IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-2091
[2022] NZHC 783

UNDER	Rule 5.49 of the High Court Rules 2016
IN THE MATTER OF	ORMISTON RISE LIMITED (In Receivership and In Liquidation)
BETWEEN	DAMIEN MITCHELL GRANT as liquidator of ORMISTON RISE LIMITED (IN RECEIVERSHIP and IN LIQUIDATION) Applicant
AND	ARENA ALCEON NZ CREDIT PARTNERS, LLC Respondent

Hearing: 24 March 2022

Appearances: Adam Botterill and Kelly Cocks for the Applicant
James Caird and Sophie Hawksworth for the Respondent

Judgment: 14 April 2022

JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR

This judgment was delivered by me on ***14 April 2022*** *at* ***11:00am***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Waterstone Insolvency (A Botterill/K Cocks), Auckland, for the Applicant
Simpson Grierson (J C Caird/S L Hawksworth), Auckland, for the Respondent

Introduction

[1] Mr Damien Grant is the liquidator of Ormiston Rise Ltd (**ORL**), a company in receivership and liquidation. He has brought a proceeding by originating application under s 266 of the Companies Act 1993 seeking orders requiring the respondent to produce books, records and documents of ORL and to produce information about the business, accounts or affairs of ORL.

[2] The respondent is Arena Alceon NZ Credit Partners LLC (**Arena**), a company incorporated in Delaware, United States of America. Arena is a shareholder of ORL and was also the main lender to a development owned by ORL. It applies to dismiss Mr Grant's proceeding under r 5.49(3) of the High Court Rules 2016, arguing the originating application was not validly served and that the liquidator's powers under ss 261 and 266 of the Companies Act do not have extraterritorial reach.

Background

[3] ORL was incorporated on 8 July 2019 to purchase and develop land at 125C Murphys Road, Flat Bush (the **Flat Bush property**). Arena is an institutional asset manager and limited liability company. It has made a number of investments in New Zealand, including through lending arrangements with New Zealand developers to fund residential property developments.

[4] On 18 February 2020, ORL and Arena entered into facility agreements to provide to ORL a maximum funding of $340,000,000 for the development project of more than 660 units and associated works at the Flat Bush property. Arena took security over all the assets of ORL and a first registered mortgage over the Flat Bush property. Arena is also a minority shareholder in ORL, with a 19.5 per cent shareholding.

[5] On 7 May 2021, ORL was placed into receivership. Neale Jackson and Grant Graham were appointed as joint receivers. A few months later, Mr Grant was appointed administrator of ORL by board resolution. He soon wrote to Arena

requesting, pursuant to ss 239AG and 261 of the Companies Act, that it provide books, records and documents pertaining to ORL. Specifically sought were:

(a) all correspondence (including emails) between Arena and ORL;

(b) instructions and advice;

(c) pre-loan originating correspondence and negotiations;

(d) loan drawdown details; and

(e) evidence and notices of default.

[6] Arena declined to provide any books, records and documents, saying the relevant Companies Act provisions did not have extraterritorial reach. In any event, it denies it holds any such material.

[7] ORL was placed into liquidation by way of creditors' resolution passed at the watershed meeting on 29 September 2021. A month later, Mr Grant purported to serve his originating application on Arena's solicitor at the time, Mr James Caird of the law firm Simpson Grierson. Mr Caird advised Mr Grant that he was not authorised to accept service of the application.

[8] Mr Grant then engaged process services in New York, United States of America. The process servers purported to serve the originating application on Arena. They served the documents at the registered address listed for Arena in its capacity as a shareholder of ORL on the New Zealand Companies Register. Arena is not independently registered on the Companies Register.

[9] Arena says Simpson Grierson was not authorised to accept service of the originating application, and that the New York process servers delivered the application to the New York office of one of Arena's related entities, Arena Investors LP (**Arena Investors**). Arena says the application was received by a temporary receptionist at Arena Investors, who is not authorised to accept service of documents on Arena's behalf.

[10] Arena also maintains that liquidators' powers under ss 261 and 266 of the Companies Act do not have extraterritorial effect in respect of creditors or shareholders.

