IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-000802

IN THE MATTER OF	of the Companies Act 1993
BETWEEN	THE REGISTRAR OF COMPANIES Plaintiff
AND	NORTHERN CREST INVESTMENTS LIMITED Defendant

Hearing: 8 June 2009

Appearances: M Woolford for the Plaintiff
N Gedye for the Defendant
D Grove for the Creditors in Support

Judgment: 8 June 2009

ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

Solicitors/Counsel:
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[1] The plaintiff (the Registrar) applies for an order placing the defendant (NCI) into liquidation on the grounds:

a) NCI has persistently and seriously failed to comply with s194 of the Companies Act 1993 concerning its obligation to keep accounting records;

b) NCI is insolvent;

c) It is just and equitable that NCI be put into liquidation.

[2] Mr Grove represents two creditors, the Inglesons and Ms Hudson, who have filed notices of appearance in support of the Registrar's claim.

[3] At the conclusion of the hearing I dismissed the Registrar's application and directed costs lie where they fall. I then outlined a framework of reasons for my conclusions.

[4] I said that much has changed in the last four months since the Registrar's proceeding had been filed. On the face of matters there were good reasons for the Registrar's claim for liquidation – in particular because of Mr Mark Bryers' (Mr Bryers) position as NCI's sole director and because it appeared he was a major debtor of the company. Since, he has resigned as a director. Control of NCI is now very much with persons who appear well qualified and in whom the Court can for present purposes have confidence in.

[5] NCI has now provided the outstanding financial accounts. These have been audited and in particular the 2009 annual accounts carry no qualification from the auditors even though some of their assessments are supported by assumptions.

[6] The Registrar and creditors in support submit that because of alleged deficiencies with the 2008 annual accounts they do not comply with s194 of the Companies Act 1993. I said any deficiency has from a liquidation perspective been sufficiently answered by the 2009 accounts. Further I stated that issues which may

still arise due to the 2008 accounts are capable of being dealt with by the Registrar by other means because of the investigative powers available to him.

[7] I said that the matter was being dealt with in the winding-up Court; and that the Court accepts there is sufficient evidence to substantiate a claim of solvency on the basis of NCI being able to meet its debts as they fall due. I noted the liquidation was not supported by virtually all of its creditors and shareholders. Further that a question mark arises in relation to those claims of persons who appeared in support of the Registrar. Certainly it is clear that those claims would need to be tested elsewhere than in the context of a winding-up proceeding.

[8] I stated there was nothing in the evidence to support claims of misfeasance or bad faith conduct. I noted the company is proposing to migrate to Australia. I said this Court had the confidence that the regulatory authorities of Australia could adequately protect the interest represented by issues raised upon this proceeding.

[9] I noted that the liquidator of the Blue Chip company supported a proposal that might provide a dividend for those who otherwise would certainly miss out altogether. I said the evidence clearly suggests that much more harm would result if the Registrar's application was granted.

[10] I ordered that the Registrar's proceeding be dismissed. I noted that there was no further need for any confidentiality order to remain concerning the file and directed that order be rescinded.

[11] I decided costs should lie where they fell because in the outcome NCI was successful but in the beginning the Registrar's proceeding had been justified and continued to be justified right up until the time of the hearing because only then was the full measure of NCI's evidence known.

Detail of reasons for decision

[12] In the four months since this proceeding was filed a large number of affidavits have been filed. Three large affidavits were filed by Mr J R McPherson on

behalf of the Registrar. On behalf of NCI five affidavits have been filed by Mr Bryers whose name is well known in association with the Blue Chip group of companies of which NCI has been described as the parent company. In recent weeks the Court has also received from NCI two affidavits from Mr M Wilson, two from Mr G Eakin, one from Mr D Townsend and one from Mr J Meltzer.

[13] Mr Wilson and Mr Eakin are two of the three recently appointed independent directors. Mr Wilson has been appointed chairman of NCI. He is an experienced chartered accountant. I accept he has a substantial degree of independence having been involved as an advisor in NCI board meetings for some months and having a good knowledge of the company's current affairs. He has accepted appointment as a director and chairperson in full knowledge of the responsibilities that that entails. Mr Wilson is an Australian National and is operating NCI under the ASX regulatory regime as well as under the New Zealand Companies Act.

[14] In his affidavit Mr Wilson has specifically addressed the question of unsecured creditors and the company's ability to pay its debts through to at least 31 March 2010. He has indicated that by the 2009 accounts NCI's position is shown as having improved. He referred in explicit terms to the funding of the company and expressed confidence in the chief financial officer's competence and continuing oversight. It is evident from the April 2009 accounts that an operating profit of AUD$542K is shown.

