

998

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M NO 861/96

UNDER Section 211(2)(c) of the Companies Act 1955  
BETWEEN HOLMDEN HORROCKS  
Plaintiff  
A N D PROMO MARKETING INTERNATIONAL LTD  
Defendant

Hearing: 22 May 1997

Counsel: D H Abbott for the applicant (A J Maher) and for Holmden  
Horrocks  
B L Sellars for Mobil Oil New Zealand Ltd  
A D McInnes for the Official Assignee

Judgment: 27 MAY 1997

---

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

---

Solicitors for the applicant

D H Abbott  
DX CP19036

Solicitors for Mobil Oil New Zealand Ltd  
Russell McVeagh McKenzie Bartleet & Co  
DX CX10085

Official Assignee

M T Milroy  
Commercial Affairs Division  
Ministry of Commerce  
DX GX10053

### Introduction

This is an application by a director and member of the defendant company for an order under s220 of the Companies Act 1955 terminating the liquidation of the defendant company.

The company was put into liquidation on 22 August 1996 on the application of Holmden Horrocks.

The present application was originally opposed by Holmden Horrocks but that firm has withdrawn its opposition.

Mobil Oil New Zealand Ltd opposes the application.

The Official Assignee does not oppose the application and will abide by the decision of the Court. The Official Assignee does, however, seek the imposition of certain conditions should the Court make an order terminating the liquidation.

The application is prosecuted on the basis that, if successful, the order will lie in Court pending notice being given to the Court by Holmden Horrocks, the Commissioner of Inland Revenue and the Official Assignee that certain conditions as to payment of costs and disbursements in the case of Holmden Horrocks and the Official Assignee and as to the payment of preferential debt to the Commissioner of Inland Revenue have been complied with.

### The arguments in support of the application

The arguments in support of the application may be summarised as follows:

- (a) there is no recovery for creditors if the company remains in liquidation but there is potential recovery for creditors if the liquidation is terminated, so enabling the company to bring a claim against two third parties;
- (b) the members of the company (of whom the applicant is one) have undertaken to pay the costs of terminating the liquidation and the costs of prosecuting the claim against the third parties;
- (c) the company's creditors other than Mobil Oil New Zealand Ltd and the Commissioner of Inland Revenue will either be paid in terms of the conditions to be attached to the order or have indicated support for the application or failed to indicate opposition to it;
- (d) the Commissioner of Inland Revenue has indicated that he will not oppose the application provided certain requirements are;
- (e) the opposition by Mobil Oil New Zealand Ltd is motivated by the desire to prevent the bringing of the claim referred to in (a) above, it being one of the two third parties against whom that claim would be brought;
- (f) the defendant failed to oppose the liquidation proceeding because it was unaware that it had been issued and served.

The application is supported by an affidavit sworn by Mr A J Maher.

The arguments in opposition to the application

Mobil Oil New Zealand Ltd opposes the application of the following grounds:

- (a) the claim against the third parties could be brought even if the defendant remains in liquidation;
- (b) the company's creditors do not support the application or, alternatively, such support as may have been given was given without full knowledge of the consequences of the application;

- (c) if the liquidation is terminated and the proposed proceeding is successful, the company will be under no obligation to apply any proceeds to the creditors as it will no longer be in liquidation;
- (d) there is no evidence that the company is solvent or that the position of the company has altered subsequently to the company being put into liquidation by the Court.

There is no evidence in support of the grounds advanced in opposition to the application.

### Background

The company was responsible for the promotion of the Wellington Street Race and the Pukekohe Circuit event. Mobil Oil New Zealand Ltd was one of the sponsors of the Wellington Street Race. In 1995, some six weeks before the Wellington Street Race of that year, Mobil Oil New Zealand Ltd informed the Wellington City Council that in its view the defendant company was in breach of the sponsorship agreement between it and Mobil and issued a press release stating that the Wellington Street Race was unlikely to proceed. The next day the Wellington City Council, through the Mayor, announced by press statement carried by the national media that the Wellington Street Race would not proceed. At the time of these two statements neither Mobil nor the Wellington City Council had had discussions, not even made contact, with the company concerning the alleged breach.

The public statements made by Mobil and the Wellington City Council led to the withdrawal of racing teams that had previously confirmed that they would compete, the loss of major hospitality sales, the loss of trackside signage sales and, it is claimed, irreparable damage to the defendant company's

credibility, with the result that the company's planning and organisation of the Wellington Street Race was brought to a halt and it had to withdraw from promotion of the Pukekoehe event. The company had already incurred considerable liability in preparation for the Wellington Street Race and was unable to continue trading.

The summary of events in the preceding paragraphs is based on Mr Maher's affidavit in support of the application. This evidence has not been challenged by Mobil Oil New Zealand Ltd either in the course of counsel's submissions or by filing of evidence.