Arena's application for order dismissing proceeding

[11] Arena seeks orders dismissing Mr Grant's proceeding under s 266 of the Companies Acts and for costs, on the following grounds:[1]

> (a) The Applicant has filed an originating application seeking orders under s 266 of the Companies Act 1993 requiring the Respondent to produce books, records and documents of Ormiston Rise Limited (In Receivership & In Liquidation) (**Company**), and to produce information about the business, accounts, or affairs of the Company (**266 Application**).
>
> (b) The Respondent has filed an appearance under protest to the jurisdiction of the Court to hear and determine the 266 Application.
>
> (c) The 266 Application has not been validly served on the Respondent:
>
> (i) the Respondent is a company incorporated outside of New Zealand, namely in Delaware, the United States of America. The Respondent has no place of business in New Zealand;
>
> (ii) on 19 November 2021, the Applicant purported to serve the 266 Application on the Respondent by delivering it to the receptionist at the New York office of a related entity of the Respondent, Arena Investors, LP, at 405 Lexington Avenue, 59th Floor, New York, the United States of America;
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> (iii) the 266 Application does not fall within one of the categories of cases under r 6.27(2) of the High Court Rules 2016 (**HCR**). Accordingly, the Applicant is not permitted to serve the 266 Application on the Respondent without leave;
>
> (iv) the Applicant has not applied for, or been granted, leave to serve the 266 Application outside New Zealand; and
>
> (v) in the event that leave was not required the Applicant has not served the 266 Application on the Respondent in a manner permitted under the HCR:
>
> (aa) the 266 Application was not served on Respondent, but was delivered to the office of a related entity; and
>
> (bb) service on a receptionist is not valid service under New York law.

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1 Interlocutory application by respondent for order dismissing proceeding dated 16 December 2021 at [2].

(d) The Court has no jurisdiction to hear and determine the s 266 Application:

(i) sections 261 and 266 of the Companies Act 1993 do not have extraterritorial effect in respect of the Respondent; and

(ii) the Respondent has not submitted to the jurisdiction of the New Zealand Courts in respect of ss 261 and 266 of the Companies Act 1993.

(e) The grounds appearing in the affidavits of **Todd Steward Strathdee** filed in support of this application.

Affidavit of Todd Stewart Strathdee affirmed 15 December 2021

[12] Mr Todd Strathdee, Arena's representative in Australia and New Zealand, has made an affidavit in support of Arena's interlocutory application to dismiss Mr Grant's proceeding. He says Arena does not have in its possession or control any books, records or documents of ORL.[2]

[13] Mr Strathdee also says Simpson Grierson had not been authorised to accept service of the s 266 application and that the New York process servers had served the application on a temporary receptionist at Arena Investors, who was not authorised to accept service of documents on Arena's behalf. He confirms that Arena has not submitted to the jurisdiction of the New Zealand courts in relation to Mr Grant's exercise of his powers under ss 261 and 266 of the Companies Act.[3]

Affidavit of Christopher James McNamara affirmed 10 February 2022

[14] Mr Christopher McNamara, a partner at the United States law firm Barton LLP, has also made an affidavit in support of Arena's interlocutory application to dismiss Mr Grant's proceeding. He deposes that service upon a Delaware limited liability company must be done in accordance with § 18-105 of the Delaware Code.[4]

[15] Mr McNamara says that section provides generally that service upon a Delaware limited liability company shall be made by delivering a copy of the legal

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2 Affidavit of Todd Stewart Strathdee in support of respondent's interlocutory application to dismiss proceeding under Rule 5.49(3) High Court Rules 2016 affirmed 15 December 2021 at [15].

3 At [16]–[21].

4 Affidavit of Christopher James McNamara in support of respondent's interlocutory application to dismiss proceeding under Rule 5.49(3) High Court Rules 2016 affirmed 10 February 2022 at [11].

papers to any manager of the company in Delaware, the registered agent of the company in Delaware, or, in certain circumstances, the Delaware Secretary of State. The provision would not allow for service upon an unauthorised receptionist, either within or outside Delaware.[5]

[16] Further, Mr McNamara says that as a matter of New York law, service upon a limited liability company is invalid where the service was made upon an unauthorised receptionist. He says he is therefore of the opinion that the liquidator's attempted service on Arena was ineffective.[6]

Mr Grant's notice of opposition to Arena's application for order dismissing proceeding

[17] Mr Grant opposes Arena's application on the grounds:[7]

