IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-007741

UNDER	Section 209 of the Companies Act 1993
BETWEEN	NORTHERN CREST INVESTMENTS LIMITED Applicant
AND	ROSS ERIC HAYWOOD Respondent

Hearing: 2 June 2011

Appearances: A R Nicholls for the Applicant
D Grove for the Respondent

Judgment: 2 June 2011

Reasons: 3 June 2011

REASONS FOR JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
03.06.11 at 4:00pm, pursuant to
Rule 11.5 of the high court rules.

Registrar/deputy registrar
Date... ... ...

Solicitors/Counsel:
A Nicholls, Edwards Clark Dickie Lawyers, Auckland – nicholls@ecd-legal.co.nz
D Grove, Barrister, Auckland – danielgrove@45chancery.co.nz

[1] On 2 June 2011 I heard counsels' submissions upon the applicant's (NCI) application to set aside the respondent's (Mr Haywood) statutory demand.

[2] At the conclusion of those, I advised counsel I would immediately deliver my decision with my full reasons to follow by 4:00pm the next day.

[3] These are the reasons I gave at the time of delivering my decision. My full reasons follow from paragraph 16 herein.

REASONS FOR DECISION

[4] NCI's position is that there is a claim against Mr Haywood that ought to be heard. Mr Nicholls argued that it is not the Court's job to resolve those issues here at this time.

[5] NCI have endeavoured to explain their delay in making that claim as being due to matters of complexity and cost. The fact is the claims are presently largely unparticularised. They have arisen in circumstances that might cast dispersions upon the motives of those making the claims.

[6] There presently is no satisfactory evidence of an arguable case brought by or able to be brought by NCI against Mr Haywood. The grounds for setting aside the statutory demand fail.

[7] At this time the Court has two options available to it if it is of the view that NCI is unable to pay its debts. The first is to order NCI to pay the debt within a specified period and in default to place it into liquidation.

[8] The other option is to dismiss the application and to forthwith make an order putting NCI into liquidation.

[9] Applications for setting aside are mostly about arguable defences or cross claims or setoff claims. These applications are not always concerned about solvency or about a company being able to pay its debts as they fall due.

[10] In this case the issue of solvency has been directly addressed. Mr Grove submits NCI is hopelessly insolvent. I cannot disagree with that description. From the material available to the Court it is clear that for the trading period of six months ending September 2010 NCI traded at a net loss of about NZ$3 million and had negative equity of about NZ$7.7 million.

[11] There are also public interest reasons involved for NCI. Liquidation would give an opportunity for independent oversight for a review of directors' actions over past years.

Order for liquidation

[12] There is an order for the liquidation of Northern Crest Investments Limited.

[13] The Court appoints Mr A J McCullagh and Mr S M Lawrence as liquidators. Their rates of charge are approved in terms requested by paragraph 4 of the liquidators' memorandum of consent.

[14] NCI is to pay Mr Haywood's costs on a 2B basis together with disbursements approved by the Registrar.

[15] The time of the making of the order for liquidation is noted at 12:08pm.

FULL JUDGMENT REASONS

The application

[16] The application is made pursuant to s 290 of the Companies Act 1993 (the Act) by which section the Court may order the setting aside of a statutory demand if satisfied there is a substantial dispute about whether or not the debt is owing or is due or if it appears to the Court the applicant has a counterclaim, set off, or cross demand in an amount at least equal to the statutory demand.

[17] If satisfied there is no substantial dispute or case for a counterclaim, set off or cross demand then s 291 provides the Court with two options that may be used if it

appears at that time to the Court that the applicant company is unable to pay its debts, namely:

(a) To order the company to pay the debt within a specified period and in default to place the company into liquidation.

(b) To dismiss the application and forthwith make an order putting the company into liquidation.

[18] In the outcome of the setting aside application it is available to the Court to immediately order the liquidation of an unsuccessful applicant if the Court is of the view the applicant company cannot pay its debts, or it is just and equitable that an order for liquidation be made.

The statutory demand

[19] It refers to a sum of $142,049.78 plus interest owed, pursuant to a deed of settlement entered into by Maine Sheldon Holdings Pty Limited (MSH) as principal debtor, NCI as guarantor and Mr Haywood as creditor.

[20] The statutory demand was served at NCI's registered office c/o Minter Ellison Rudd Watts at Wellington.

[21] NCI is a New Zealand company. It has applied to set aside the statutory demand. Mr Eakin of Australia, has sworn an affidavit in support of the application.

Grounds for setting aside application

[22] The application claims:

(a) Mr Haywood, through his negligence and bad faith, caused NCI's guarantee of the debt payment due to Mr Haywood, to be discharged and as a result nothing is owing under that guarantee.

(b) The guarantee was executed by NCI's Australian registered company which is a separate legal entity to the New Zealand registered company that is the subject of the statutory demand.

[23] The first ground for setting aside claims an arguable case for a cross claim. The second ground asserts there is a substantial dispute whether or not the debt is owing in New Zealand at all.

