IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-921

UNDER	The Companies Act 1993
BETWEEN	CALVIN BLAKLEY WEST Plaintiff
AND	SHAFTSPRY LIMITED Defendant

Hearing: 3 February 2009

Appearances: R Pidgeon for Plaintiff
D E Smyth for Defendant

Judgment: 3 April 2009 at 11 am

RESERVED JUDGMENT OF ASSOCIATE JUDGE H SARGISSON

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*This judgment was delivered by Associate Judge Sargisson on **3 April 2009** at **11 am** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
Fortune Manning, PO Box 4139, Auckland 1140
Simpson Dowsett Mackie, PO Box 27240, Mt Roskill, Auckland 1004

Introduction

[1] The plaintiff, Calvin West, has been substituted for the original plaintiff, the Chief Executive of the New Zealand Customs Service, who has been given leave to withdraw from the proceeding.

[2] Mr West seeks an order to liquidate the defendant, Shaftspry Limited, under s 241(4)(a) or (d) of the Companies Act 1993. Those provisions allow the court in its discretion to appoint a liquidator where:

a) A defendant company is unable to pay its debts; or

b) It is just and equitable that the company be put into liquidation.

[3] Mr West seeks the order on alternative bases. First, that Shaftspry has creditors it cannot pay and is therefore insolvent, and secondly and in any event that the factual circumstances clearly show that an order for liquidation would be just and equitable. In his application Mr West raised various factors in support, but at the hearing he placed primary reliance on the following :

a) Shaftspry is not trading. It has no cash flow and its only way of paying its third party creditors is to sell its sole asset, a property of 13.8 hectares of land at Te Kauwhata.

b) A sale is also needed to enable him to recover his investment in and advances he has made by way of loans to the company. The sum involved is substantial (in excess of $300,000) and only partially secured by a mortgage over the Te Kauwhata property. The company also owes him $70,000 for running a restaurant, which the company cannot pay unless the property is sold.

c) Mr Cowley, the controlling shareholder and director, has had ample time to sell the property and cannot be relied on to proceed with the sale process in a proper fashion. He has failed to comply with a shareholders' special resolution to sell the property;

d) Shaftspry was founded on a personal relationship between himself and Mr Cowley, and the relationship has collapsed into a state of serious acrimony resulting from a number of serious disputes between them;

e) In the circumstances, the just and equitable outcome is to put company in the hands of a liquidator so that the winding up can proceed in an orderly fashion for the benefit of the shareholders and the creditors.

[4] Shaftspry's initial response to the liquidation application was to oppose it and to file an application for a permanent stay under r 31.11 of the High Court Rules on the grounds that:

a) The failure to sell the property thus far is through no fault of the company or Mr Cowley who has been taking steps to sell the property in accordance with the agreement to sell made by the special resolution of the shareholders;

b) The resolution, passed on 8 May 2008, provided a mechanism for the sale of the property, the enforced recovery of debts, the payment of all creditors, and the winding up of the company's affairs, and the company and Mr Cowley are continuing to give effect to it;

c) In the circumstances, the liquidation proceeding amounts to an abuse of process.

[5] At the hearing counsel for Shaftspry and Mr Cowley made clear that Shaftspry did not pursue its case on the ground based on abuse of process. Counsel accepted quite properly that the company could not raise the shareholders' resolution as a permanent bar to an order for liquidation should the circumstances otherwise warrant an order. He also advised that the company and Mr Cowley accept that the Te Kauwhata property must be sold in order to pay out the creditors and to realise the shareholders' investments and repay their advances and now seek only a short and temporary stay. He indicated that they accept that a liquidator may soon have to

be appointed for that purpose, but not quite yet. He urged that the best price for the property would be obtained if Mr Cowley were given a little more time to complete the steps he had in train to complete negotiations that were underway with a genuine overseas buyer and to obtain a resource consent the buyer requires. He argued that the potential benefits of his proposal would outweigh any just and equitable grounds that Mr West relies on in petitioning the Court to order the liquidation immediately. In support he referred to an affidavit sworn by Mr Cowley filed shortly before the hearing. The affidavit expanded on Mr Cowley's evidence about the purpose of the resource consent application and the ongoing efforts to sell the property. Mr Cowley's evidence is that he has already made application to renew a previous resource consent to authorise discharges generated by winery related activities, which consent would enable the company to conclude its negotiations with the overseas buyer who had made an offer subject to resource consent. He considered that given a little more time he could secure agreement to a much more favourable counter offer that would add significant value to the sale price for the benefit of the two remaining shareholders, himself and Mr West.