> 1.5 The section 266 application has been validly served on the Respondent –
>
> a The proceedings were served in accordance with rules 6.27(e) and 6.32 of the High Court Rules 2016 (**HCR**);
>
> b The Respondent was served at its registered address as listed on the New Zealand Companies Office and address as specified in the contracts to which the Respondent and ORL were both party to;
>
> c The proceedings were served on a clerk authorised to accept service thereof; and
>
> d The proceedings were served in accordance with the service rules of the State of New York, United States of America.
>
> 1.6 The Court should assume jurisdiction for reasons as set out below –
>
> a There is a good arguable case that the claim falls wholly within rule 6.27(2)(e) of the HCR:
>
> i The Respondent, through its agent Quaestor Advisors, LLC (**Quaestor**) was a first mortgagee over the property situated at 125C Murphys Road, Flatbush, Auckland (**Property**),

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5 At [11].

6 At [12]–[16], citing *Partridge v Authentic Brands Group* New York SC 2021-32219, 8 November 2021.

7 Notice of opposition to interlocutory application by respondent for order dismissing proceeding dated 24 January 2022.

ii The Respondent is the main lender to the development project at the Property.

iii The books, records and documents sought from the Respondent relate to the secured level of debt owed by ORL to Quaestor.

b The application has a real and substantial connection with New Zealand.

c There is a serious issue to be tried on the merits.

d New Zealand is the appropriate forum for the section 266 application to be heard.

e Other relevant circumstances support an assumption of jurisdiction, such as:

i The Respondent is both shareholder and related creditor of ORL;

ii The contractual relationship giving rise to the debtor-creditor relationship between the parties is governed by New Zealand Law; and

iii The Respondent has participated in the insolvency process of ORL, governed by New Zealand Law.

1.7 The Court has jurisdiction to hear and determine the section 266 application –

a The Respondent falls within the category of persons/entities to which section 261 of the Companies Act 1993 (**Act**) applies.

b Section 261 of the Act confers on the liquidator wide powers to gain access to information about a company and its business, assets, and affairs.

c Sections 261 and 266 of the Act can be applied extra-territorially.

d The contracts giving rise to the debtor-creditor relationship between ORL and the Respondent are governed by New Zealand law.

1.8 In the event that leave was required –

a Leave would have been granted for reasons as set out above at paragraphs 1.6(b) – (e); and

b It is in the interests of justice that the failure to apply for leave should be excused.

Affidavit of Mr Grant sworn 24 January 2022

[18] Mr Grant has made an affidavit in support of his notice of opposition. He deposes that Arena has been involved in the receivership, voluntary administration and liquidation process of ORL and that Mr Caird had written to the liquidator on multiple occasions during the course of the insolvency.[8]

[19] Mr Grant says, given that it appears that Arena has been significantly involved in ORL's affairs as both a shareholder and principal funder of the Flat Bush development, it is necessary that he, as liquidator, is able to gain access to documents and information in Arena's possession. The documents and information are needed for him to investigate fully and make recoveries for the creditors where possible.[9]

Arena's submissions

[20] Mr James Caird, for Arena, submits that the Court does not have jurisdiction to hear and determine Mr Grant's application, because:[10]

> (a) the application has not been validly served in accordance with the HCR or in a manner permitted under the law of the State of Delaware (or the State of New York). Valid service goes to the heart of jurisdiction; as the application has not been properly served on Arena, it cannot be determined by the Court; and
>
> (b) the Liquidator's powers under ss 261 and 266 of the Companies Act do not have extraterritorial effect as against a shareholder or creditor of a New Zealand company in liquidation.

[21] Mr Caird submits there is a threshold issue whether the Court's leave is required before an originating document can be served on an overseas respondent. Under r 6.27(2), an originating document can be served without leave in limited cases, including when the subject matter of the proceeding is property situated in New Zealand. Where a proceeding does not fall within a relevant exception, leave must be obtained under r 6.28.[11]

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8 Affidavit of Damien Mitchell Grant dated 24 January 2022 at [4.8].
9 At [4.9].
10 Synopsis of submissions for respondent in support of interlocutory application to dismiss proceeding under r 5.49(3) High Court Rules dated 10 March 2022 at [5].
11 At [20]–[21].

