IN THE COURT OF APPEAL OF NEW ZEALAND

CA67/2013
[2013] NZCA 452

BETWEEN	DAMIEN GRANT AND STEVEN KHOV AS FORMER LIQUIDATORS OF NZ PROPERTIES HOLDING LIMITED (IN LIQUIDATION) Appellants
AND	CP ASSET MANAGEMENT LIMITED First Respondent
	ASIA PACIFIC HOTEL INVESTMENTS LIMITED Second Respondent
	CP RETAIL HOLDINGS LIMITED Third Respondent
	RAISONS PACIFIC INVESTMENTS LIMITED Fourth Respondent
	SOUTH ISLAND HOTEL INVESTMENTS LIMITED Fifth Respondents
	YEIL C & M LIMITED Sixth Respondents
	BRIAN AND BRIDGIT LAWRENCE Seventh Respondents

Hearing:	22 August 2013
Court:	Ellen France, Wild and Miller JJ
Counsel:	K P Sullivan and B J Norling for Appellants B P Keene QC and J F Anderson for First to Sixth Respondents G A Keene for Seventh Respondents
Judgment:	30 September 2013 at 11 am

JUDGMENT OF THE COURT

A The fresh evidence filed is admitted, and the appeal is allowed. The creditors' resolution of 15 August 2012 is set aside. Messrs Heath and Lamacraft are removed, and the appellants are reinstated, as liquidators of NZ Properties Holding Ltd.

B The first to sixth respondents must pay each of the appellants and the seventh respondents costs on a standard appeal on a band A basis and usual disbursements. The award for the appellants includes provision for second counsel.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Brian and Bridgit Lawrence, the seventh respondents, won a large judgment against NZ Properties Holding Ltd ("NZ Properties") and Capital Hospitality Holdings Ltd ("Capital HH") in proceedings that were ultimately undefended. When the judgment debt was not paid, the High Court put the companies into liquidation on the Lawrences' application and appointed the appellants, Damien Grant and Steven Khov, as liquidators.

[2] Interests associated with the Pandey family, who controlled NZ Properties, lodged proofs of debt in the liquidation of that company and passed, over the Lawrences' opposition, a creditors' resolution which would replace Messrs Grant and Khov with new liquidators, Aaron Heath and Michael Lamacraft.

[3] The High Court declined to set the resolution aside under s 245A of the Companies Act 1993 and exercised its jurisdiction under s 243(7) to replace Messrs Grant and Knov as liquidators of NZ Properties.[1]

[4] The Lawrences, the seventh respondents, actively support the appeal. Opposing it are the related creditors which supported the resolution, the first to sixth respondents.

The narrative

[5] NZ Properties was formerly named CP Holdings Limited after its director, Charles Pandey. It was one of a group of companies controlled and managed by Mr Pandey, his wife Jaswanti, and his son Prakash.[2]

[6] In 2003 the company leased a Rotorua motel to the Lawrences. Evidence suggests that the Pandeys knew the plumbing was seriously defective but did not tell the Lawrences, who suffered a series of pipe failures and floods which caused substantial losses and precluded them from selling their interest in the motel. Their tenure ended when their business failed in March 2008.

[7] The Pandeys appear to have taken an uncompromising attitude to the Lawrences' problems. Litigation began in 2006, the Lawrences suing CP Holdings and Capital HH, to which CP Holdings had transferred ownership of the motel.

[8] It appears that the defendants admitted liability in 2007, but damages remained to be fixed and the proceeding was much delayed. Shortly before it reached trial in November 2011 the defendants capitulated. A formal proof hearing was held before Woodhouse J. On 18 December 2011 the Lawrences obtained judgment for $1,040,662 against NZ Properties and $803,808 against Capital HH.[3]

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1 *Grant & Khov v CP Asset Management Ltd & Ors* [2012] NZHC 3488 [High Court judgment].

2 Charles and Jaswanti Pandey each held 50 per cent of the shares. There is evidence that Prakash Pandey was closely involved. For our purposes it is not generally necessary to distinguish among the Pandeys.

3 *Lawrence Riverside Ltd v CP Holdings Ltd* HC Auckland CIV-2006-404-4739, 15 December 2011.

