

IN THE MATTER of the Companies Act
1955

AND

IN THE MATTER of CHREON ELECTRONICS
LIMITED ex parte the
Collector of Customs,
Christchurch

Hearing: 23 May 1984

Counsel: D.J.L. Saunders for Petitioner
D.I. Jones for Company

Judgment: 31 MAY 1984

JUDGMENT OF ROPER J.

This is a petition for winding-up which was opposed by the company. The petition is put forward on the grounds that the company is unable to pay its debts, and that it is just and equitable that it be wound up and was issued following the company's failure to meet a demand pursuant to s.218 of the Act for payment of sales tax. It is undisputed that the company now owes \$133,486 to the Collector of Customs for unpaid sales tax and penalties, \$90,000 of that sum being sales tax that was recovered by the company but not passed on to the Collector.

There is no doubt whatsoever that the company is hopelessly insolvent. Its total indebtedness is to the order of \$447,000 and of that sum \$157,186 is owed to secured creditors. No evidence was called by an accountant or some other disinterested person as to the company's assets but according to Mr C.J.B. Nicholls, Managing Director of the company, there are assets of \$159,885. However in cross-examination he agreed that if the assets are sold there may not be enough to meet even the secured creditors, in which

case there would be some personal liability upon him by way of guarantee. As matters stand there is just no prospect of the unsecured creditors receiving anything.

Mr Nicholls' professed stand is that his company owes the money and he wants the opportunity to pay it. The means by which he proposes to do this are curious in the extreme. Mr Nicholls and his father are the shareholders in Chreon and another company, Micro Age Ltd. Mr Nicholls is Managing Director of both companies. He accepted that Chreon could not trade its way out of its present difficulties and what he proposed was that Chreon's creditors should be paid from Micro Age's earnings, although of course there is no obligation on that company to assume liability for Chreon's debts. His proposed scheme was coupled with the submission that the majority of unsecured creditors oppose the winding up. Only one creditor, who is owed \$4,554, actually filed notice of intention to appear, and it supported the petition, but was not represented at the hearing. Mr Nicholls tried to overcome that difficulty by canvassing a good number of the creditors by phone or letter to enlist support. He sent out this document for completion and return under a covering letter and some ten creditors returned it duly completed:-

"I who holds the position of
at wish to register our opposition to
the action under Section 219 of the Companies Act
between the New Zealand Customs Department and
Chreon Electronics Limited.

We are of the opinion that Chreon Electronics
Limited should be allowed to continue in its
current operation of trading to try and reduce
its debt to us and its other creditors.

Chreon Electronics Limited is currently in debt
to us for

Balance as of 31 March 1984

Current Balance

If the Customs Department does not proceed under

Section 219 our company will take no action to recover the indebtedness by Chreon Electronics Limited and will allow it to pay it back at a rate that its directors feel is appropriate.

We have been trading with Chreon Electronics Limited for approximately years and are prepared to continue trading with them in an endeavour to help them trade through their current difficulties.

Yours sincerely"

Other creditors drafted their own reply following the general format of the document but adding a few conditions of their own, and one American company which is owed \$74,700 replied by telex, the last sentence of which reads:-

"We request monthly reports on company situation."

I think without exception the creditors have expressed support in the stated belief that Chreon will be able to trade its way through its current problems. Even Mr Nicholls accepted that it can't.

There is ample authority for the proposition that a petitioning creditor who cannot get paid a sum presently payable has as against the company a right *ex debito justitiae* to a winding up order. However, that general rule is qualified by another, namely, that the Court will have regard for the wishes of the majority in value of the creditors, and if for some good reason they oppose a winding up order the Court in its discretion may refuse it. (See Re Vuma Ltd [1960] 1 W.L.R. 1283, and In re Restaurant Chevron Ltd [1963] N.Z.L.R. 225.) It is questionable whether Chreon has the support "of the majority in value of the creditors" but that aside I fail to see any reason, whether compelling or otherwise, which could justify their stand.

At my request Mr Jones has supplied the covering letter that Mr Nicholls sent out with the documents to be

completed by creditors. It is dated the 18th May 1984, and reads:-

"I am writing to you to explain the embarrassing position my company is currently in and wish to request your support to try and rectify it.

During the period from March 1982 to May 1983 Chreon undertook a three quarter of a million dollar contract and involved itself in the taking over of another company.

The large contract was the first major contract the company undertook. Due to a lack of experience mistakes were made and there was no financial gain for the company. Experience in handling large contracts and knowledge of the specialised field was gained.

Our involvement and taking over of another company was also ill conceived. Not enough checking was done at the initial stages. This company was wound up last year due to contingent liabilities not declared in the original negotiations. We are unable to recover this loss due to the original directors having no tangible assets to sue for.