[22] Mr Caird says that where, as here, an appearance and objection to jurisdiction has been made relating to service effected outside New Zealand under rr 6.27 or 6.28, then the Court will determine that aspect of the application under r 6.29. That rule asks whether service was valid (or would have been valid if the Court granted leave) and whether the court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d).[12]

[23] Next, Mr Caird submits r 6.32 of the High Court Rules provides that service may be effected outside New Zealand either by a method specified in r 6.1, provided for in rr 6.33 and 6.34, or permitted by the law of the country in which the document is to be served. Rule 6.1 allows for personal service, service at an address for service, or service at an address as direct by the Court. Rules 6.33 and 6.34, meanwhile, relate to service through official channels or by way of a convention in force between New Zealand and the relevant overseas jurisdiction. Neither rr 6.33 nor 6.34 therefore applies here.[13] Consequently service would need to be effected in accordance with the law of the country in which the document is to be served.

[24] Mr Caird submits that service in Delaware is to be carried out in accordance with § 18-105 of the Delaware Code. That section provides that service on a limited liability company must be made by delivering a copy personally or to the dwelling house of any manager or registered agent of the company in Delaware, or at the registered office or place of business of the company in Delaware. Service on an unauthorised receptionist is not permitted under Delaware or New York law.[14]

[25] Turning to the matter of jurisdiction, Mr Caird submits it is well established that invalid service is fatal to jurisdiction. The Court has jurisdiction only if the documents by which the proceeding is commenced are properly served, either within New Zealand or overseas.[15] Further, he submits that there is a strong starting presumption that New Zealand statutes do not have extraterritorial effect. While ss 261 and 266 of the Companies Act applies to foreign directors, it does not follow

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12 At [22].
13 At [23]–[25].
14 At [26]–[28].
15 At [29]–[31], citing *Commerce Commission v Viagogo AG* [2019] 3 NZLR 559, [2019] NZCA 472 at [52]; *Du v M5 Holdings Ltd* [2019] NZHC 2313 at [48];and *Discovery Geo Corp v STP Energy Pte Ltd* [2013] 3 NZLR 122, [2012] NZHC 3549 at [15].

that the Companies Act applies extraterritorially to all persons listed under s 261(2). Whether ss 261 and 266 can apply to foreign creditors or shareholders has not received judicial consideration.[16]

[26] Recapitulating, Mr Caird submits that the Court's leave was required for Mr Grant to serve the s 266 application. Rule 6.27 does not apply because the subject matter of the proceeding is documents of ORL alleged to be held by Arena. Any documents held would be situated outside of New Zealand.[17]

[27] While the Court may assume jurisdiction under r 6.29, Mr Caird submits it must only do so if the proceeding was validly served, but for the failure to obtain leave. Here, the purported service of the originating application was defective because service on Arena was required to be carried out in accordance with Delaware law. It was not.[18]

[28] As to the reach of the liquidator's powers under ss 261 and 266, Mr Caird submits they are "extraordinary" powers with a very wide scope. Courts are to be closely solicitous of their exercise to ensure liquidators do not obtain unfair or improper litigation advantages.[19] Viewed against the "well-stablished" statutes are presumed not to have extraterritorial effect, Mr Caird submits, there is no necessary implication that Parliament intended the extraordinary powers of a liquidator to apply to foreign shareholders and creditors.[20]

Mr Grant's submissions

[29] Mr Adam Botterill, for Mr Grant, submits that the documents have clearly come to Arena's attention. Arena was served at its office as listed on Companies Register and set out in the facility agreements as an address for notices. He further submits that § 311-A of the Consolidated Laws of the State of New York

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16 At [32]–[35], citing *Poynter v Commerce Commission* [2010] 3 NZLR 300, [2010] NZSC 38 at [15], [36]–[45] and [78]; *Grant v Pandey* [2013] NZHC 2844 at [27]; and *Re Tucker* [1988] 1 WLR 497 (Ch).

17 At [41]–[43].

18 At [44]–[48].

19 At [49]–[50], citing *Finnigan v Ellis* [2017] NZCA 488, [2018] 2 NZLR 123 at [16]–[17]; and *Cory Wright & Salmon Ltd (in rec & liq) v KPMG Peat Marwick* (1989) 4 NZCLC 65,180 (HC) at 65,182.