[9] In the meantime, CP Holdings changed its name to NZ Properties on 9 November 2011. Between 2006 and 2011 the company also transferred its real property to related entities. Properties were transferred in June 2006 to Capital HH, in June 2007 to CP Investments Ltd, and in July 2011 to Northbridge Trustee Ltd. The appellants say that all of these entities are related. Capital HH also transferred properties, including the motel, in December 2010 and May 2011; the transferee, Risecorp Investment Trustee Ltd, is also said to be a related entity. It appears that NZ Properties and Capital HH are now assetless.

[10] The Court appointed Messrs Grant and Khov liquidators of NZ Properties and Capital HH on 23 March 2012. Counsel for the Lawrences, Mr Keene, told us that he suggested the two men, with whom the Lawrences had no prior relationship. They are insolvency practitioners, but not chartered accountants.

[11] On 5 April 2012 the first respondent, CP Asset Management Limited, lodged a proof of debt in the liquidation of NZ Properties and requested that a creditors' meeting be held for the purpose of replacing the appellants as liquidators of that company. It appears that the reason why no similar request was made for Capital HH, of which the appellants remain liquidators, is that the Pandeys deny having control of it.

[12] The appellants initially rejected the proof of debt for insufficiency of evidence. They maintained that stance after CP Asset Management supplied some supporting information, causing it to apply under s 284 of the Companies Act for an order that the proof of debt be admitted and a direction that the appellants hold a creditors' meeting.

[13] In May and June 2012 the appellants sent a series of demands for information and requests for examination to the Pandeys and entities associated with them. The demands were extensive. The recipients appear to have complied with them only in small part, which caused the appellants to move under s 261 for orders that they comply. The application is still on foot; it remains to be heard.

[14] The appellants eventually agreed to admit the proof lodged by CP Asset Management for voting purposes at the creditors' meeting, which was held on 15 August 2012. Two days before the meeting proofs were lodged by the second to sixth respondents, of whom only the last, Yeil C & M Ltd, is said to be independent of the Pandeys. Together the proofs of the related creditors claimed $2,032,078.77. Mr Grant, who chaired the meeting, admitted the proofs for voting purposes. The solicitor for the Pandey interests, Mr Hucker, held proxies for the first to sixth respondents, whose votes prevailed.

[15] A firm called Hussey & Associates Ltd lodged a proof claiming a debt of $20,761. It did not participate in the creditors' meeting, and it has taken no part in the litigation.

[16] We need not discuss the proofs in detail. All but the Hussey & Associates Ltd proof call for further inquiry. For example, the proof by CP Asset Management, for $199,654.08, includes several years' salary for the Chief Financial Officer of the CP group of companies. It is not clear on the evidence before us why NZ Properties should be liable for his salary. The proofs from Asia Hotel Investment Ltd, CP Retail Holdings Ltd, and Raisons Pacific Investment Ltd include aged debts, some of them potentially unrecoverable because they were incurred more than six years earlier.

[17] There are also questions about the proof filed for Yeil, which is not a related party. It concerned a sum of $250,000.00 for professional services for a property development project, but the supporting document, a scope of works dated 21 October 2010, stated that payment was contingent on the project not going ahead or being awarded to another contractor. A letter from Yeil's solicitor suggests that it may have gone ahead with Yeil's assistance. Nothing further is known about the development.

[18] On 24 August 2012 the appellants moved for orders setting aside the creditors' resolution and, in the alternative, appointing Messrs Heath and Lamacraft as replacement liquidators.

[19] The first application was brought under s 245A, which authorises the High Court to set a creditors' resolution aside where it was passed by the votes of creditors related to the company in liquidation and its passage is contrary to the interests of creditors, or a class of them, as a whole, and it is reasonably likely to prejudice the interests of creditors who voted against it having regard to a) the benefits accruing to the related creditors from the resolution, b) the nature of the relationship between the related creditors and the company in liquidation, and c) any other matter. The section is set out in full at [38] below.

[20] The second application was brought under s 243(7), which allows the Court to replace an existing liquidator, if it thinks fit, on an application made after a meeting of creditors resolves that such application should be made. The legislation prescribes that the existing liquidator must bring the application.

[21] After CP Asset Management's proof was admitted for voting purposes it abandoned its now-redundant application for directions. Both sides sought costs, which were awarded to CP Asset Management. In a judgment delivered on the papers on 30 August,[4] Lang J reasoned that while they reasonably sought verification, the appellants had rejected the proof without giving CP Asset Management an adequate opportunity to respond, then refused to reconsider their decision when they received some supporting information, leaving CP Asset Management no alternative but to bring the application. In the result, CP Asset Management was the successful party. It was refused an uplift on scale.

