

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-003252

IN THE MATTER OF A Creditor's Compromise Scheme for
Approval

RED BLACK EVENTS LIMITED
Applicant

Hearing: 24 June 2009
Counsel: C J Cato for applicant
Judgment: 25 June 2009 at 2:00pm

INTERIM JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 25 June 2009 at 2:00pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Queen City Law, PO Box 6908, Auckland 1141 for applicant

[1] This application for approval of a compromise between Red Black Events Limited (“the company”) and its unsecured creditors (“the creditors”) came before the Court for the first time on 24 June 2009. Although the applicant is not expressly named in the application (and, curiously, the application is addressed to the company as well as the Court and listed creditors) counsel confirmed that the application is brought by the company.

[2] The company seeks Court approval of a compromise proposed by the board of directors of the company pursuant to Part 14 of the Companies Act 1993 and accepted at a meeting of creditors held on 20 May 2009.

[3] The application is brought pursuant to s 236 of the Companies Act 1993. In addition to seeking approval, the company also seeks ancillary orders in relation to service and hearing of the application.

[4] Although all but one of the creditors who attended the meeting (in person or by proxy) or submitted a postal vote supported the compromise, there are still a number of procedural and substantive matters upon which it needs to be satisfied. For that reason I am giving this interim judgment on the ancillary matters, with a view to bringing the matter back before the Court for what may then be a relatively brief hearing.

Background

[5] The application is supported by an affidavit of Richard Wood, a director of the company. He annexes to the affidavit a copy of the notice of meeting sent to the creditors setting out the proposed compromise, a statement of relevant matters in accordance with s 229(2)(b) of the Companies Act, copies of postal voting and proxy voting forms sent to creditors, a schedule of creditors intended to be included in the compromise, and minutes of the meeting and a certificate as to the result of the postal voting. The latter documents have been signed by Glenn Andrew Walker, a chartered accountant who was appointed to chair the meeting and to receive and

count the postal votes. Under the compromise Mr Walker was also appointed Compromise Manager responsible for managing the compromise. The following background is taken from the statement pursuant to s 229(2)(b) sent to creditors.

[6] The company operates a business known as Traffic Bar & Kitchen at 2 Queen Street, Auckland. It experienced financial difficulties after renovating its premises at 2 Queen Street and as a consequence of difficult trading conditions since launching its business. It entered into an informal payment arrangement with unsecured creditors in mid 2008 and took steps to rationalise its business costs. Although it increased its turnover, and made modest improvements to profitability over the summer period 2008-2009, it has been unable to generate cash surpluses to reduce its unsecured debt significantly.

[7] In late February 2009 one of the unsecured creditors commenced steps to put the company into liquidation. The directors of the company have responded by putting the proposal for compromise to all unsecured creditors (including themselves as shareholders with current accounts with the company). The compromise comprises a moratorium of all unsecured creditors' debt as at 28 February 2009 until trading is expected to pick up again over the summer months. The creditor who has started the liquidation proceeding has agreed to an adjournment of the proceeding to allow the present application to be brought, and to discontinue the proceeding if the Court approves the compromise.

[8] The company has obtained funding to allow it to meet operational expenses through winter/spring 2009. It intends commencing repayments to the creditors following expiry of the moratorium on 30 November 2009, out of trading surplus (together with any additional funding that it may obtain) but after meeting obligations to secured and preferential creditors and normal operating expenses (including lease costs) as they fall due.

Procedural steps

[9] The discretion given to the Court under s 236 to approve a compromise is very general. There are no prescribed steps as with a compromise under Part 14 of

the Act. It is established law, however, that the Court has a duty to ensure that the rights of affected creditors are adequately protected, and this includes procedural rights: *Re C M Banks Limited* [1944] NZLR 248. Towards this end, s 236(2) sets out a number of matters that the Court may order before determining the application for approval. These include giving notice of the information relating to it, directing meetings to consider the proposal, requiring a report on the compromise to be provided, and specifying persons who shall be entitled to appear and be heard on the application.

[10] Although the evidence of Mr Wood indicates that the company has endeavoured to address these matters in the notice given to creditors of the meeting of 20 May 2009 (and no doubt expanded upon in the meeting itself) there are a number of matters on which the Court needs to be satisfied before determining this application:

- a) Mr Wood states that “the compromise has been fairly put before all unsecured creditors” but does not expressly state how that was done. The inference is that the notice of meeting, statement relating to compromise and other documents were sent to all unsecured creditors. There is no express reference to a list of creditors, the address to which the notice was sent, and the date on which it was sent. As the compromise, when approved, will be binding on creditors who may not agree with it, the Court must be clear as to the notice that has been given to them.
- b) The schedule of creditors produced by Mr Wood lists a total of 48 creditors including the 3 shareholders with outstanding current accounts, and the amounts owed to each as at 28 February 2009. The total debt is \$401,483.11. The minutes of the meeting of 20 May 2009 refer to 25 creditors representing a debt of \$382,044 voting for the proposal and 1 creditor with a debt of \$476 voting against. It would be helpful to the Court to have the schedule of creditors expanded to show those who voted (and whether in person, by proxy or by post) and those who did not.

- c) The compromise refers to a payment of \$25,000 being made the working day after the Court gives approval of the compromise but does not expressly state how that will be applied (pro rata or otherwise).
- d) The compromise refers to repayment of frozen debt commencing from 1 December 2009 (on a pro rata basis) with a creditor committee being appointed to work with the Compromise Manager in determining future debt repayments and the timing of such repayments. It is unclear whether or not a creditor is free to take recovery action after that day if dissatisfied with the timing or amount of payments made to it under this arrangement.
- e) Although it seems likely that the costs of the Compromise Manager will be met by the company out of its trading income, this should be addressed expressly and an estimate of likely cost provided.

Interim orders

[11] I make the following orders to address the matters I have referred to above and to bring the matter back before the Court:

- a) The company is to file and serve further affidavits addressing the matters I have identified in paragraph [10] above. The affidavit in respect of the way in which the scheme is to operate (paragraph [10] (c), (d) and (e)) should be provided by Mr Walker as Compromise Manager.
- b) The application, supporting affidavits and a copy of this interim judgment are to be served on the creditors together with notice of the next date of hearing.
- c) Any creditor wishing to be heard on the application is to file and serve notice of intention to appear two clear working days before the

hearing date. Service may be effected by posting by ordinary mail to the current address held for each creditor or by email to those who do not have a postal address in New Zealand. It will not be necessary to re-serve creditors with the originating application or affidavit of Mr Wood if those documents have already been served on creditors.

- d) The Registrar is to re-list the application for further call at 10:00am on 9 July 2009. The application will be determined that day unless any creditor appears to oppose the application, and the matter cannot be properly determined on that date.

Associate Judge Abbott