IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2009 412 88

IN THE MATTER OF Part 5, Subpart 2 of the Insolvency Act
AND IN THE MATTER OF WARWICK WILLIAM SCOWN

Hearing: 30 March 2009

Appearances: M G Kirkland for Applicant

Judgment: 30 March 2009

(ORAL) JUDGMENT OF ASSOCIATE JUDGE OSBORNE

---

[1] The insolvent seeks approval of a proposal under Part 5 of the Insolvency Act 2006.

[2] The insolvent lodged his proposal on 30 January 2009. Through his trustee, Mr Gareth Holle, he then followed the procedure for putting that proposal by notice to all his creditors, together with all the information required under the Insolvency Act. A meeting of creditors was subsequently convened on 20 February 2009 when the required majorities of creditors (ie a majority in number and a three quarters majority in value) accepted the proposal. The specific numbers, as disclosed by Mr Holle's affidavit, were that 7 creditors who attended the meeting voted in favour of the proposal and 2 voted against. In dollar terms a figure of $4,732.079.00 represented the majority, and a figure of $229,001.00 represented those voting against.

The proposal itself

[3] The proposal was that a dividend of 2.5 cents in each dollar be paid on all debts proved by creditors. It was that proposal which was accepted by the majorities

to which I have referred. Mr Kirkland from the bar gave me some additional background to the rationale for what, on the face of it, appears to be a very modest proposal indeed. The background which is obviously well understood by the creditors involved is that Mr Scown had undertaken a development at Glenorchy which was financially disastrous. He has had to deal with the consequences of that through a process of selling down with the co-operation of creditors. The funds for this proposal come not from any remaining personal assets – he has none - but from assistance he has received substantially from his father and also from a friend. Undoubtedly, the creditors took those matters into account when voting as they did.

My approach to the approval of the proposal

[4] Section 327 of the Insolvency Act 2006 requires a proposal to satisfy an insolvent's debts to be in the prescribed form and to be accompanied by a statement of affairs in the prescribed form. I am satisfied that that was done. Under s 330 the person appointed provisional trustee had to call the meeting of creditors as I have referred to, and I am satisfied that the provisions of both s 330 and 331 were met. These are:

> **330 Provisional trustee must call meeting of creditors**
>
> (1)The provisional trustee must, as soon as practicable after the proposal is filed, call a meeting of creditors by posting to every known creditor at the creditor's last known address—
>
> (a)a notice of the date, time, and place of the meeting:
>
> (b)a summary of the insolvent's assets and liabilities:
>
> (c)a copy of the proposal and particulars of any charge or guarantee:
>
> (d)a creditor's claim form:
>
> (e)a postal vote in the prescribed form.
>
> (2)A creditor who has proved a claim in the prescribed manner may vote on the proposal by sending a postal vote that reaches the provisional trustee before or at the meeting.
>
> (3)If the provisional trustee receives a postal vote before or at the meeting, the postal vote has effect as if the creditor had been present and voted at the meeting.

331 Procedure at meeting of creditors

(1)The provisional trustee is the chairperson of the meeting of creditors, unless the creditors elect their own chairperson.

(2)The creditors may—

(a)examine the insolvent:

(b)accept the proposal with or without amendments or modification, by passing a resolution that sets out the proposal in its final form:

(c)confirm the provisional trustee as trustee, or appoint another person who is willing to act as trustee, in which case that person becomes the trustee.

(3)The resolution accepting the proposal must be decided by a majority in number and three-quarters in value of the creditors who—

(a)vote; and

(b)are personally present or are represented at the meeting by a person specified in section 332 or have voted by postal vote.

(4)If the insolvent consents, the creditors may include in the proposal teams for the supervision of the insolvent's affairs.

[5] Following the acceptance of the proposal it was then the obligation of the trustee to apply to the Court, as he has now done through Mr Kirkland, for approval. Sections 333 (1) – (3) provide:

333 Court must approve proposal

(1)After the proposal has been accepted by the creditors, the trustee must, as soon as practicable,—

(a)apply to the Court for approval of the proposal; and

(b)send notice of the hearing of the application in the prescribed form to the insolvent and to each known creditor.

(2)The Court must, before approving a proposal, hear any objection that is made by or on behalf of a creditor.

(3)The Court may refuse to approve the proposal if it considers that—

(a)the provisions of this subpart have not been complied with; or

(b)the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors; or

(c)for any reason it is not expedient that the proposal be approved

[6] The process is therefore in three stages. The first stage was achieved through the filing of the proposal at the meeting of creditors; the second stage was that the acceptance of the required majorities had to be secured; and the third is the stage which has now reached me this morning. I have to consider the reasonableness of the proposal, and I have to consider the expediency of the proposal.

[7] It is well settled law that while I have some discretion to refuse an approval I should refuse approval only if one or more of the trigger paragraphs in s 333(3) apply. The approach normally taken to proposals is that set out by Hardie Boys J. in *Re Bennetts Proposal* (HC Christchurch B138/81 and M306/81 1 February 1982) which was subsequently quoted with approval in *Farmer v Rowley* [1992] 2 NZLR 195 at 196:

> I think the Court should accept the view of the creditors or the majority of them and grant approval unless it is apparent that one of the grounds for refusing approval exists

[8] I note also, as has been pointed out by this Court previously, that the very heading to s 333 is that the "Court must approve proposal", which emphasises the limited nature of the discretion.

Have the provisions of the sub-parts of s 333 been complied with?

[9] I find that each of the statutory requirements has been complied with.

Are the terms of the proposal "not reasonable" or "not calculated to benefit the general body of creditors"?

[10] I find this a clear case where the proposal has all up-side for the creditors, and no demonstrable downside.

Expediency of the proposal

[11] Adopting the previously used judicial approaches of such terminology as "practicable", "suitable" or "appropriate", I find the present proposal has all those qualities.

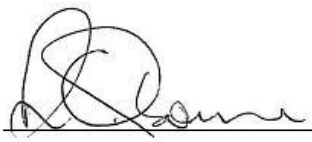
Exercise of the discretion

[12] Ultimately, having been through those steps I stand back and look at the proposal in its entirety and determine whether there is anything that should adversely impact on the exercise of my discretion in this case. I find that there is none.

Result

[13] The application for approval of the proposal is granted.

[14] I note that a bankruptcy application is to be called before in in the Invercargill High Court on 6 May 2009. I anticipate in view of this decision that the application will be dismissed at that time, but leave counsel to make the necessary arrangements.



ASSOCIATE JUDGE OSBORNE

Solicitors
Kirkland Enright Lawyers, Auckland