The High Court hearing

[22] The appellants' applications under ss 245A and s 243(7) were heard in the High Court at Auckland before Venning J on 6 December 2012, Mr Hucker appearing as counsel for the first to sixth respondents. Judgment was delivered on 18 December.

[23] The Judge dealt first with the application under s 245A. It was common ground that the first to fifth respondents are related creditors of NZ Properties for

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4 *CP Asset Management Ltd v Grant* HC Auckland [2012] NZHC 2228.

purposes of s 245A, and that the resolution would have failed had their votes been disregarded. The appellants argued that their replacement would disadvantage the independent creditors for two reasons. First, the replacement liquidators would have to start from scratch, which would increase costs; Mr Grant had spent a significant amount of time on the liquidation already, without taking any fees. Second, if the preliminary investigation revealed that recovery actions were justified, the appellants would take proceedings without seeking funding from creditors. Mr Grant had said that:

> At this stage I am willing to continue to support any proceedings without seeking funding from creditors. If I can identify any recovery actions I would pursue recovery action. However, I do reserve my right to not initiate proceedings if I consider the litigation risk is too high given that NZ Properties is an assetless company.

[24] The first to fifth respondents accused the appellants of acting as debt collectors for the Lawrences. They criticised Mr Grant for acting too aggressively and making oppressive demands for documents. For the first respondent, Prakash Pandey deposed that the objective was an investigation conducted by properly qualified liquidators who understood their responsibilities and would act independently of the Lawrences. He attached media commentary by Mr Grant, who has something of a public profile as a liquidator.

[25] Venning J was assured that the first to fifth respondents had agreed to offer the new liquidators sufficient funding for an appropriate investigation. The amount offered was $25,000. The Judge accordingly was not satisfied that the resolution was detrimental to the creditors generally or to the Lawrences, since both sets of liquidators would investigate possible recovery actions. That being so, he concluded that the majority ought to prevail and refused to set the resolution aside. We examine his reasons later.

[26] The Judge next turned to the application under s 243(7). He followed *Jacobsen Creative Surfaces Ltd v Smiths City Ltd*, in which Hansen J identified the relevant considerations as independence, resources, competence and experience of the liquidator, the liquidator's familiarity with the company, the speed with which the

liquidation can be carried out, and the wishes of the creditors and contributories.[5] Most of these considerations he found neutral. But of the creditors, only the Lawrences supported retention. The Judge was also disposed to think that the appellants' confrontational approach may have contributed to delay. He discounted a suggestion that they enjoyed an advantage because they remain liquidators of Capital HH, finding it too soon to make that assessment. The appellants were accordingly replaced.

[27] The Judge subsequently awarded the respondents costs of $8,955, reasoning that while liquidators are not ordinarily liable for costs, the appellants had not taken a neutral approach; rather, they moved to set the resolution aside and vigorously resisted their replacement.[6] He declined the respondents an uplift.

Developments since the High Court decision

[28] The appellants and the first to sixth respondents both sought to adduce fresh evidence on appeal. We found it relevant, and it generally concerned events since the High Court judgment. We decided to admit all of it, while ignoring those parts of the evidence for the appellants that are inadmissible hearsay.

[29] The evidence included a six-monthly report of the new liquidators, dated 25 March 2013. It recorded that they had been put in funds for a "preliminary investigation", and that Charles Pandey had supplied some information and documents on request. They did not yet have all of the information requested, but they expected that he would supply it.

[30] With respect to claims against the company, the new liquidators noted that the appellants had not obtained sufficient accounting information to verify creditors' claims, and explained that they intend to do no work on agreeing claims until sufficient funds are available to pay a dividend.

[31] The new liquidators recognised that the appellants had done a considerable amount of work. The appellants co-operated with the new liquidators, who relied

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5 *Jacobsen Creative Surfaces Ltd v Smiths City Ltd* [1994] 1 NZLR 128 (HC).
6 *Grant & Khov v CP Asset Management Ltd & Ors* [2013] NZHC 403.

upon a helpful summary of their work and followed their suggested lines of inquiry. The report referred to three property dispositions that the appellants had identified as suspicious. The new liquidators found these transactions beyond reach, for they happened outside the voidable disposition periods in s 297 (two years) and s 298 (three years) of the Companies Act. It appears from the report that the new liquidators have not investigated the dispositions that NZ Properties did make during those periods.