[6] Counsel also argued that Mr Cowley's proposal was consistent with the spirit of the shareholders' resolution and that the resolution was a unanimous resolution made by all of Shaftspry's shareholders, who were three in number at the time. The suggestion was that a brief indulgence would be reasonable so as to allow Mr Cowley to complete his efforts to achieve the agreed objectives of the resolution. While counsel acknowledged that the company had other significant unsecured creditors he said none were pressing for payment of the long outstanding debts and as the company was not trading the company was not incurring further debt.

[7] Counsel sought a further three months to conclude the negotiations, and obtain the resource consent. After discussion however he conceded all that the company could possibly expect was a matter of weeks not months in order to see whether a counter offer would be accepted. He accepted any counter offer could be made subject to resource consent being obtained so as to deal with the purchaser's concerns about resource consent.

[8] Following the hearing I reserved my decision. I also convened a telephone conference after the receipt of memoranda by both counsel about the sale. That conference was held on 23 March.

Discussion

[9] Although the extent of the debt Mr West claims to be owed and the extent of his secured interest in the land appear very much in dispute, as does his claim to an entitlement to wages for running the restaurant, there is no dispute that the company owes money to Mr West.

[10] There is also no dispute that the company does indeed have significant long outstanding third party unsecured debts that it cannot pay until it sells its property at Te Kauwhata.

[11] While neither side was able to say precisely what the overall amount is that the company owes, and counsel for the company was initially reluctant to go so far as to concede that the company was in a state of insolvency, counsel recognised quite properly that it was difficult to maintain any argument to the contrary. There can, in these circumstances, be no real dispute that Shaftspry is insolvent. In any event, any doubts on the issue of insolvency were put to rest at the telephone conference. At the conference counsel for the company acknowledged that there are significant company debts that remain outstanding and that the prospect of Mr Cowley's concluding a sale and obtaining funds in the immediate future permit the company to pay them do not look at all positive. Put simply, the company has no cash flow to pay its debts, and is not likely to be in funds any time soon.

[12] That being the case, Mr West has satisfied at least one of the jurisdictional grounds for an order for liquidation. The only real issue that requires determination is whether Mr Cowley has raised sufficient grounds on behalf of Shaftspry to justify the exercise of the court's discretion to temporarily stay or adjourn the application. Indeed, through counsel Shaftspry accepted that the real issue is whether it has advanced sufficient discretionary factors to justify a temporary stay or adjournment of Mr West's application. I am satisfied it does not.

[13] The argument to the contrary, based as it was on the company's having an asset it is to sell, the proceeds of which should be sufficient to pay all legitimate debts and to allow a distribution of the balance of the proceeds to the shareholders, is based on a belief that is illusory. There is no imminent sale as Mr Smyth acknowledged at the telephone conference. If there ever was a case for a temporary stay, clearly there is no longer. The only proper course is to place the affairs of the company in the hands of a liquidator who will bring a detached and professional approach to the realisation of the company's assets and its winding up. There is therefore no reason that could justify an adjournment.

[14] There is also room to find the necessary clement of unfairness or undue pressure that the Court referred to in *Hewlett-Packard (NZ) Limited v Compusales Software & Hardware Limited* (1990) 5 NZCLC 66,281.

[15] It is not necessary in the circumstances to discuss the further basis Mr West advanced for liquidation or to go through each item of dispute. Suffice to note the decision to liquidate a company on the ground that it is just and equitable to do so involves the exercise of a broad discretion: see *Jenkins v Supscaf Limited* [2006] 3 NZLR 264. The evidence clearly illustrates the collapse of the relationship between the two shareholders and the contentious manner in which the company has transacted its business affairs since December 2006. Implicit in the limited stay counsel for the company sought was an acceptance that it was only a matter of time before this state of affairs would likely justify an order. Mr West's position is that the state of affairs has gone on long enough, and there is no real benefit to be gained by the company and the shareholders that might justify a delay in winding up the company.

Result

[16] I accept the submission for Mr West that a liquidator should be appointed in order to deal with the land appropriately to investigate the company's affairs and to act as guardian of the interests of unsecured creditors. Liquidation is in the best interests of both the shareholders of the company and its creditors.

[17] Accordingly, I make an **orders**:

a) Placing the defendant company into liquidation;

b) Appointing as liquidators Christopher Robert Ross Horton, chartered Accountant and John Albert Price insolvency specialist. Both consent to act and have certified that they are not barred from acting under s 280;

c) Awarding costs to Mr West on a 2B basis plus disbursements to be fixed by the Registrar;

[18] The date and time of the **order** is **3 April 2009** at **11 am**.

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Associate Judge Sargisson