coupled with the submission that on the evidence Mr Grant appears to lack independence, due to his prior role as administrator for Meadowlands and his association with a Mr Masterton who has been a professional business advisor to Ms McCarthy in the set up of her new company.

[35] Counsel for Mr West submits that the criticisms are justified and point to the need for intervention. He argues that there is a proper case to appoint Mr Meltzer and Mr Lamacraft as replacement liquidators because Mr Grant has really acknowledged a refusal to fund meritorious actions. Additionally, he submits that if replacement liquidators are not appointed for some reason, supervisory directions should be made. Counsel for Mr West placed considerable reliance on the orders made by the Court in *Hedley v Albany.*[13] In that case Wild J made directions to the liquidators to take steps under s 261 to obtain documents and explanations from the directors of the company in liquidation and certain other steps including obtaining an independent valuation of an asset and conferring with the applicant's counsel about the economical conduct of any actions that they might bring. The liquidators were also directed to report to the Court on the outcome of the directions.

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[13] *Hedley v Albany Power Centre Ltd (in liquidation)* [2005] 2 NZLR 196.

Delay in investigating Rosemarie McCarthy's conduct and the transfer of Meadowlane's assets

[36] Essentially Mr West makes threefold allegations about the liquidators' investigation of Ms McCarthy. First, he contends that there was a wholesale transfer of the fixed assets and business of Meadowlane to Ms McCarthy which the liquidators took no steps to investigate until he moved for orders in February 2013. Additionally, they appear to have done little to obtain information from Mr Masterton and have not interviewed him. It was not until after this application was filed that the liquidators made any enquiry about collecting and valuing the fixed assets. Mr West claims that the fixed assets were in Ms McCarthy's possession for months before the liquidators did anything to recover. Secondly, Mr West contends that no valuation of the business or the fixed assets has been obtained. He claims that the liquidators ought to be requiring that Rosemarie McCarthy account for the value of the fixed assets rather than accepting a return of assets she no longer wants some two years later. A claim for their book value ought to have been made. Thirdly, Mr West takes issue with the fact that no meaningful recovery action has been taken against Rosemarie McCarthy's current account debt.

[37] Mr West's first criticism (that the liquidators took no steps to investigate the transfer of assets from Meadowlane to Ms McCarthy until he moved for orders) is not supported by the facts. The inference that the liquidators would have done little or nothing were it not for Mr West's application is not warranted. It is clear on the evidence that within six weeks of the date of liquidation, the liquidators had taken a number of steps in their investigation. In the case of Ms McCarthy, they had by 19 July 2012 made a reasonably comprehensive demand on her under s 261 for information. A series of exchanges took place between the liquidators and Ms McCarthy and on 17 October 2012 the liquidators conducted an in-depth interview of her under oath pursuant to s 261. Additionally, Mr Masterton was in attendance at the interview and available to the liquidators to answer questions, albeit not under oath. Mr Grant says that the liquidators' investigations are on-going and he points out that they do not claim that they have completed a full investigation as yet: rather, that they are undertaking systematic steps to investigate potential recoveries, some of which have already been identified. In short, he says, Mr West's

criticisms are premature and that the liquidators have not ruled out commencing a claim against Ms McCarthy. At this stage, formal demand has been made on her and a claim has commenced against Mr McCarthy who has failed to respond to all of the liquidators' requests. It is also clear from the evidence that the liquidators have been attempting to recover the missing fixed assets but that this process has been delayed for reasons beyond their control.

[38] Mr West's submission that the liquidators ought to obtain an independent valuation or recover the book value of the assets taken by Ms McCarthy rather than accepting the assets no longer wanted two years later is disputed by the liquidators. Their uncontroverted evidence is that the assets are mainly office equipment and furniture which has little value and that it is likely that the book value is significantly more than the market value. It is the liquidators' submission that as the company only went into liquidation on the 30 July 2012, the claim of two years is grossly exaggerated. It is their submission that the assets were in Ms McCarthy's possession for less than a year.