[32] With respect to directors, the new liquidators have found that Prakash Pandey was likely a de facto director of the company, although further assessment may be needed to confirm it. They believe that Jaswanti Pandey was not a de facto director; she signed two documents ostensibly as a director, but apparently did so in error. It does not appear from the report that the new liquidators have explored potential claims against directors.

[33] The new liquidators intend to finalise their report once they have the remaining information that they have sought from Charles Pandey. It does not appear that they propose to extend the scope or depth of the investigation. They probably lack the necessary funds to do so. Of the $25,000 paid for the investigation, $16,387.78 had been spent as at 23 March 2013.

Section 245A

[34] Counsel agreed that the appeal turns on the decision under s 245A. Mr Keene QC realistically acknowledged that if the resolution is set aside the decision to replace the liquidators must follow. We concur, so will focus on s 245A.

[35] The section is found in pt 16 of the Act, which concerns the process of liquidation. Liquidation having commenced, as a general rule the appointed liquidator must call a meeting of the company's creditors. Where the Court appointed the liquidator, as in this case, the meeting must consider whether to confirm the appointment or ask the Court for a replacement.[7] The meeting must also

[7] Companies Act, s 243(1)(b).

decide whether to pass a resolution recording creditors' views, which the liquidator must then take into account.[8]

[36] Section 245A applies generally where related creditors determine a vote at a creditors' meeting. Such meetings may address a variety of matters. As just noted, creditors may express views, to which the liquidator must have regard. They may also by resolution appoint a liquidation committee, which has powers of oversight[9] and may invoke the Court's supervisory jurisdiction under s 284.

[37] The section is derived from s 600A of the corresponding Australian legislation, the Corporations Act 2001. Parliament added it to the Act in 2006 via the Insolvency Law Reform Bill 2005, the explanatory note to which stated that the Bill aimed to increase liquidators' accountability to creditors and "reduce the scope for company shareholders and related parties to defeat the interests of creditors at creditors' meetings" by allowing the Court to intervene.[10]

[38] The section provides:

> **245A Power of Court where outcome of voting at meeting of creditors determined by related entity**
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> (1) This section applies if the Court is satisfied that—
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> (a) a resolution at a meeting of creditors was passed, defeated, or required to be decided by a casting vote; and
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> (b) the resolution would not have been passed, defeated, or required to be decided by a casting vote if the vote or votes cast by a particular related creditor or particular related creditors were disregarded; and
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> (c) the passing of the resolution, or the failure to pass it,—
>
> (i) is contrary to the interests of the creditors, or a class of creditors, as a whole; and
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> (ii) has prejudiced, or is reasonably likely to prejudice, the interest of the creditor who voted against the resolution, or for it, as the case may be, to an extent that is unreasonable having regard to—

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8 Sections 243(1)(c) and 258(1)(b).

9 Section 315.

10 Insolvency Law Reform Bill 2005 (14-1) (explanatory note) at 5.

(A) the benefits accruing to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the resolution; and

(B) the nature of the relationship between the related creditor and the company, or between the related creditors and the company; and

(C) any other related matter.

(2) The Court may, on the application of the liquidator or a creditor,—

(a) order that the resolution be set aside:

(b) order that a new meeting be held to consider and vote on the resolution:

(c) order that a specified related creditor or creditors must not vote on the resolution or on a resolution to vary or amend it:

(d) make any other orders that the Court thinks necessary.

(3) In this section,—

promoter has the same meaning as in section 2(1) of the Securities Act 1978

related creditor means a creditor who is a related entity of the company in liquidation

related entity means in relation to the company in liquidation,—

(a) a promoter; or

(b) a relative or spouse of a promoter; or

(c) a relative of a spouse of a promoter; or

(d) a director or shareholder; or

(e) a relative or spouse of a director or shareholder; or

(f) a relative of a spouse of a director or shareholder; or

(g) a related company; or

(h) a beneficiary under a trust of which the company in liquidation is or has at any time been a trustee; or

(i) a relative or spouse of that beneficiary; or

(j) a relative of a spouse of that beneficiary; or

(k) a company one of whose directors is also a director of the company in liquidation; or

(l) a trustee of a trust under which a person (A) is a beneficiary, if A is a related entity of the company in liquidation under this subsection.