20 At [51]–[55].

allows for personal service on limited liability companies to be made to "any other agent authorized by appointment to receive process".[21]

[30] Mr Botterill submits, based on Mr McNamara's affidavit evidence, that service on a receptionist authorised to accept service would appear to be valid under New York law. The relevant affidavit of service of the s 266 application stated than an authorised clerk accepted service. For this reason, the liquidator believed everything had been done correctly in effecting valid service. The Court has previously declined to find that service was defective when the relevant documents had come to the attention of the parties intending to be served. Here, while the New York office was not the registered office of Arena, the liquidator did everything that could be done to bring the originating application to Arena's attention.[22]

[31] Mr Botterill says Arena seeks to rely on a technicality to avoid service, despite it being Arena that failed correctly to list its registered address on the Companies Register. It is within the Court's power under r 1.9 to amend the procedural defect. The primary objective of the service rules — bringing the respondent's attention to the proceeding — has here been achieved.[23]

[32] Next, Mr Botterill submits there is a good arguable case that the claim falls within one or more of the paragraphs of r 6.27. That is because the main purpose of ORL was to purchase and develop the Flat Bush property. The facility agreements between ORL and Arena are governed by New Zealand law and concerned lending arrangements for the development. Rule 6.27(e) provides that leave will not be required when the subject matter of the proceeding is land or property situated in New Zealand, *or any act, deed, will, instrument or thing affecting such land or property*. That definition, in Mr Botterill's submission, captures the loan agreements and other documents relating to the development and the mortgage over the land.[24]

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21 Synopsis of argument for the applicant dated 17 March 2022 at [4.5]–[4.6].

22 At [4.7]–[4.11], citing *Tickled Pink Design Ltd v Concept to Completion Ltd* HC Auckland-2003-404-831, 23 May 2003 at [27].

23 At [4.13]–[4.15], citing *Exportrade Corp v Irie Blue New Zealand Ltd* HC Auckland CIV-2008-404-7130, 28 April 2010 at [58].

24 At [4.16]–[4.24].

[33] Mr Botterill submits that the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d). New Zealand is the appropriate forum to deal with matters relating to New Zealand companies. Further relevant considerations are:[25]

a The respondent, of its own accord, entered into Facility Agreements governed explicitly by New Zealand law.

b The respondent is a substantial shareholder in ORL.

c The respondent was the main lender to ORL.

d The respondent has elected to subject itself to New Zealand Law in situations where it has been convenient for the respondent to do so, such as participating in the insolvency process of ORL (governed by New Zealand Law).

[34] Mr Botterill submits that, should the Court find that Mr Grant required leave to serve the originating application, it would have been granted under r 6.28. It is in the interests of justice that the failure to apply for leave be excused.[26]

[35] Turning to the reach of liquidators' powers under ss 261 and 266 of the Companies Act, Mr Botterill says the policy of Part 16 of the Companies Act counts against applying extraterritorial limitations. Arena chose deliberately to become a shareholder of ORL, a company registered in New Zealand and governed by New Zealand company law. It entered into the facility agreements, which are explicitly governed by New Zealand law and give rise to contractual duties owed by Arena to ORL. In those circumstances, ss 261 and 266 of the Companies Act should have extraterritorial effect.[27]

[36] Mr Botterill submits that while Arena does not owe ORL the same duties as that of a director, the significant extent to which Arena was involved in ORL's affairs as a shareholder, creditor and main lender is relevant. The liquidator requires the requested documents and information to investigate ORL's affairs. That purpose is sufficient to justify reading ss 261 and 266 as having extraterritorial effect.[28]

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25 At [4.25]–[4.31].
26 At [4.32].
27 At [5.3]–[5.7].
28 At [5.8]–[5.10].

Legal principles

Amendment of procedural defects and errors

[37] Mr Botterill seeks to rely on r 1.9 of the High Court Rules. It provides, relevantly:

> **1.9 Amendment of defects and errors**
>
> (1) The court may, before, at, or after the trial of any proceeding, amend any defects and errors in the pleadings or procedure in the proceeding, whether or not there is anything in writing to amend, and whether or not the defect or error is that of the party (if any) applying to amend.
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> ...

[38] An irregularity in the service of a process was excused under the predecessor rule because there was no prejudice to the party concerned. The Court considered that the intention of service rules is that service be effected in such a way as to give a defendant the opportunity to take whatever steps it considers appropriate.[29]

Appearance and objection to jurisdiction

[39] Rule 5.49 provides:

> **5.49 Appearance and objection to jurisdiction**
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> ...
>
> (3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.
>
> ...
>
> (6) The court hearing an application under subclause (3) or (5) must,—
>
> (a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; and
>
> (b) if it does not dismiss the proceeding under paragraph (a), set aside the appearance.
>
> (7) To the extent that an application under this rule relates to service of process effected outside New Zealand under rule 6.27 or 6.28, it must be determined under r 6.29.

