

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

CIV 2009 409 2763

BETWEEN THE COMMISSIONER OF INLAND
REVENUE
Plaintiff

AND ERUERUITI INVESTMENTS LIMITED
Defendant

Hearing: 1 April 2009

Appearances: F Donaldson for Defendant/Applicant
P W Saunders for Plaintiff/Respondent

Judgment: 1 May 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

[1] This an application brought on behalf of the company which is the defendant in a winding up proceeding. The company applies to have the appointment of interim liquidators set aside. The factual merits are strongly against the company, for reasons developed below. In addition to factual issues the company raises argument as to the legal basis of the winding up application itself, suggesting that the tax position as between the company and the Commissioner is such that the company does not have an existing tax liability. The company submits that while it pursues its rights of objection under the tax legislation it would be savouring of unfairness or undue pressure for there to be a continuation of the winding up proceeding or the interim liquidation. The company's arguments in that regard are also flawed.

Background

[2] In November 2008 the Commissioner applied to put the company into liquidation.

[3] The statement of claim filed by the Commissioner is very detailed. It contains allegations as to transactions of the company and those controlling it from 2002 to 2008. It refers to the striking off of the defendant from the companies register on 17 August 2006 and the reinstatement to the companies register on 12 May 2008 at the request of the Commissioner. It refers to assessments for income tax which the Commissioner completed in 2008. Finally, it summarises the grounds upon which the Commissioner seeks an order that the defendant be put into liquidation and the summarised grounds are:-

89.1 The company has persistently or seriously failed to comply with the Companies Act because it has not kept accounting records that correctly record and explain the transaction of the company or that will at any time enable the financial position of the company to be determined with reasonable accuracy; and/or

89.2 It is just and equitable to do so because:

89.2.1 The Commissioner lacks confidence in the conduct and management of the defendant company because:

- (a) The company has been stripped of its assets other than the loan to Rural Tech.
- (b) The company was allowed to be struck off without accounting to debtors.
- (c) Mr Buxton continues to control the company as a shadow or de facto director.
- (d) The current director will not act to preserve assets of the company.
- (e) The liquidators of HJP were never advised by the director of HJP or Mr Buxton (as the shadow or de factor director of HJP) that the defendant company was a debtor of HJP.
- (f) There has been an intermingling of funds between Picton, Division, Kilmarnock, HJP and the defendant company.

89.2.2 It is conducive (sic) to commercial morality and in the public interest to liquidate the defendant company; and/or

89.3 The defendant company is unable to pay its debts.

[4] With the application to put the company into liquidation, the Commissioner applied for and obtained, without notice, an order appointing interim liquidators. Those liquidators have been in office since 23 December 2008 and the Court is satisfied on the evidence that has been provided that they have been taking active

steps to protect the interests of the company. Further reference will be made to those steps.

[5] The company's application and the submissions supporting it were heavily focused on arguments that the Commissioner's assessment of the company's tax liability is the subject of dispute. In that regard the company's arguments miss the point that the application to put the company into liquidation is based on a number of factors – other factors (beyond the legal status of the tax liability) justify the application. The Court is satisfied that on all heads the Commissioner's application to put the company into liquidation is properly brought and is a matter which should properly be determined at hearing.

Failure to comply with the Companies Act

[6] The Commissioner asserts (see the summary in paragraph 89.1 of the statement of claim set out above) that the company had persistently, or seriously, failed to comply with the Companies Act in relation to its records. In relation to the failure to comply with the Companies Act, the statement of claim invoked the Court's powers under s 241(4)(a) Companies Act 1993.

[7] The statement of claim (paragraph 81) alleged that the defendant company had not kept accounting records that correctly record and explain the transactions of the company or that would at any time enable the financial position of the defendant company to be determined with reasonable accuracy. This pleading reflects the requirements of s 194 of the Act. The express provisions of s 241 make it clear that it is the default of either the company itself or of its board that justify the Court's intervention under s 241(4)(b) of the Act.