The next question for consideration is why the company failed to defend the liquidation proceeding brought by Holmden Horrocks on the basis now relied on, which was of course already in existence. Mr Maher's explanation for the failure is that, when the defendant company ceased trading, it closed its business premises and failed to open a new registered office. He says that neither he nor any other officer of the defendant company was aware that Holmden Horrocks was bringing a liquidation proceeding. He says that he had earlier received a demand from Holmden Horrocks for payment of the debt, had tried to negotiate a compromise and had assumed, in the absence of anything more, that Holmden Horrocks had decided to defer further action. Issue is taken with this evidence in an affidavit sworn by Mr B R Harris in support of Holmden Horrocks' original opposition to the application. However, the challenge to Mr Maher's evidence that he was not aware of the institution of the liquidation proceeding (as opposed to the statutory demand) is based on a particular reading of a passage in the liquidator's first report dated 26 September 1996. The reference in that passage to Mr Maher having stated "*that the company was served with the proceedings around 5-6 months prior to the liquidation order being*

*made*" is capable of being read as referring to the statutory demand rather than the liquidation proceeding itself.

The total indebtedness of the defendant company according to Mr Maher is \$1.955 million. Of this amount \$1.035 million is owed to him and his fellow shareholder, Mr A Bagnall. Mr Maher, who is the sole director although only one of two shareholders, has failed to provide a statement of affairs or financial records to the liquidator. The result of this is that the exact position of the company and the cause of failure have not been able to be determined by the liquidator.

There has been considerable delay on the part of Mr Maher in bringing this application. He first spoke to the liquidator about bringing it shortly after the company was put into liquidation. He again told the liquidator in September 1996 that it would be brought shortly. It was in fact only brought a fortnight ago.

It is common cause that the proposed proceeding against Mobil Oil New Zealand Ltd and the Wellington City Council will only be brought by the liquidator if the creditors or some of them are prepared to fund the proceeding.

The approach of the Court to applications such as the present

The authorities on s250 of the Companies Act 1955 in its earlier form, which provided only for a power to stay a winding up, apply equally to the section in its present form, in which it provides for an order terminating the liquidation.

In *Re Calgary & Edmonton Land Co Ltd* [1975] 1 All ER 1046, it was held, quoting from the headnote:

*The court would, in normal circumstances, generally exercise its discretion to grant a stay only where the applicant showed (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or that he consented to the stay or was otherwise bound not to object to it; (b) that the liquidator's position was fully safeguarded either by paying the proper amount of his expenses or sufficiently securing payment; (c) that each member either consented to the stay or was otherwise bound not to object to it, or there was secured to him the right to receive all that he would have received if the winding up had proceeded to its conclusion.*

The decision was that of no less distinguished a Chancery Judge than Megarry J (now V-C). The judge dismissed the application because he considered that the applicant had failed to produce any firm and acceptable proposals satisfying the creditors and liquidator and there was nothing binding the other shareholders.

This authority was followed in this Court by Tipping J *in Re Bell Block Lumber Ltd (in liquidation)* (1992) 5 PRNZ 642. In that case an order was made because the Court was satisfied that all creditors would be able to be paid in full.

I need only refer, in addition to these authorities, to the judgment of another equally distinguished Chancery Judge, Buckley J (as he then was), in *In Re Telescriptor Syndicate, Ltd* [1903] 2 Ch 174 at 180-181, where his Lordship said:

*Where application is made in bankruptcy to rescind the receiving order or to annul an adjudication, the court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. ... I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding-up of a company and in the bankruptcy of an individual*

My decision

In the light of the authorities, I am not satisfied that this is a proper case in which to make the order sought.

I am of this view for the following reasons:

- (a) there is no immediate benefit to the creditors other than Holmden Horrocks and the Commissioner of Inland Revenue;
- (b) there is no certainty of long-term benefit for creditors because, even assuming a successful outcome to the proposed proceeding against Mobil Oil New Zealand Ltd and the Wellington City Council, there is no power in this Court, once having terminated the liquidation, to require the payment of the proceeds to the creditors;
- (c) the creditors would be put to the trouble of monitoring the progress of the proposed proceeding in order to ensure that they obtained payment if it were successful;
- (d) there is no power in this Court, once the liquidation is terminated, to prevent the defendant company from trading as well as or opposed to pursuing its claim against the two third parties;
- (e) even if I am wrong in the findings in (b) and (d) (on the basis that appropriate conditions could be attached to the order), I consider that it is undesirable that this Court should be involved, over what may be a long period, in monitoring or passing judgment on the fulfilment of those conditions by the defendant company;
- (f) it is open to the shareholders to fund the proceeding even if the liquidation is not terminated;
- (g) Mr Maher's failure to provide the liquidator with a statement of affairs, so that the liquidator has been unable to investigate the



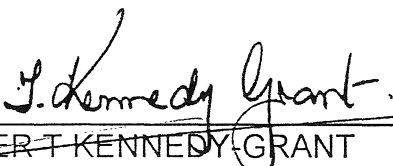
true position of the company, causes me concern, notwithstanding the fact that Mr Maher's evidence as to the indebtedness of the defendant company has not been challenged;

- (h) Mr Maher's failure to bring this application earlier is not, in my view, satisfactorily explained and is cause for concern as to the diligence with which he and Mr Bagnall will prosecute the proposed claim.

### Orders

In the circumstances, I make the following orders:

- (a) the application by Mr A J Maher dated 7 May 1997 for an order terminating the liquidation of the defendant is dismissed;
- (b) Mr Maher is ordered to pay the costs of Mobil Oil New Zealand Ltd and the Official Assignee on his application in the sum of \$500 each.

  
~~MASTER T KENNEDY GRANT~~