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[29] See generally *Kirton v Prospecdev Holdings Ltd* (1990) 2 PRNZ 412 (HC).

...

[40] As already stated, jurisdiction is dependent on valid service on the defendant.[30]

Service outside New Zealand

[41] Rule 6.27 provides that originating documents may only be served out of New Zealand without leave in specified circumstances, one of which is under r 6.27(e), where "the subject matter of the proceeding is land or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land or property".[31] By "affecting such land" is meant something *directly affecting* the land or property, not simply something *relating to* the land or property.[32]

[42] Leave under r 6.28 must be obtained for serving any originating document in all other cases. That rule provides:

> **6.28 When allowed with leave**
>
> (1) In any when service is not allowed under rule 6.27, an originating document may be served out of New Zealand with the leave of the court.
>
> ...
>
> (5) The court may grant an application for leave if the applicant establishes that—
>
> (a) the claim has a real and substantial connection with New Zealand; and
>
> (b) there is a serious issue to be tried on the merits; and
>
> (c) New Zealand is the appropriate forum for the trial; and
>
> (d) any other relevant circumstances support an assumption of jurisdiction.

[43] Rule 6.29 provides:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the

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30 *Discovery Geo Corp v STP Energy Pte Ltd*, above n 15.
31 High Court Rules 2016, r 6.27(e).
32 *William Cable and Co Ltd v Teagle, Smith and Sons Ltd* [1928] NZLR 427 (SC) at 431.

court must dismiss the proceeding unless the party effecting service establishes—

(a) that there is—

(i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and

(ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or

(b) that, had the party applied for leave under rule 6.28,—

(i) leave would have been granted; and

(ii) it is in the interests of justice that the failure to apply for leave should be excused.

...

[44] Finally, r 6.32 provides:

6.32 Service outside New Zealand

(1) An originating document permitted under these rules to be served outside New Zealand may be served by a method—

(a) specified in rule 6.1; or

(b) permitted by the law of the country in which it is to be served[.]

...

(2) Subclause (1) is subject to subclauses (3) and (4).

...

(4) No service outside New Zealand is valid if effected contrary to the law of the contrary where service is effected.

Service of process in Delaware and New York

[45] § 18-105 of the Delaware Code provides:

18-105 Service of process on domestic limited liability companies and protected series or registered series thereof

(a) Service of legal process upon any domestic limited liability company or any protected series or registered series thereof shall be made by delivering a copy personally to any manager of the limited liability company in the State of Delaware, or the registered agent of the limited liability company in the State of Delaware, or by leaving it at

the dwelling house or usual place of abode in the State of Delaware of any such manager or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the limited liability company in the State of Delaware. ...

...

[46] § 311-A of the Consolidated Laws of the State of New York provides:

311-A Personal service on limited liability companies

(a) Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

Liquidators' powers under ss 261 and 266 of the Companies Act

[47] Section 261 of the Companies Act provides:

261 Power to obtain documents and information

(1) A liquidator may, from time to time, by notice in writing, require a director or shareholder of the company or any other person to deliver to the liquidator such books, records, or documents of the company in that person's possession or under that person's control as the liquidator requires.

(2) A liquidator may, from time to time, by notice in writing require—

(a) a director or former director of the company; or

(b) a shareholder of the company; or

(c) a person who was involved in the promotion or formation of the company; or

(d) a person who is, or has been, an employee of the company; or

(e) a receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or

(f) a person who is acting or who has at any time acted as a solicitor for the company—

to do any of the things referred to in subsection (3).

(3) A person referred to in subsection (2) may be required—

(a) to attend on the liquidator at such reasonable time or times and at such place as may be specified in the notice:

(b) to provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests:

(c) to be examined on oath or affirmation by the liquidator or by a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:

(d) to assist in the liquidation to the best of the person's ability.

[48] Finally, s 266 relevantly provides:

266 Powers of court

(1) The court may, on the application of the liquidator, order a person who has failed to comply with a requirement of a liquidator under section 261 to comply with that requirement.