Today we find ourselves in the position of having an action under Section 218 and 219 of the Companies Act being served on us by the Customs Department. We have been in negotiation with the Customs Department since January and have been involved in a court case with them.

The judgement of one court case was in our favour and this has reduced our indebtedness to the Customs Department by approximately \$66,000.00 plus accrued penalties. We still owe them a lot of money and the action under Section 219 of the Companies Act is due to be heard in court on the 23 of May. To try and stop this action I am requesting your help.

Why should you help me?

I have been trading for seven years and have supported many suppliers and associated industries. I have maintained a small level of employment, up to 22 at one time, and still provide a service to our customers and the community.

If the company is wound up the liquidation of the

assets will not cover the amount owed to the bank, mortgagees, and secured creditors. This will mean that none of the unsecured creditors or the Customs Department will receive any money.

We currently have employed, a team of management consultants who have begun to install both management and marketing policies. If we continue they will prepare quarterly budgets and recommend company strategies. They have already produced budgets that show we can trade out given time.

We have gained exceptional expertise in our field and we would appreciate the opportunity to use it.

If the Customs Department do succeed in winding us up the following would happen.

1. You would receive no reimbursement for your debt.
2. I would probably have to declare myself bankrupt.

How can you help me?

I would very much appreciate it if you would have a copy of the attached letter, along with the appropriate data copied on to one of your company's letter heads. I would then request that you sign it and return it to me in the enclosed addressed envelope.

Our barrister will present these along with trading data from our consultants and try to impress upon the judge that we can potentially trade out of our problems and return some of the monies owed to companies such as yours.

Unfortunately I am unable to advise exactly how long it would take to repay all monies and in fact even if I can, but if you give me support I will endeavour to do my best to get as much to you in the shortest time possible. We are currently negotiating another contract for \$420,000.00 which lies in our field of expertise.

I would request that you give this your most urgent attention as the court hearing is on Wednesday next week. If you wish to discuss this with me or would appreciate further information please do not hesitate to contact me on Christchurch 891-109. If I am unavailable please leave your name and I will contact you.

Please give me a chance to recover some of my indebtedness to you."

I will be charitable and content myself with saying that it is a misleading letter in that it omits important relevant information which would be essential for a prudent creditor to make an informed decision. There is no reference to Chreon's total indebtedness, nor the amount still owing to the Collector of Customs despite the company's success as to \$66,000. Of more importance is the complete failure to mention the part Micro Age would play. As I understood Mr Nicholls' evidence the team of management consultants (whose report was certainly not presented to me) was concentrating on Micro Age, not Chreon, and it was Micro Age which was negotiating a \$420,000 contract.

On the morning of the hearing Mr Nicholls sent a further letter to creditors expressing appreciation for their support. It reads:-

" CHREON ELECTRONICS LIMITED
23 May 1984

&name&
&title&
&company&
&addr1&
&addr2&

Dear &greeting&

Please accept my warmest appreciation for the support you have extended to my company.

As in our phone call the following is our current position.

The company's indebtedness after deducting the assets from the liabilities is over \$200,000.00. This is a lot of money and will take time to repay. Our proposal to the court will be that \$5,000.00 per month will be transferred from the MicroAge (NZ) Limited trading account into a fund, plus any profit received from the continued trading of Chreon Electronics Limited. This fund will be

distributed on an equal basis to all unsecured creditors.

Chreon Electronics Limited will not be incurring any of the normal overheads of staff, rent, etc as it is acting only as the wholesale arm of MicroAge. It will however have the mortgage interest to pay and any further sales tax penalties.

If the judgment is in our favour we will be requesting the Customs Department to consider the following.

1. That they do not exercise their privileged position as an unsecured creditor and be considered equally with you all.
2. That no further penalty tax be accrued and to consider the amount due as frozen from the date of the judgement.
3. That they consider deducting penalty tax already accrued as an encouragement to the business sector.

Of the approximately 64 unsecured creditors we have received only 3 against us continuing trading and one of those was the Customs Department.

Again thank you for your support, which I hope I am able to reciprocate.

I will advise you of the judges decision after the hearing this afternoon.

Yours faithfully,

Chris Nicholls
Managing Director"

What the creditors' reaction to that letter has been I do not know but I would be surprised if their support is still forthcoming.

I see no basis whatsoever for refusing the order sought. There will be an order for winding up. The Official Assignee at Christchurch is appointed provisional liquidator and the Petitioner is awarded costs of \$500 with disbursements

as fixed by the Registrar.

A handwritten signature in cursive script, appearing to read 'H. W. Thompson & Morgan'.

Solicitors:

Crown Solicitor, Christchurch, for Petitioner

H.W. Thompson & Morgan,

Christchurch, for Company