IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M NO 28/98

IN THE MATTER	of the Companies Act 1993
BETWEEN	FUJI XEROX FINANCE LIMITED Applicant
A N D	PAPARANGI CONSULTANCY LIMITED (IN LIQUIDATION) Respondent

Hearing:	19 October 1998
Counsel:	BT Cullen for the applicant, CM Paul MCL Lim for the Official Assignee and, by leave of the Court, for Westside Contractors Ltd
Judgment:	19 October 1998

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

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[1] This is an application by a shareholder of the defendant for an order terminating the liquidation of the defendant company.

[2] The company was put into liquidation by order of this Court on 20 April 1998.

[3] I approach my decision in the same manner as that which I adopted in the case of ***Holmden Horrocks v Promo Marketing International Ltd*** [1997] 8 NZCLC 261,409 at 261,412:

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

[4] The situation of the defendant company in this case is as follows:

(i) it has been in liquidation since 20 April 1998;

(ii) at the time of its liquidation it had the following assets:

(a) a property in Fiji subject to vendor mortgage to a Mr & Mrs Hunter;

(b) a property in Whakatane subject to a mortgage to the Bank of New Zealand;

(c) a leasehold interest in a kiwifruit property;

(d) a debt of $133,333 from Te Runanganui O Te Ika Whenua;

(iii) at the time of liquidation it had the following debts apart for the amounts owed under the two mortgages referred to:

(a) a debt to Fuji Xerox Finance Ltd of some $98,000;

(b) a debt to Farmlands Trading Society Ltd of some $1,700;

(iv) since the company has been in liquidation the Whakatane property has been sold by the Bank of New Zealand in the exercise of its rights under the mortgage, with a shortfall of approximately $70,000;

(v) the company is also in default under its mortgage to Mr & Mrs Hunter in respect of the Fiji property;

(vi) in addition, there is a dispute between the company and Westside Contractors Ltd to which it leased the kiwifruit property for the 1997-1998 season.

[5] The position so far as the last of these matters is concerned is that I have only limited evidence regarding it. There are claims made by each of the two parties against the other. I have only Mr Paul's evidence as to the validity of these claims. I do not, by saying that, mean that I reject his evidence; but Westside Contractors Ltd has not had an opportunity to put its case before the Court in oposition to this application. The reason for that is that it was not served with the papers in this proceeding due to a

misunderstanding between the applicant and the Official Assignee as to which of the two had, or would accept, responsibility for service on Westside Contractors Ltd.

[6] Mr Cullen, for the applicant, seeks an order terminating the liquidation to enable the company to sell its Fiji property or to raise finance on the security of that property. He accepts that it might be appropriate for the Court to make any such order conditional so that it lapses if the Fiji property is not sold or the refinancing is not obtained within a certain period.

[7] On the evidence before me it is clear that the company is in a position to meet the debt to Fuji Xerox Finance Ltd, it having been reduced by agreement to a sum of $38,000 and the debt due to Farmlands Trading Society Ltd. It is also clear on the evidence before me that the Official Assignee's costs and disbursements can be met.

[8] The question is whether there is any realistic prospect of the company meeting its other obligations if this Court were to exercise its discretion to make an order terminating the order of liquidation made in April of this year.

[9] I should say, first, that I do not consider it appropriate to make a conditional order. Parties dealing with a company are entitled to know that it is out of liquidation and likely to stay out of liquidation or that it is in liquidation. I do not believe that it is conducive to commercial efficiency or morality to create a twilight situation such as, in my view, would result from an order subject to conditions such as Mr Cullen submitted might be appropriate. I therefore consider my decision on the basis that it is an all or nothing decision; either I make an order terminating the liquidation of this company or I decline to make such an order.

[10] I have come to the conclusion that the proper course for me to adopt is to decline to make such an order and to leave the company in liquidation.

[11] My reasons for coming to this conclusion are as follows:

(a) Even if the Fiji property were to be sold at the price suggested by the valuer, whose reports are exhibited to Mr Paul's affidavits, of Fiji$290,000 (currently NZ$283,000) there would only be a margin of NZ$32,000 after payment of the amount owed to Mr & Mrs Hunter under their mortgage and the shortfall owed to the Bank of New Zealand after its mortgagee sale of the Whakatane property and that without taking into account any of the costs of the sale.

(b) There is no certainty that the Fiji property can be sold for its valued price. We are all aware of the present depressed state of the world economy. Buyers of property are clearly going to take advantage of that; and I have grave doubts as to whether the valuer's figure would in fact be achieved.

(c) The option of refinancing using the Fiji property as security is not realistically one which is open to the company even if an order terminating the liquidation is made. The company has no income currently, for the obvious reason that it has been in liquidation. Its major client prior to its liquidation was Te Runanganui O Te Ika Whenua. That company's debt to the defendant comapny had been outstanding for at least a year in March 1998 and, on the evidence before me, Te Runanganui O Te Ika Whenua is in no position to pay that debt or any part of it until such time as its claims before the Waitangi Tribunal are processed and, then only if, they result in a successful outcome for that body.

(d) There is no evidence of any alternative source of income.

[12] I therefore make an order dismissing Mr Paul's application for an order terminating the liquidation of the defendant company.

[13] I make no order as to costs. The applicant will bear his own costs. The Official Assignee's costs may be taken out of the company.

MASTER T KENNEDY-GRANT