[39] The liquidators reasonably point to difficulties they have encountered in progressing their investigation quickly due to Ms McCarthy's untruths at her interview. They also point to the fact that Mr McCarthy has not yet responded to any of their requests for information, further hindering the investigation. I accept that these difficulties have been a very real and material cause of delay to the investigation. Strangely, Mr West's focus appears to be solely on one of the directors, Ms McCarthy. Though Mr West appears to have a significant role in the Australian company, his evidence is silent about what, if anything, he has done to encourage Mr McCarthy to assist the liquidators. Counsel for Mr West indicates he was without instructions on the matter

[40] I accept that is a particular concern Mr West has is that the liquidators have not commenced a recovery claim against Ms McCarthy but they have not ruled it out. They have reached the point where they have made a demand. Whether they proceed if the demand is not met is still a decision for them to make. They will need to explain their position if they decide not to pursue this recovery action, and in their

explanation they will need to cover what they have done to investigate the shortfall, if any, that Mr McCarthy may have owed to the company in respect of other assets.

[41] Overall, I find the liquidators' explanations as to their investigation in relation to Ms McCarthy to be reasonable. I am not satisfied that Mr West has established a proper basis to reject them. There is nothing in them that is not credible and nothing in the evidence as a whole that positively establishes the contrary. In arriving at this conclusion, I have not overlooked issues raised about the liquidators' independence, to which I make brief reference next.

Independence -Previous Advice

[42] Though acknowledging that Mr Grant is not a person disqualified from acting as a liquidator in terms of s 280, counsel for Mr West submits that Mr Grant gave advice to Ms McCarthy on how to further her interests by placing the company into administration, and then into liquidation. He also points to the fact that the company's name was changed on the date the administrators were appointed. He submits Mr Grant ought to be barred by reason of this.

[43] Materially, counsel for Mr West acknowledges that Mr Grant and Mr Khov are responsible and professional liquidators of considerable experience and submits that the case is not that Mr Grant actually lacks independence but that perceptions matter. Counsel touched briefly on aspects of the evidence that point to business connections Mr Grant has with Mr Masterston, who was Ms McCarthy's principal advisor in the restructuring of the company. He also referred to Mr Grant's directorship of a company in which Mr Masterton is a 50 per cent shareholder.

[44] The liquidators do not dispute that Mr Grant gave advice about the purpose and benefits of placing the company into administration to Ms McCarthy. However, Mr Grant says that there is no relationship between the liquidators and Ms McCarthy or Meadowlane that would disqualify himself and Mr Khov from acting as Meadowlane's liquidators. He acknowledges that they came to act as administrators through Mr Masterton's referral. He contends, however, that their independence is not compromised by his knowing Ms McCarthy's advisor. He points out that it is

common business practice for professionals to refer clients to one another, particularly in New Zealand given the small size of the New Zealand insolvency industry.

[45] I agree with counsel for the liquidators that the Court's approach in *Katovich v Meltzer*[14] is apposite. Duffy J dealt with a similar situation involving advice given prior to liquidation. At [37] she states that she was satisfied the degree of connection was not enough to invalidate appointment.

[46] Counsel for the liquidators submits that the extent of the connection between Mr Grant and Mr Masterton does not impeach the liquidators' independence. Taking the evidence and submissions overall, I accept this to be the case. The acknowledgement, fairly and reasonably made by counsel for Mr West, indicates that the case relating to independence is essentially about a possible perception that Mr West alone appears to hold. Additionally, I accept that Mr Grant's evidence provides an appropriate assurance of his impartiality. I am satisfied that there is insufficient substance to the perception argument to raise a real concern about the impartiality of the present liquidators.

Proofs of Debt

[47] Mr West contends that creditors of Ms McCarthy's new company are now trying to claim as creditors of Meadowlane and that their claims, which amount to a little over $50,000 ought to be rejected. [15] Counsel for Mr West submits a rigorous assessment of the proofs of debt is required as they disclose services provided after 31 March 2011 when Meadowlane ceased trading. The fact that the liquidators have not yet made a decision to accept or reject the proofs of debt is said to indicate further shortcomings on the part of the liquidators.

[48] The liquidators accept that some of the claims made in the proofs of debt may not be claims properly made on Meadowlane but they repeat that their inquiry is continuing and they are working through the proofs of debt. They explain that they

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14 *Katavich v Meltzer*, above n 3.

15 West refers to the following proof of debts: Garnett, Nash, Vodaphone, Telecom, Federal Express, Elevate CA Ltd, Vazey Child, Pone, and Philip Cochrane.

consider that they have acted within their jurisdiction to accept the proofs of debt for voting purposes pursuant to reg 20(2) of the Companies Act 1993 Liquidation Regulations 1994 and such acceptance is subject to a review later in the event that there are distributions to be made to creditors, but that it is futile to proceed until such point as there are funds to distribute. The liquidators rely in support of this approach on Lang J's statement in *CP Asset Management Ltd v Grant* that "It was always open to the liquidators to defer acceptance of the proof of debt until such point as [the debtor] supplied adequate supporting documentation."[16] Thus while noting that s 304 requires a liquidator as soon as practicable to either admit or reject a claim in whole or in part that despite s 304 of the Act,[17] the liquidators say they are entitled to defer acceptance until they have adequate documentation to verify claims.