The threshold requirements in ss 245A(1)(a) and (b)

[39] The Court must first be satisfied that a resolution was passed, defeated or decided by casting vote at a meeting, and that the result would have differed had the votes of identified related creditors been disregarded.

[40] Creditor means a person entitled to make a claim for an unsecured debt or liability of the company in liquidation.[11] The section defines a related creditor as a creditor who is a related entity, which term is in turn defined to include, for example, the company's directors and their relatives.

[41] To vote as of right, a person must have made a claim under the Act and had it admitted wholly or in part either for payment or for voting.[12] The chairperson of the meeting also has a discretion to allow a claim for voting purposes, and must provisionally exercise it in favour of the creditor if in doubt.[13] This last point sufficiently disposes of a tentative suggestion in argument that, having admitted the related creditor proofs for voting purposes, Mr Grant cannot now question them.

The interests of creditors, or a class of them

[42] The next requirement is that the outcome of the vote must be contrary to the interests of the creditors as a whole, or a class of them.[14]

[43] The legislation leaves it to the Court to define a class of creditors if it thinks fit. In an insolvency context the Court normally exercises this jurisdiction to prevent injustice that may occur when the interests of some creditors differ materially from

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11 Sections 245A, 240(1), 303.

12 Companies Act 1993 Liquidation Regulations 1994, reg 19.

13 Companies Act 1993 Liquidation Regulations, reg 20.

14 In this respect the section differs from s 600A of the Corporations Act 2001 (Cth), the corresponding limb of which has been interpreted as meaning that the relevant interests are those of the creditors as a whole: *Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (Subject to Deed of Company Arrangement) (No 2)* [2011] FCA 178, (2011) 82 ACSR 300.

those of others.[15] A class is "confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".[16] The legislation does not presume that related creditors form a separate class. It recognises rather that their interests need not differ from those of other unsecured creditors, who depend on liquidation processes to recover as much of the money owed to them as is reasonably possible.

Balancing prejudice to the minority against interests of the related party creditors

[44] The Court must next consider whether the resolution has prejudiced, or is reasonably likely to prejudice, the interests of the minority creditor who voted against it to an extent that is unreasonable having regard to a) the benefits accruing to the related creditors, or some of them, from the resolution, b) the nature of the relationship between the related creditors and the company in liquidation, and c) any other matter.[17] This element contemplates that although the creditors may form part of the same class the resolution may benefit some of them, the related creditors, while harming others. If the preferences of the minority are to prevail, the Court must find the prejudice unreasonable having regard to the benefits to the related creditors and their relationship to the company in liquidation.

[45] If satisfied of all of the matters in s 245A(1), the Court may set the resolution aside, order that a new meeting been held to reconsider the resolution, or make any other orders that it thinks necessary.

The decision in this case

[46] It is common ground that the threshold requirements have been satisfied. We accordingly focus on the s 245A(1)(c) factors.

Is the resolution contrary to the interests of creditors, or a class of them?

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15 *Wilder Transport Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,120 (HC).

16 *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 (CA) at 583.

17 Section 245A also differs from s 600A in that this requirement is additional, not alternative, to the requirement that the decision be contrary to the interests of creditors.

[47] In his reasons Venning J implicitly treated all unsecured creditors as a single class. Mr Sullivan did not suggest on appeal that he was wrong to do so. The evidence does not identify any respect in which the related creditors' interests differ from the Lawrences' – by way of example, none of them is said to have received the company's assets – and the possibility that they voted not in their own interests but to protect others can be addressed at the next stage of the inquiry.

[48] The creditors of a failed company are ordinarily entitled to have its affairs thoroughly investigated to learn whether it has any assets, or the liquidator any rights of recourse, that might repay them.[18] Where a creditor, or in this case the liquidator, is prepared to fund such investigation, the Court will not lightly deny them the opportunity that it represents.[19]

[49] The respondents did not oppose any investigation. Rather, as noted above, Prakash Pandey deposed that they want it done by liquidators who are independent, properly qualified and responsible, qualities in which Mr Pandey finds the appellants wanting. Venning J did not share that opinion. He found the appellants sufficiently independent and competent. That conclusion was not challenged before us.