[8] For the purposes of the present application Robert Bruce Walker gave expert evidence by affidavit. Mr Walker's evidence was not challenged by counsel for the defendant and the Court accepts Mr Walker's qualifications to provide the factual and opinion evidence that he provided. He had extensively reviewed such financial information as had been kept by the company and its board. Mr Walker's evidence specifically addressed the requirements of s 194 of the Act before reviewing in detail

the accounting records of the company. As Mr Walker's conclusions are justified by the observations he sets out early in his affidavit the Court here sets out verbatim the conclusions Mr Walker reached:

- 6.1 I set out in some detail at the outset what I consider to be the set of inter-related documents and records would be necessary to meet the requirements of section 194 of the Companies Act 1993. In summary, the essential need is for a general ledger which is capable of producing a trial balance and financial statements to meet the requirements of GAAP. The accounts within the general ledger must be stated at a sufficient level of detail, either in their own right or through memorandum records, to enable the entries made to them to link to the underlying material documenting the transactions or work papers which describe the financial effects of economic events affecting the relevant company. Clearly an integral element of the accounting records entails obtaining corroborating documents from third parties to substantiate entries in the company's general ledger such as bank statements.
- 6.2 The accounting records analysed in detail in the foregoing paragraphs do represent a general ledger of sorts. They are difficult to follow but do entail the formulation of accounting entries and their summary and presentation in the primary elements comprising a financial report. In every other respect these accounting records are defective.
- 6.3 The accounting records compiled for EIL could not be said to correctly record and explain the transactions which it purports to record in material respects. Transactions which are not interest are recorded as interest. There is clear evidence that interest has arisen but this has been omitted. There is little documentation to enable tests of reasonableness of what the interest charges should have been. Transactions are recorded without regard to the GST implications of those transactions. A material transaction, being the sale and purchase of shares in FDL, has not been recorded in accordance with the underlying sale and purchase agreement.
- 6.4 The accounting records have been compiled in such a way as to obscure details of the assets and liabilities of EIL. Not only does this cause the company not to be able to comply with section 10 of the Financial Reporting Act 1993, it does not allow the collection of assets and the settlement of liabilities.
- 6.5 To be fair, the evidence of Mr McGowan's letter suggests that he did not prepare the accounting records to satisfy section 194 of the Companies Act 1993. His motive was to dispute assessments made by the Inland Revenue in the absence of other records. However, in all but the most simple businesses a set of financial statements including an income statement, is a necessary precursor to the determination of income tax liabilities of one sort or another. Mr McGowan's accounting record, in my opinion, do not meet the necessary standard to qualify as a basis for determination of the income tax position.

[9] Mr Donaldson for the defendant did not suggest that the records of the company had been satisfactory. He acknowledged in terms the “abysmal state of the records”. It is fair to say that the emphasis of his submissions was on other aspects of the Commissioner’s basis for proceeding.

[10] The Court is satisfied on the evidence that the plaintiff had strong grounds to plead that the company had persistently or seriously failed to comply with the requirements of the Act with regard to accounting records.

Just and equitable

[11] Section 241(4)(d) authorises the Court to appoint a liquidator if it is satisfied it is just and equitable that the company be put into liquidation. Paragraph 89.2 of the statement of claim invokes this jurisdiction.

[12] While that jurisdiction has been utilised classically in the context of the breakdown of trust and co-operation between those involved in the company (see *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360) the jurisdiction is unfettered and extends to any situation in which the Court is satisfied as to the “just and equitable” threshold. In *Ebrahimi’s* case itself, Lord Wilberforce emphasised the Court should not be too timorous in giving full force to the words of the provision.

[13] While it is premature for this Court to determine how it would rule when the liquidation application comes to a hearing, there is strong evidence on which the Court might be led to conclude that winding up of this company would be just and equitable. The uncontradicted evidence of Mr Walker is again important in this regard. Reflecting the factual allegations contained within the statement of claim, Mr Walker deposes that he has found evidence of a number of related party funding issues where a lack of records and information leaves reconciliation and explanation of transactions at this point impossible. There are similar issues relating to the treatment of advances. Mr Walker found that it was likely that there were both receivables and payables invalidly set against one another in the pool which in the

defendant's correspondence and documents came to be referred to as the "advance accounts".

[14] Further, the plaintiff's statement of claim alleges, uncontradicted, a series of board appointments and resignations in relation to the defendant and in relation to related companies, which the plaintiff suggests point towards a lack of genuine control by those who have come to be directors. The plaintiff's case is that the defendant and its related companies have been under the control of Terence George Buxton, but that various others including Grant Perry McGowan, Graham Alexander Galt, Edward John Robinson and Harry James Bowley have been the people appointed as and nominally acting as directors.