[49] It is unnecessary to discuss each proof of debt in detail. I accept the submission of counsel for the liquidators that the salient point is that the liquidators' instructions are that they accept that further inquiry is called for in respect of a number of them and that if such enquiry will be completed.

[50] In general terms, I do not find in the liquidators' approach to the proofs of debt conduct that has been shown to be wrong or unreasonable.

IRD

[51] Counsel for Mr West submits that there is a potential claim against IRD based on doubtful default GST assessments for the period after Meadowlane had ceased to trade at the end of March 2011 and IRD's reversal of a deduction for conference expenses. The allowance of the deduction had resulted in the return to the company of overpaid provisional tax of $29,602.96 representing a terminal tax credit. Counsel argues that the deduction should stand and belongs to Meadowlane and that the liquidators ought to pursue the matter by making application under s 113 of the Tax Administration Act 1994. The net result could be that a tax credit for overpaid provisional tax of $29,602.92 will be made available to the liquidators for the benefit of creditors.

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16 *CP Asset Management Ltd v Grant* [2012] NZHC 2228 at [17].

17 Section 304 states that "The liquidator must, as soon as practicable, either admit or reject a claim in whole or in part."

[52] Counsel for Mr West submits that there is no reason why the liquidators should not make such an application. He argues that the result of such an application is likely to be that there would be a very small level of unsecured creditor claims.

[53] The liquidators claim that as in the case of the other proofs of debt, they are entitled to accept IRD's proof of debt subject to later scrutiny. Their evidence is that a s 113 application is unlikely to be successful as the IRD's power to automatically offset the debt for GST purposes pursuant to s 47 of the Goods and Services Tax Act 1985 would likely to mean the application would be a fruitless exercise.

[54] I have reservations about the adequacy of the liquidators' explanation for their approach to a s 113 application. It seems incomplete and is difficult to follow. Realistically, at the hearing counsel for the liquidators accepted that there is an opportunity to request reassessment under s 113. He agrees with counsel for Mr West that there is an opportunity to do so and advised that the liquidators are willing to consider taking that step. I do not detect in the approach of the liquidators a rigid refusal to make the application but if they do not do so, the reasons for that decision would need to be more fully articulated than they have been in the evidence so far.

[55] At this stage, I am not satisfied that the approach of the liquidators in respect of IRD has been shown to be unreasonable. I do accept some further explanation would be appropriate.

Diners

[56] Counsel for Mr West also raised issues about the liquidators' approach to payments made by the company to Diners and whether the transactions involved ought to be treated as voidable transactions. I accept, as counsel for the liquidators submits, that the criticism of the liquidators is premature and that the issue at this stage remains essentially one for the liquidators.

Funding

[57] The central submissions counsel for Mr West makes about funding are twofold. The first is that the liquidators appear to have identified recovery options, but that Mr Grant has only taken recovery action against Mr McCarthy notwithstanding the relative straightforward nature of the remaining possible actions against Ms McCarthy and others. He submits that the taking of action by the liquidators may result in there being close to a full return to creditors and there being a surplus available for payment to the contributories. He also points to Mr West's concern that if Mr McCarthy is unable to meet a judgment, any judgment that the liquidators obtain against him, nothing would be recovered for the benefit of creditors. The second submission is that Mr Grant's evidence that he "cannot initiate multiple proceedings as this is a company with limited assets out of which to fund litigation" is telling. Counsel submits that Mr Grant's statement demonstrates a decision not to pursue actions and to ignore the legitimate interests of creditors to ensure that funds are recovered to satisfy bona fide claims. He says that the appropriate course is therefore for Mr Grant and Mr Khov to stand aside and so as to enable those actions identified as being meritorious to be pursued.