[15] Mr Wilson's evidence as to NCI's ability to pay its debts is supported by the affidavit of Mr Townsend, an experienced independent chartered accountant with Hall Chadwick of Australia, the national accounting firm expected to be confirmed at the soon to be held AGM as the current auditors of NCI.

[16] Mr Townsend has reviewed the affidavits of Mr McPherson and Mr Bryers, among others. He has considered the question of whether NCI can pay its debts as and when they fall due and concluded they can.

[17] He points out confusing and misleading depiction of NCI's financial affairs in the plaintiffs' material because they do not separate out the group reporting from NCI's own position.

[18] Mr Townsend had, just one working day prior to this hearing, completed an audit of the 2009 accounts. Whilst noting in his report an ability to access some relevant documents and the limitations caused to him thereby he concludes that the 2009 accounts comply with generally accepted accounting practice in New Zealand and gave a true and fair view of the company's and the group's financial position.

[19] In his role as a newly appointed director Mr Eakin will also chair NCI's audit committee. Mr Eakin also represents NCI's largest shareholder, Manifest Capital, an Australian listed company. Mr Eakin believes that NCI can trade its way into a healthy financial position in the near future. He stated:

> "Although it does not have substantial tangible assets, its intellectual property and the good relationships it enjoys with its distribution channels and the other key elements of its business in my opinion all indicate that Northern Crest can be expected to trade its way into a satisfactory position within the coming months."

[20] Mr Eakin explains that in addition to having acquired 20 percent of NCI's shares initially and whilst that shareholding has been reduced, it remains the largest shareholder. He said that Manifest Capital's clients have also advanced NCI a further AUD$3M as a cash advance, unsecured. It is intended that loan be converted into shares with a planned rights issue. In that outcome the AUD$3M would form part of the capital of NCI and will no longer comprise part of its debt. Mr Eakin says that if NCI is placed into liquidation Manifest Capital's clients would loose all their investment in their shares and likely also the AUD$3M cash advance.

Creditors in support

[21] To their notice the Inglesons have attached a photocopy of a document purportedly containing the signature of directors in support of a commitment to make payment to the Inglesons. But, although the potential for a claim based upon that document has long existed, no proceedings have ever been filed in support of it. Mr

Gedye for NCI advised with brief reasons why any claim brought by the Inglesons would be defended.

[22] Ms Hudson has filed proceedings in the High Court in support of her claim. In that, NCI has been named as seventh defendant. It has been joined as a party because it is claimed NCI is the ultimate beneficiary of sums paid by Ms Hudson and others when purchasing into developments promoted by Blue Chip companies.

[23] It is obvious that although those creditors have status before this Court, their claims are not ones that are ever likely to be resolved short of trial before another Court.

[24] Initially a further notice of appearance in support was filed on behalf of Robt. Jones Holdings Limited. That company was not represented in these proceedings. The Court is entitled to infer it no longer supports the liquidation of NCI.

Other creditors

[25] Two such have been referred to in the evidence as identified by the Registrar's submissions to which consideration ought to be given. However it is clear from the evidence on behalf of NCI that in respect of one there is a proposal to issue a convertible note in satisfaction of the debt. As regards the other it is questionable whether it is indeed a debt of NCI at all. That creditor appears to have released NCI from a guarantee liability. As much may be inferred from the recent auditor's report.

[26] It is noteworthy that neither creditor supports the liquidation proceeding.

Solvency

[27] It is clear from the Registrar's evidence that its case depends largely upon an assessment of solvency on a balance sheet basis. The reason is that NCI's assets largely comprise a $4.129M receivables figure in the accounts. Questions are properly raised regarding the recoverability of these. However it is clear NCI does

not rely upon collection of them for its viability, its ability to trade or its business plan.

[28] I adopt Mr Gedye's submission that while some doubts about recovery of receivables presents as an easy target for the Registrar's criticisms, this issue is of no relevance or weight to the correct issues namely whether NCI is able to pay its current debts as they fall due.

[29] The combined evidence of all the deponents on behalf of NCI supports the proposition that NCI is able to meet its debts as they fall due – this after all being the proper test for consideration of solvency. Of course, the time for assessment of solvency is at the date of the hearing, and not based upon historical assessment.

Persistent or serious failure to comply with the Companies Act

[30] This claim by the Registrar provided the impetus for the liquidation application. In reality it provides the real thrust of the Registrar's claim in the hearing before me.

[31] Section 194 (1) of the Companies Act requires the board of a company to cause accounting records to be kept that –

> "…
>
> (b) Will at any time enable the financial position of the company to be determined with reasonable accuracy; and
>
> (c) Will enable the directors to ensure that the financial statements of the company comply with section 10 of the Financial Reporting Act 1993 and any group financial statements comply with section 13 of that Act; and
>
> (d) Will enable the financial statements of the company to be readily and properly audited."