[15] An affidavit of Graham Alexander Galt sworn on 13 March 2009 on behalf of the defendant refers to Mr Galt's appointment as a director of the defendant on 31 March 2005. Mr Galt deposed that:

- his appointment was at the request of Mr Buxton whose resignation as director was recorded at the same time;
- the company had been earlier formed for property development but that the development interest had been abandoned – all that was left for the company to do was to maintain in existence some financial interests of the shareholders;
- the only remaining assets of the company rested in various loans advanced to various entities for the benefit of the shareholders as they saw fit;
- he was "a caretaker" who would satisfy the requirements of the Companies Act until the company was wound up;
- he saw little need for any active input as a director, with the company having a firm of accountants in place to "look after the financial issues";
- there was no need for any direct input from him in the company's affairs as he was "quite comfortable for these to be 'managed' by Terry [Buxton]";

- Mr Buxton “could be expected to manage that role for the benefit of the company and the interests of the shareholders as a whole”;
- he noted that the company had subsequently been struck off the register on 17 August 2006 because of the failure of the company accountants to file a return on time;
- he said that was because the accountants also were under the impression that liquidation was the option to be pursued by the shareholders;
- he fully expected the normal process of liquidation of the company to follow such a striking off;
- instead what occurred was the commencement of some form of “bun-fight” between the Inland Revenue Department and Mr Buxton personally;
- he could see little or no advantage to being involved in that particular issue since it bore no relationship to the bests of either the company or himself;
- his health subsequently deteriorated to the point that he could not reasonably function in his capacity as director.

[16] In the Court’s view the evidence of Mr Galt reinforces the claim of the plaintiff. It suggests strongly that the company’s board was not attending to its duties. It suggests strongly that matters were being left to be attended to (if at all) by a person who was not a member of the board.

[17] As significantly, to the extent any board member took a view as to the appropriate future of the company, the view was that the company should be wound up.

[18] Against this background, there would appear to be a case for the Court to proceed to wind up the company in the just and equitable jurisdiction (leaving aside any other jurisdiction).

“Company unable to pay its debts”.

[19] The Commissioner at the hearing of the liquidation application will be entitled to seek to establish inability to pay debts by reference to accounting evidence which the Commissioner may wish to adduce.

[20] In the affidavit evidence provided as to accounting matters within the company, which the Commissioner has filed for the purposes of the present application, there is sufficient to indicate that the Commissioner has evidence pointing to such inability on the facts.

[21] It is the cash flow test of solvency which counts under s 241(4)(a) Companies Act 1993: See *Re Tweeds Garages Limited* [1962] Ch 406 at p 410 per Plowman J.

[22] In this case there is no evidence of cash flow ability to meet any taxation obligations of the defendant.

[23] Furthermore, since the appointment of the interim liquidator, Orion International Limited (in liquidation) has filed a proof of debt claiming to be a creditor of the defendant in the sum of \$2,431,616.51. One of the interim liquidators, Keiran Anne Horne, has by affidavit deposed that she considers that the claim by Orion is a debt owed by the defendant company.

[24] While such matters might ultimately require resolution at a hearing, there is in the context of the present application evidence as to the inability of the defendant to pay a debt other than the debt the Commissioner claims.

Status of the Commissioner

[25] While the submissions for the defendant were extensive, a focus in the course of oral submissions was upon the proposition that the plaintiff had no standing to bring the winding up application (or therefore the interlocutory application for appointment of interim liquidators) because the Commissioner was not a creditor in any sense under s 241(2)(iv) of the Act.

[26] Not content simply to fall back on the inclusion of contingent and prospective creditors within s 241 of the Act, Mr Saunders for the Commissioner submitted that the Commissioner, through the tax assessment in question, was a (present) creditor in any event.

[27] Some explanation of developments is required.

[28] The Commissioner's relevant default assessment for the income year ended 31 March 2005 (\$83,393.97) was made on 29 September 2008. The defendant admits that.

[29] On 15 January 2009 the defendant filed with the Commissioner a Notice of Proposed Adjustment (NOPA) in which the defendant asserted that it would record net losses from trading and that no taxes were due. The Commissioner did not accept the validity of the NOPA for reasons which he explained in correspondence to the defendant. In the event, the Commissioner on 13 March 2009 issued a Notice of Response (NOR) rejecting the defendant's NOPA.

[30] I was advised by counsel for the Commissioner, in his submissions, that subsequently (on 26 March 2009) the Commissioner had issued a further notice under s 89N(1)(c)(iii) Tax Administration Act 1994 truncating the disputes procedure which had been initiated by the defendant's filing of the NOPA. I indicated to Mr Saunders that in the absence of prior application, and in the absence of proper evidence, I was not prepared to have regard to the factual content of his submissions with regard to the truncation of the disputes process. The hearing proceeded upon the basis of the Commissioner's other evidence and Mr Saunder's other submissions.

[31] Against that background, the submission for the Commissioner is that the Commissioner is legally entitled to collect the tax debt based on an assessment where disputes rights have not expired.