[50] Having disposed of the principal rationale advanced for the resolution, the Judge identified the most decisive consideration as the appellants' promise to continue the investigation and pursue action without requiring funding from creditors. By contrast, the new liquidators would undertake a limited investigation of the company's affairs, and if possible areas of recovery were identified and legal advice confirmed a positive cost-benefit analysis, the company's creditors or a third party funder would be asked for their views on funding.

[51] Venning J accepted that at a very general level it could be contrary to the interests of creditors, particularly non-related creditors, if a potential recovery action having some merit was not pursued, but such was by no means the "necessary or certain" result of the resolution.[20] He accepted a submission that the benefits of the

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18 *Re Ocean Shipping Ltd* HC Auckland M348/96 16 July 1996; *Katavich v Meltzer* [2011] NZCCLR 8 (HC) at [47].

19 *Re Ocean Shipping Ltd* at 2–3.

20 High Court judgment, above n 1, at [32].

investigation for creditors were speculative, and he pointed to a series of prerequisites before prejudice would result: the new liquidators must be appointed by the Court; they must identify a potential recovery action warranted on a cost-benefit basis; they must fail to secure creditor or third party funding to pursue such action; and finally, they must decide not to pursue the action without funding.

[52] When dealing with the application under s 243(7), the Judge reasoned that because the first to fifth respondents had agreed to fund the new liquidators in the initial investigation, both sets of liquidators had the appropriate resources to discharge their obligations, subject to funding for any viable recovery action.[21] It was (and is) common ground that Messrs Heath and Lamacraft are respected chartered accountants and experienced liquidators. He suggested that the Lawrences might get leave to bring an action personally against directors and managers under s 301, and legal aid might be available to them.

[53] We do not know whether a thorough investigation will disclose viable avenues of recovery from transferees or company officers, but we do not consider its benefits to creditors speculative. Creditors are entitled to an investigation, which must be considered beneficial in itself where they can point to something that merits it. In this case the narrative discloses a possibility that the Pandeys knew the litigation would crystallise a large liability to the Lawrences. In light of that, the disposition of assets to related entities invites inquiry. On the record before us, the Judge's attention does not seem to have been drawn to the dispositions which we have mentioned at [9] above.

[54] As matters stand, the creditors may not get an adequate investigation. Venning J was given to understand that the $25,000 made available to the new liquidators would suffice, but the updating evidence shows that most of it has been spent on a preliminary investigation, apparently without examining dispositions within the preference periods, or reviewing the company's trading history for any breach of directors' duties, or deciding whether Prakash Pandey was a de facto director. The appellants' application for orders under s 261 has been left in abeyance.

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[21] At [44]–[45].

[55] Recognising this difficulty, Mr Keene QC intimated that his clients were willing to make more money available to the new liquidators. We did not ask him how much they had in mind. The offer highlights the incongruity of allowing interests controlled by the subjects of the investigation to dictate its funding and hence its scope and depth.

[56] Mr Keene QC emphasised the appellants' confrontational approach, which he sought to illustrate by arguing that they used their s 261 powers unreasonably by issuing more, and more extensive, demands for information than necessary. Counsel submitted that this behaviour caused delay. As noted earlier, Venning J formed an impression that the appellants contributed to delay through their confrontational approach.

[57] Manifestly, it is contrary to the interests of creditors to have the fruits of a liquidation squandered through a liquidator's needlessly aggressive behaviour. However, this company presently has no fruits to share, and evidently never will unless recovery actions succeed. The investigation which must precede any such actions depends on information from the Pandey interests. There is no dispute about that. The appellants' demands for information were extensive, but we are in no position to say that they were unreasonable or that the appellants, rather than the Pandeys, are to be blamed for any resulting delays, which cannot have been extensive. There may be substance in Mr Grant's complaint that he was not even given the company's books and records, to which he was plainly entitled. As noted above, Venning J did not accept that the appellants lacked independence or competence. Nor did he assign blame for conflict between them and the Pandeys. For our part, we neither endorse nor criticise the appellants' conduct. The High Court can determine the proper scope of disclosure and the causes of any delay when the s 261 application is heard, and its supervisory jurisdiction under s 284 is available to discipline the appellants should that be necessary.