[58] I agree with counsel for the liquidators' that these submissions read too much into Mr Grant's statement. The liquidators make plain that at no point have they refused to investigate due to a lack of funding but rather, that the investigations are ongoing and they are self-funding certain actions. They are entitled to complete their assessment of what recovery action is warranted on a cost benefit basis, before prejudice could be said to result to Mr West or other creditors.[18] In these circumstances it is not unreasonable to expect Mr West to allow the liquidators to complete their investigation and to finalise their position with respect to recovery action. It is premature at this stage to intervene. These remain matters for the liquidators' judgment as counsel for the liquidators submits.

Conclusion on Mr West's case for intervention

[59] As will be apparent from my assessment of Mr West's various criticisms, I cannot be satisfied on the evidence before me that a case has been made out for

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[18] *CP Asset Management Ltd v Grant* HC Auckland CIV 2012-404-2498, 30 August 2012 at [44] – [45].

replacement liquidators at this stage. There is an additional reason. Mr West's evidence contains nothing in the way of particulars to show that his offer to fund the replacement liquidators to undertake a proper investigation and to take recovery action has substance. There is no indication from Mr Meltzer and Mr Lamacraft of the funding that Mr West should budget for and no evidence from Mr West to show that he has access to funds to meet such a budget. It is self-evident that where a creditor seeks replacement liquidators and relies on an offer to fund recovery action, the offer to fund further investigation and recovery actions must be real and meaningful. There must be some assessment of what steps are proposed, the likely cost, and the extent to which funding for those steps is available and will be committed to the process. Materially, Mr West does not address these issues and provides no details whatsoever of the funding he proposes.

[60] In these circumstances, there is no credible factual basis on which the Court may responsibly appoint as replacement liquidators Mr Meltzer and Mr Lamacraft. Had there been a case for intervention by way of replacement of the current liquidators, and I do not accept there is, then the proper course would have been to appoint the Official Assignee.[19]

[61] I turn next to whether there is, nevertheless, a case for some intervention by way of supervisory directions.

[62] Counsel for Mr West submits that the approach in *Hedley*[20] is more interventionist than the approach the Court adopted in *Levin*[21] and that the approach in *Levin* should not be followed. I accept that each case turns on its own facts and that where liquidators have failed in their duties or acted unreasonably, what is an appropriate form of intervention is a matter of discretion. In this case, however, I accept that the liquidators should be permitted to complete their investigation and be permitted to reach a final decision on those actions that they will pursue and those that they will not and that Court intervention in the form of the extensive directions that counsel for Mr West seeks is not required. It has not been shown that the

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19 Counsel for the liquidators advised at the hearing that assuming a replacement liquidator is justified, the liquidators' preference would be for the Court to appoint the Official Assignee.

20 *Hedley v Albany Power Centre Ltd (in liquidation)* [2005] 2 NZLR 196.

21 *Levin v Lawrence* HC Auckland CIV-2012-404-956, 25 June 2012

liquidators have acted unreasonably in any overall sense. The circumstances are not such that they have completed their investigation or rejected taking meritorious claims.

[63] I see some basis, however, for a direction that the liquidators resolve whether or not they will accept or reject Mr West's claim and for a requirement that the liquidators give further explanation of some matters by way of a report to the Court within a reasonable time. I propose therefore to impose a requirement that the liquidators report to the Court on the following matters:

(a) What further steps they intend to take with a view to determining whether or not to accept or reject Mr West's claim to be a creditor, and when they anticipate making that decision.

(b) In clear terms what (having reviewed the case for a s 113 claim as outlined by counsel for Mr West) are the costs and benefits of making such a claim.

(c) What further steps do they propose to take to complete their investigation into the transfer of non-fixed assets to both directors and what consequential action do they anticipate to recover any shortfall and to recover the current account debts?

[64] The liquidators are to file the report for referral to me. Their counsel is to file and serve a memorandum not later than 6 December 2013 setting out the time that they consider reasonable for the purpose of filing the report.

[65] I order accordingly.

Result

[66] For the reasons discussed, I am satisfied Mr West should have leave to make this application. I am not satisfied that Mr West has not laid a sufficient foundation for the substantive orders that he seeks by way of replacement liquidators or extensive directions. I accept that there is a case for requiring additional explanation

from the liquidators on some matters. I decline to make orders under s 284 either by way of replacement orders or supervisory orders in the form of directions in respect of the conduct of the liquidation, save to the limited extent set out above.

Leave

[67] Given the nature of the orders, I issue this judgment as an interim judgment. I give leave to either side to seek that the matter be brought back before the Court once the liquidators have filed their report.

Costs

[68] At this stage, it is appropriate that costs be reserved.

H Sargisson
Associate Judge