

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

**CIV 2009 409 001696**

BETWEEN THE COMMISSIONER OF INLAND  
REVENUE  
Plaintiff  
  
AND CHAR CHAR LIMITED  
Defendant

**CIV 2009 409 001697**

AND BETWEEN THE COMMISSIONER OF INLAND  
REVENUE  
Plaintiff  
  
AND YELLOW CROSS BREWING  
COMPANY LIMITED  
Defendant

Appearances: K Clark QC for Plaintiff  
A J Forbes QC for Defendants

Judgment: 3 November 2009

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**JUDGMENT OF ASSOCIATE JUDGE OSBORNE  
As to Adjournment Application**

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[1] In parallel proceedings, the Commissioner has applied for orders putting both defendants into liquidation.

[2] In response to the claims issued on 31 July 2009 the defendants promptly filed statements of defence. The inability of the defendants to pay their debts was admitted but the defendants sought orders, in the Court's discretion, to have the

proceedings adjourned to enable the defendants to put compromise proposals to their creditors under s228 Companies Act 1993. The defendants stated an expectation that they would receive the required majorities of approval. A related company, Edward J Schwartz Entertainment Inc Limited CIV 2009 409 1698), was in a similar position and was dealt with through subsequent conferences and hearings in a similar manner. Atlas Food & Beverage Limited (CIV 2009 409 1342), another related company, is also involved in the proposals.

[3] Proposals were subsequently put to creditors and it has been reported to the Court that the Schwartz and Atlas proposals were approved by the required majorities but that the Char Char and Yellow Cross proposals did not receive the required majorities. Flowing from that, these defendants intended to bring applications variously under s232 and s236 Companies Act 1993 for Court approval. I have since (6 October 2009) allocated 30 November 2009 for the hearing of any applications of these two defendants and two other defendants or of the Commissioner.

[4] Through the process of submission of proposals to creditors and creditors' meetings, the Commissioner has repeatedly signalled his opposition to the proposals and his desire to have the liquidation proceedings heard without delay. These two proceedings last came before me by telephone conference on 5 October 2009 when the hearing of these liquidation applications was pending on 8 October 2009. I ruled that it was just and appropriate that the fixtures be vacated to enable the Court to consider such s232 and s236 applications as were filed in relation to the compromises before reaching judgment on the liquidation applications. I noted the Court's consideration being beyond the interest of purely the plaintiff and the defendants and being concerned also with the interests of other creditors.

[5] The s232 and s236 applications were accordingly allocated urgent fixtures (together) on 30 November 2009. I imposed a timetable which would see any applications ready for such hearing being:

- (a) Application by either party for orders, together with evidence to be filed by 16 October 2009.

- (b) Notice of opposition and all evidence in opposition to be filed by 23 October 2009.
- (c) Any evidence in reply to be filed by 30 October 2009.

[6] I viewed these dates as allowing time to ensure that all the relevant evidence was on the table to enable both parties to properly prepare for and file their submissions in advance of the 30 November hearing. I adjourned these proceedings (together with the Schwartz proceeding) to 2 November 2009 in order to confirm that all interlocutory steps for the s232 and s236 applications had been completed and for the purpose of timetabling pre-hearing submissions.

[7] As it transpired, before the matter was called in Court before me on 2 November 2009 Panckhurst J as the Judge who will hear the s232 and s236 applications on 30 November 2009 has reviewed these proceedings and the hearing date is confirmed. The timetable would need amendment.

#### **Commissioner's application to proceed**

[8] Notwithstanding detailed submissions from Ms Clark, particularly as to understandable grievances of the Commissioner as to delay, I have reached a clear view that these two proceedings should remain adjourned pending the outcome of the 30 November 2009 hearing.

[9] Ms Clark for the Commissioner, in support of the making of liquidation orders now, emphasised that the defendants are unable to pay their debts and that the compromises proposed by these two defendants have not been approved. I previously took those points into account but nevertheless vacated the October fixtures having regard to what I considered the appropriateness of the s232 and s236 applications being heard promptly.

[10] Ms Clark's next point was that the defendants have had the benefit of additional time since seeking, on what she submits are dubious grounds, the vacation of the October fixture. She points to the added complication that the defendants

have not observed the timetable put in place on 6 October, requiring any applications by 16 October. She notes that the Commissioner on time filed the two applications he wished to make in relation to related companies.


[11] These two defendants have still to file their applications, some two weeks after the timetable date and indeed now after the dates by which both the opposition evidence and any reply evidence was to have been completed. Mr Forbes produced to me a bundle of documents which are in the nature of a draft application, a draft affidavit and a draft notice to creditors. Mr Forbes explained that with the amount of work that lay in the s232 and s236 documentation, alongside other matters with which Mr Henderson and his companies are dealing at the moment, the defendants were simply unable to deal with the applications within the timetable.

[12] The Court is unimpressed by the fact that the defendants had still failed, some two weeks after the timetable date, to file their necessary documents. The defendants did not apply promptly or at all to the Court, as they ought to have, for variation of the timetable – rather they left it to the Commissioner to raise the matter in advance of the call on 2 November 2009. To that extent, I am satisfied that there are inexcusable aspects of the defendants' conduct on these applications which require to be dealt with in costs, but I am not satisfied at this point that the reasons which led to the decision to vacate the fixtures on 6 October 2009 are not still achievable. The reasons relate to the opportunity for the companies and their creditors to have the applications in relation to the compromise heard promptly by the Court. The issues between the parties have been well ventilated and indeed were largely, if not wholly, in the minds of the parties at the time of the creditors' meetings in early October. I consider that with an amended timetable, albeit tight timetabling, any applications filed may yet be made ready for hearing on 30 November. If for any reason due to further defendant delay the applications cannot be ready for hearing on that date, then through leave which I will reserve to the plaintiff, the plaintiff will retain the opportunity to argue for winding up. Having regard to the defendants' delays to date, the plaintiff should have the opportunity to present argument for winding up should the 30 November 2009 hearing not be able to proceed because of the steps that remain to be taken between now and then in that event.

[13] I have also taken into account the Commissioner's concerns with regard to the possible increase of tax liabilities and the argument for an independent investigation of the companies' affairs. Having regard to the proximity of the 30 November 2009 hearing, and the opportunity for the Court to consider creditors' interests broadly in that context, those considerations do not cut across the view which I reached on 6 October 2009 that there should remain an early opportunity for s232 and s236 applications to be heard.

[14] I accordingly decline for now the plaintiff's application for liquidation orders. I adjourn these two proceedings to 10.00am 30 November 2009, to be called following the s232 and s236 applications. I reserve leave to the plaintiff to apply on 5 days notice for the liquidation applications to be brought on for earlier hearing should there be any further breach by the defendants of timetabling directions or should the unanticipated nature of any aspect of the defendants' applications, evidence or submissions mean that the 30 November hearing is no longer realistic.

[15] I will now hear from counsel on any remaining timetabling issues and on the issue of the costs of this hearing.

A handwritten signature in black ink, appearing to be 'AJ Forbes', written over a horizontal line.

Solicitors  
Inland Revenue, Wellington  
AJ Forbes QC, Christchurch  
Cousins & Associates, Christchurch  
Crown Law, Wellington  
K Clark QC, Wellington