[24] Mr Eakin's affidavit asserts that NCI's Australian entity guaranteed MSH's loan obligation to Mr Haywood; and refers to claims of negligent performance by Mr Haywood as an employee of the Australian entity and on behalf of the New Zealand entity; and details claims of an arguable counterclaim, set off or cross demand in an amount exceeding Mr Haywood's claim.

[25] Mr Eakin is an executive director of Northern Crest Investments Limited ABN 72 117 103 376 (an Australian registered company). He is also a director of NCI, incorporated in New Zealand on 12 August 1983.

[26] As Mr Eakin has done, I too will refer for present purposes to the New Zealand entity as NIC and to the Australian entity as NOC.

[27] Mr Eakin states that the statutory demand related to obligations of NOC and not NCI under a "Deed of Settlement and Loan Repayment" (the Deed) dated 10 March 2010 that was executed by him and another director of NOC, and is not executed by NCI.

[28] Referring to the Deed, Mr Eakin notes by it that NOC guaranteed to Mr Haywood the obligations of MSH a company now in liquidation. Mr Eakin noted that all parties to the Deed were, at the time of execution, resident in Australia and that NOC and MSH remain so.

[29] Referring again to the Deed, Mr Eakin notes in clause 11 an option available to Mr Haywood (referred to in the Deed as "Ross") of having the Deed construed in

accordance with the law of New South Wales or New Zealand by pleading in that jurisdiction. Clause 11(c) provides:

> 11. General
>
> (c) This Deed shall be construed in accordance with and governed by the laws of New South Wales, Australia or laws in force in the country of New Zealand, at the choice of Ross. Each of the parties irrevocably submits to the jurisdiction Ross chooses to plead in and the parties agree that the Court system of that state shall be the forum of choice in relation to this Deed.

[30] Mr Nicolls' submissions suggest that legally there is some difference between the Australian and New Zealand aspects to this dispute; that Mr Haywood's statutory demand is not a pleading pursuant to clause 11(c) of the Deed and therefore he cannot issue a statutory demand to enforce NCI's obligations.

[31] Concerning the claims against Mr Haywood, Mr Eakin states Mr Haywood was formerly the group financial controller for Blue Chip Financial Solutions (Australia) Limited (BCFSAL). Pursuant to an employment contract he was from 2007 employed as a financial controller and required to report to the chief financial controller. Mr Haywood was also employed by MSH. By an employment agreement dated 10 March 2010 he is noted as the "executive" who was bound to report to the executive director. That employment agreement bears the same date as the Deed which referred to Mr Haywood having advanced A$142,000 to MSH.

[32] Mr Eakin [para 11] deposes that the liquidation of MSH:

> ... is in no small part related to Mr Haywood's mismanagement of that company. In particular, he was responsible for ensuring that GST returns and other obligations... to the Australian Tax Office [ATO]... were met. It would appear from our investigation of the failure of the company that he simply failed in those obligations and that resulted PAYG (the Australia equivalent of PAYE) was not handled properly, incorrect information was provided, the resulting liability and administrative costs are tentatively put at A$340,000.

[33] Mr Eakin also deposes:

> 13. Mr Haywood has similar obligations in respect of another company called Barkley Walsh Pty Limited. That company is also now in liquidation. An interim report of the ATO dated 12 January 2010 was provided to the liquidator. A copy of that report is annexed

hereto marked "H". The interim report of the ATO at page 7 details serious matters in regards to false and misleading statements that incorrectly stated net GST totalling A$574,693.00.

14. The ATO has applied its remission considerations and penalty percentages and, as at the date of that interim report, considered that the liability by way of final penalty payable is A$397,147.00. I have corresponded with the ATO and we continue to work through those issues. This is time consuming and expensive. Annexed hereto marked "I" is my letter dated 5 February 2010 to the ATO. At this point in time it would seem that at least A$270,000.00 of GST refunds will not be able to be recovered.

15. Mr Haywood was also responsible for the filing obligations of the Bluechip Financial Solutions Limited Consolidated Group ("the Consolidated Group") in New Zealand 2007. The Company then Bluechip Financial Solutions Limited ("BCFSL") now Northern Crest Investments Limited should have been removed from the Consolidated Group as it effectively ceased trading because it moved its business to Australia. Had this been completed correctly NZ$500,000.00 approximately that was paid in that year by way of provisional tax would have been recoverable. The error in this respect was discovered in April 2010.

16. Since then I and our solicitors in this matter (Lee Salmon Long – Julian Long acting) have been attempting to deal with this issue. Annexed hereto and marked "J" is my briefing paper that succinctly as possible sets out the issue. Also annexed hereto and marked "K" is a letter from the IRD to our solicitor in respect of the matters.

17. A similar scenario applies to Mr Haywood's negligent management of the filing obligations of the New Zealand company Moorcroft Holdings Limited. Annexed hereto marked "L" a letter from the IRD dated 7 May 2009 proposing adjustments to the GST returns filed by the Company.