[32] According to the Registrar's case NCI has persistently failed to observe this obligation.

[33] Much of the substance in the Registrar's claim falls away with the filing of the 2008 audited accounts. The Court is satisfied that NCI has provided a

reasonable, detailed and credible explanation for the delay in complying with s194. It is arguable that any failure to file the 2008 accounts within time was not wilful or inexcusable. Regardless, it did file those accounts but because of the requirements of the ASX regime it was also required to report on the period of 15 months following March 2008. In addition there was the added burden of the requirement for group reporting. Then, when the accounts were completed they had to be audited. Also and undoubtedly, as claimed, this liquidation proceeding made it harder to finalise the audit.

[34] I accept Mr Gedye's submission that a failure to file accounts on time would not normally generate a liquidation proceeding. There are sanctions under the Financial Reporting Act 1993 and the Companies Act designed specifically to address such a failure: s194 (4) Companies Act 1993, s36 Financial Reporting Act 1993.

[35] In these circumstances it is inappropriate to describe the late filing of the 2008 accounts as a "persistent" failure. Nor, in light of the explanation of difficulties encountered can it appropriately be described as a serious failure which term is more consistent with wilful, unjustified and frequent breach.

[36] Because the 2008 accounts have now been filed the focus of the Registrar's complaint now particularly concerns the adequacy of those accounts. The Registrar has focussed on the qualification to the 2008 accounts provided by the auditors. A number of such qualifications are provided in the auditor's reports. Those mainly relate to the lack of information and explanations in support of detail in the financial accounts. In that outcome the auditors stated they were unable to form an opinion as to whether the financial report complied with generally accepted accounting practice in New Zealand, and gave a true and fair view of the financial position of the company as at 31 March 2008.

[37] In short the auditors could not confirm whether statements in the accounts were reasonably accurate or not. They were complaining that they did not get the primary evidence.

[38] Much of the substance of the argument on behalf of the Registrar and the creditors in support concerns perceptions of failure to account for large sums of money associated with the collapse of NCI's group companies. I accept the submission that much of that perception is misconceived or plainly incorrect. The Registrar's purpose appears to be that there is a desirability of investigating NCI. But, if that was the Registrar's position or the purpose of the creditors in support then such power, if it is required, is available under s365 of the Companies Act.

Discretion

[39] Ultimately the Court reserves a broad discretion to refuse to put a company into liquidation.

[40] Commonly that is exercised when there is a genuine dispute which cannot be dealt within the companies Court, or because of the views of other creditors liquidation may be an inappropriate remedy. Usually if a remedy other than liquidation is reasonably available then the Court will normally decline to order liquidation.

[41] This case began because of perceived failings in maintenance of financial accounts. Likely, Mr Bryers' presence as a director, shareholder and debtor was a significant motivating factor also. Mr Bryers remains a shareholder but no longer has control. The Court has no reason not to accept the qualification experience or independence of those who have replaced Mr Bryers on NCI's board. The significance of the 2008 accounts is largely historical, notwithstanding concerns expressed over the adequacy of the material provided to support detail contained in those accounts. Regardless, it is clear those accounts arguably meet the requirements of s194 which section is concerned with the company's primary financial records and does not address the audited annual financial statements and annual reports. The intent of s194 is that the primary financial records of the company must be "reasonably accurate". The fact is that NCI's financial accounts did enable those accounts to be audited, which was done, and which audit was signed off. Further, the qualifications mentioned of the 2008 audit report were not repeated in the 2009 report.

[42] It is not for this Court upon a liquidation application to make findings concerning solvency where, as in the circumstances of this case, such would need to be the subject of expert evidence. At this time this Court is without that evidence.

[43] Save for the two creditors I have referred to, none other appears to support the liquidation application. This is an important factor when it is borne in mind that the Registrar's purpose in this proceedings is restricted to the petitioning rights of ordinary creditors and contributories.

[44] NCI's board is now controlled by Australian Nationals. Apparently, a greater part of its shareholding is controlled by Australian interests. The majority of its creditors are Australian interests. It is applying for relisting with the ASX. Its intention is to migrate to the Australian Register. This is planned to take place shortly after the AGM scheduled for July 2009.

[45] The present board has endorsed a unit trust proposal for the benefit of New Zealand Blue Chip investors. The liquidators of Blue Chip New Zealand support such provided it is viable and can be achieved within a reasonable timeframe. Obviously liquidation would stop this. Mr Wilson has deposed that there is a likelihood of losses in excess of AUD$90M (NZ$115M) if the company is liquidated. Mr Gedye submits and I accept that in balancing the equities in the interests of the parties the Court in this case is confronted with massive irrevocable losses to well over 2000 people if the company is liquidated.

Associate Judge Christiansen