[32] Mr Saunders noted that by s 2(a) Tax Administration Act an assessment is a "disputable decision". The consequence of that, under s 109 Tax Administration

Act, is that the assessment may not be disputed in a Court or in any proceedings on any ground whatsoever and that the assessment is in all particulars deemed to be, and is to be taken as being, correct in all respects. (There is an exception in relation to objection proceedings under Part 8 or a challenge under Part 8A Tax Administration Act, which exception is inapplicable to this case).

[33] The provisions of the Tax Administration Act establish the Commissioner as a “creditor”.

[34] Mr Saunders referred the Court to the judgment of the High Court of Australia in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41. That case involved an application to set aside a statutory demand upon the basis that there was a “genuine dispute” under s 459H Corporation Act 2001 (which is the equivalent of s 290(4)(a) of the (New Zealand) Companies Act. The (Australian) Income Tax Assessment Act 1936 had “conclusive evidence” provisions equivalent to s 109 of the (New Zealand) Tax Administration Act. The High Court of Australia held that the existence of challenge proceedings by the tax payer did not allow the setting aside of a statutory demand on the ground that there was a genuine dispute.

[35] The High Court decision is relevant and its reasoning applicable. It reinforces the conclusion this Court has come to on the terminology of the Tax Administration Act itself.

[36] The Court finds that the Commissioner was, both when he brought the winding up application and subsequently, a creditor of the defendant.

[37] Even had I not concluded that the Commissioner was at relevant times a (present) creditor, I would have concluded that he was a prospective creditor. The position of the Commissioner in this case is not materially different to that of the person described by Holland J in *Re Austral Group Investment Management Limited* [1993] 2 NZLR 692 at p 695. There his Honour described a prospective creditor as being a person in respect of whom there is a real prospect of being a creditor. On the facts of that case, the Judge decided that trustees who had a claim against a company

in negligence (yet to be tested by legal proceedings) had standing to apply for a winding up order as “prospective creditors”. The Commissioner is in no less a position.

Conclusion as to status

[38] The Court is satisfied that the plaintiff had status to bring the application to wind up. The evidence filed in relation to the defendant’s application provides strong evidence in support of the winding up application on a number of grounds.

The grounds for appointment of the interim liquidators

[39] It is for the applicant on an application to appoint interim liquidators to show:

(a) A likelihood that the applicant will succeed.

(b) A need for interim control.

[40] The Court in the context of the need for interim control will consider whether assets are in jeopardy, whether the status quo should be maintained, and whether the interests of creditors are safeguarded. See *Robert Bryce & Co v Chicken & Food Distributors Limited* (1990) 5 NZCLC 66,648. Conflicts of interest of directors are also relevant: see *Re J N Taylor Holdings Limited* (1991) 9 ACLC 1.

[41] The facts of the present case clearly satisfied the threshold for appointment of interim liquidators.

[42] The need for interim control was pointed to by the lack of real control by the board.

[43] A further fact supported the appointment of interim liquidators. The Commissioner’s application filed on 19 November 2008 identified the sole remaining asset of the defendant company as being a loan of \$449,183.90 made to Rural-Tech Industries Limited on 24 December 2002. The Commissioner, as

creditor, was concerned that the board of the defendant was doing nothing to ensure that recovery of the loan was pursued within the limitation period. The Commissioner wished to ensure that an interim liquidator could safeguard the interests of creditors by issuing proceedings for the recovery of the Rural-Tech debt prior to 24 December 2008.

[44] Subsequent events have proved the wisdom of the application for the appointment of interim liquidators. The interim liquidators have not only issued proceedings within the limitation period but have subsequently obtained a default judgment. The asset of the defendant has been protected to that extent. The interests of the creditors have similarly been protected.

[45] The lack of merit of the present application is indicated by a Memorandum filed on behalf of the defendant by counsel in support of the defendant's application to set aside the appointment of the interim liquidators. In that Memorandum counsel recorded:

It is the company's position that there is no debt owing from Rural-Tech to the company in any case.

[46] But for the appointment of the interim liquidators, recovery of the Rural-Tech debt would have been placed beyond the reach of defendant's creditors.

[47] Finally the Court must have regard to the evidence which indicates that Rural-Tech was closely related to the defendant. Mr McGowan, who was appointed by the defendant company to assist in relation to the management of accounting issues was also the person who was engaged by Rural-Tech to enter into correspondence with the interim liquidator. The conflicts of interest referred to as relevant in *Re J N Taylor Holdings Limited* were in the present case palpable.

Conclusion

[48] No part of the defendant's application has merit. The application is dismissed.

[49] The Commissioner is entitled to costs and disbursements. I reserve costs. In the event that the parties cannot agree on costs, I direct that the Commissioner file written submissions within ten working days and that the defendant files its submissions in response within five working days thereafter.

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