[58] As the Judge recognised, recovery for the creditors also requires funding for any recovery actions that the investigation may disclose. That is so because the company is assetless. There is a significant difference, as we see it, between Mr Grant's offer to fund such actions and the possibility that an external litigation

funder will agree do so. The record contains no evidence about the availability of such funding, or its price. It may not extend to the liquidators' own costs. Nor are we prepared to assume that a legally aided claim by the Lawrences is a viable alternative. Mr Keene QC did not argue that they could secure legal aid to fund voidable preference proceedings brought by the liquidators, while for the Lawrences Mr Keene did contend that legal aid would not be available for a creditor's action brought by leave under s 301.

[59] We conclude that the resolution was contrary to the interests of unsecured creditors.

Balancing prejudice to Lawrences and benefits to related creditors

[60] Mr Keene QC stressed that the Court must be satisfied that the resolution has caused the Lawrences prejudice, or is reasonably likely to do so, and characterised as speculative any suggestion that a viable avenue of recovery will be disclosed.

[61] Prejudice to the Lawrences is largely synonymous with that to unsecured creditors generally. We have found the resolution contrary to the interests of unsecured creditors, rejecting the argument that an investigation is not beneficial in itself. The Lawrences have a close interest in the investigation: they are NZ Properties' largest external creditor by a large measure; their debt is settled, while those claimed by the related creditors are not; and their only prospects of recovery lie in a liquidator's recovery action. We note too that the new liquidators do not intend to investigate the proofs filed by the related creditors, who will continue to prevail over the Lawrences at any meetings of creditors called, for example, to offer the liquidators guidance or to set up a liquidation committee.

[62] For these reasons, we conclude that the resolution is causing prejudice to the Lawrences and will continue to do so.

[63] We need not examine benefits of the resolution to the related creditors, because the only benefits identified are those that they share with all unsecured creditors, whose interests as a class we have already examined. (We note in passing

that in the High Court counsel took a different approach, debating whether the related parties might benefit in some way from the new liquidators' failure to recover assets disposed of by NZ Properties. The Judge found that any such benefits to the related creditors were speculative.)

[64] The Court must also consider the nature of the relationship between the first to fifth respondents and the company in liquidation. The Pandeys controlled all of them. For the Lawrences, Mr Keene submitted that Venning J paid insufficient attention to this relationship. The Judge did not expressly refer to it in his reasons on this part of the case. The record invites the inference that the Pandeys caused the related creditors to file their proofs and vote with the objective of having the appellants removed. It is not likely that the Pandeys, whose interests must be the principal target of any recovery action, acted in the hope that such action would bear fruit for unsecured creditors generally. We accept the general proposition that related creditors might reasonably act to prevent assets of the company in liquidation being wasted by its liquidator, but this company has nothing to preserve. Finally, this is not a case in which the majority in number or value substantially comprised unrelated creditors, with the related creditors merely tipping the balance. Only Hussey & Associates Ltd and Yeil are said to be independent of the Pandeys. These considerations lead us, respectfully differing from the Judge, to reduce substantially the weight that would be attached in normal circumstances to the views of a majority of unsecured creditors.

[65] Mr Keene QC nonetheless argued that prejudice to the Lawrences from the resolution is not unreasonable, emphasising that the investigation will be carried out by the present liquidators, who cannot be compelled to take proceedings, and that there has been no alteration to any substantive right of the Lawrences, including their right to participate in the liquidation.

[66] We reject these submissions. We have already doubted whether the new liquidators can complete the adequate investigation which Venning J was promised, and the funding of recovery actions cannot be ignored. So far as the Lawrences are concerned, the question is not whether they will lose their substantive rights but whether those rights will have any value. We find that prejudice to them from the

resolution is both significant and unreasonable, having regard to the absence of benefit to related creditors and the close relationship of those creditors to the company in liquidation.

Decision

[67] The appeal is allowed. The creditors' resolution of 15 August 2012 is set aside. Messrs Heath and Lamacraft are removed, and the appellants are reinstated, as liquidators of NZ Properties Holding Ltd.

[68] Costs should follow the event. The first to sixth respondents must pay each of the appellants and the seventh respondents, who are legally aided, costs on a standard appeal on a band A basis and usual disbursements. The award for the appellants includes provision for second counsel.

Solicitors:
Waterstone Insolvency, Auckland for Appellant
Hucker & Associates, Auckland for First to Fifth Respondents
Pidgeon Law, Auckland for Sixth and Seventh Respondents