(2) The court may, on the application of the liquidator, order a person to whom section 261 applies to—

...

(b) produce any books, records, or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.

...

Analysis

[49] In my view, by reason of defective service of the proceeding on Arena, the Court does not have jurisdiction to hear and determine the liquidator's s 266 application.

[50] I reach the conclusion that service was defective through a combined reading of the relevant provisions. Rule 6.32(4) provides that service outside New Zealand is invalid if it is "contrary to the law of the country where service is effected". Service on Arena therefore needed to comply with the relevant United States laws for personal service.

[51] From the evidence before the Court, service on Arena would have been defective under both New York and Delaware law. The liquidator's attempted service on Arena clearly did not comply with § 18-105 of the Delaware Code. As well, while § 311-A of the Consolidated Laws of the State of New York allows for service to be effected on a "agent authorized by appointment to receive process", the temporary receptionist at Arena Investors was not *in fact* an authorised agent of Arena. In my view it is not material that the receptionist appeared to the process server to be so authorised, although from the affidavit of Mr Simon, the process server, it appears that no steps were taken by Mr Simon to ascertain whether the receptionist was duly authorised.

[52] Mr Botterill submitted that the Court should exercise its discretion under r 1.9 of the High Court Rules to amend the procedural defect relating to the service of the proceeding, arguing that the primary objection of the service rules, bringing the proceedings to the respondent's attention, has been achieved.

[53] Mr Caird submitted that the Court's power to correct procedural defects under r 1.9 was intended to deal with correcting minor errors, and could not be used to correct invalid service of the proceedings on an overseas party when valid service was a prerequisite to the Court having jurisdiction to hear the application at all. As noted at [44], under r 6.32(4) no service outside New Zealand is valid if effected contrary to the law of the country where service is effected. That is the case here, in that service was effected contrary to both Delaware and New York law.

[54] In my view, r 1.9 cannot be used to correct the invalid service of the proceeding on the respondent. Rule 6.32(4) expressly states that service outside New Zealand is not valid if contrary to the law of the country where service is effected. Valid service is a pre-requisite to the ability of the Court to exercise its discretion to assume jurisdiction under r 6.29. Rule 1.9 cannot be used to override the express provisions of those rules where the issue of valid service goes to the heart of the Court's ability to assume jurisdiction.

[55] As a result of my conclusion that service of the proceeding was not validly effected, the Court does not have the ability to exercise its discretion to assume jurisdiction. Consequently, the following issues dealt with at the hearing do not arise:

(a) whether the proceeding could have been served on Arena without leave, pursuant to r 6.27(e);

(b) if the proceeding could not be served on Arena without leave, whether the Court should assume jurisdiction pursuant to r 6.29(1); and

(c) whether ss 261 and 266 of the Companies Act 1993 apply extra-territorially.

Order

[56] I order that the application by Arena is granted and the proceedings are dismissed.

[57] Costs are awarded in favour of Arena on a 2B basis.

.....
Associate Judge Taylor

McNeile, Elspeth

From: Tanielu, Hosanna
Sent: Tuesday, 12 April 2022 16:15
To: DL-Senior Courts-Distribution-Publishers
Subject: RE: Judgment - Official Assignee v Haenga
Attachments: 026 Judgment of AJ Taylor (re-issued) 12.4.22.pdf

Good afternoon all,

Please see attached an updated copy of Associate Judge Taylor's judgment.

Kind Regards,

Hosanna Tanielu
Summary Judgment & Caveat Case Officer | Civil Jurisdiction| Auckland High Court
24 Waterloo Quadrant | Auckland 1140 | DX-CX10222
DDI: (09) 351 4691 | Ext 69691
Email: hosanna.tanielu@justice.govt.nz
HIGH COURT OF NEW ZEALAND
TE KŌTI MATUA O AOTEAROA

From: Tanielu, Hosanna
Sent: Monday, 21 February 2022 2:38 pm
To: DL-Senior Courts-Distribution-Publishers <DL-SeniorCourts-Distribution-Publishers@justice.govt.nz>
Subject: Judgment - Official Assignee v Haenga

Good afternoon All,

Please find attached the Judgment of Associate Judge Taylor for the above matter, delivered on 21 February at 03:00 p.m.

Kind Regards,

Hosanna Tanielu
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24 Waterloo Quadrant | Auckland 1140 | DX-CX10222
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