18. Having realised that these disparate losses arise from Mr Haywood's actions or lack thereof, as Executive Director of NOC I wrote to Mr Haywood on 9 November 2010 making demand in respect of the amounts we consider lost by his negligence. The total amount is approximately A$1,545,000.00. Many times more than he claims in his Demand. The costs incurred by the various entities, including NOC and NCI, in attempting to undo the damage done in my opinion would be more than the amount of his Demand. Annexed hereto and marked "M" is a copy of my letter to Mr Haywood.

[34] The letter dated 9 November 2010 that Mr Eakin refers to details claims of 'considerable financial loss, legal prejudice and harm' to the reputation of Northern Crest and the Northern Crest Group. In that letter Mr Eakin made demand for payment of an "initial sum" of $1,545,000 within 15 working days.

Review of issues for consideration upon the setting aside application

[35] I will confine this review to NCI's counterclaim/set off/cross demand position for I am satisfied there is no substance in a claim to differentiate the entities registered in Australia and in New Zealand. The acceptable evidence is those companies are the same entity.

[36] NOC was registered in Australia as a foreign company noting the registered office as C/o Minter Ellison Rudd Watts, Wellington. The directors of both companies are the same. The application for registration of a foreign company in Australia notes the company is referred to as Blue Chip Financial Solutions Limited incorporated on 12 August 1983 in New Zealand. The application was filed by Mr Mark Bryers.

[37] On 1 April 2008 the company changed its name to NCI (for I shall defer from referring to the company any further as NOC).

[38] In well publicised circumstances the Blue Chip operation in New Zealand collapsed at the end of 2007. The affidavit evidence does not challenge the claim that the board of NCI oversaw the operations of the Blue Chip scheme.

[39] In submissions to the Court Mr Nicholls asserted that clause 11(c) referred to an option available in the event of a pleading being filed; that a statutory demand is not a pleading and therefore no jurisdictional option is available for the service of a statutory demand upon NOC but to pursue the statutory demand process through the NSW Courts.

[40] The submission is incorrect. Liquidation proceedings are prefaced by the service of a statutory demand. The statutory demand is part of the proceedings. Liquidation proceedings are commenced by way of a notice of proceeding and statement of claim and therefore are the proceedings in which pleadings are filed. Mr Haywood has chosen to plead his case in the New Zealand Court pursuant to clause 11(c), as is his right.

[41] I should comment also upon Mr Nicholls' submissions that the amount sought in the statutory demand is a claim for damages for breach of contract that has not yet been converted into a judgment debt.

[42] This submission is also incorrect. NCI guaranteed to pay sums by instalments. MSH and NCI breached the instalment terms. Pursuant to the Deed, when there is a breach which is not rectified within 14 days, the total sum due becomes a debt payable on demand. In this case the demand was made and therefore there is a quantified debt due.

[43] It is clear from the evidence available to the Court that there is no proper dispute raised about whether:

(a) The amount sought under the statutory demand is payable.

(b) The quantum sought is correct. (Which included an obligation to pay legal fees to a maximum of A$10,000).

[44] I agree with Mr Grove that in these circumstances NCI has failed to satisfy its evidential burden to show that there is a fairly arguable basis upon which it is not liable for the amount claimed, that is, that the debt is disputed.

[45] This case is really about NCI's counterclaim/set off/cross demand position as was first identified by Mr Eakin's email dated 9 November 2010, and as is contained in paragraphs 13 – 18 (inclusive) of his affidavit, to which I earlier referred to in paragraph 33 herein.

The evidence in opposition to the setting aside application

[46] Mr Haywood's affidavit details his employment background with Blue Chip entities. He says he commenced employment with BCFSAL in March 2006 and that concluded when BCFSAL was placed into voluntary administration on 12 December 2008. He said BCFSAL was the Australian arm of the Blue Chip Group. Mr Haywood deposes that after the collapse of the Blue Chip Group in New Zealand in late 2007, Mr Bryers went to Australia to oversee operations for the Group there. He

said Mr Mellor, NCI's chief financial officer had just resigned. Mr Bryers asked him to assist in preparing consolidated accounts for NCI for the 2008 financial year ending March 2008. Mr Haywood says that was in addition to his duties as financial controller for BCFSAL.

[47] Responding to Mr Eakins claims of alleged omissions and mismanagement he says he was never a director of NCI; that from December 2008 Mr Bryers directed him to concentrate on completing the annual accounts for that company; that other accountants were retained to take on the day to day accounting function as well as preparing the Annual Report with his assistance; that all steps taken by him were at the direction of Mr Bryers who was the company's chief executive officer.

[48] Mr Haywood details the allegations of mismanagement as having first been raised in an email from Mr Eakin dated 4 November 2010. It was in the context of Mr Eakin securing Mr Haywood's support for a deed of arrangement so as to avoid MSH being placed in liquidation. According to Mr Haywood in exchange for his support, NIC would pay fees owed to the liquidators of BCFSAL and other companies which Mr Haywood had guaranteed in a sum of A$30,000.

[49] Mr Haywood says on 9 November 2010 Mr Eakin sent him an email at 6:33pm. It was the first and substantially the only document that provides particulars as to the alleged claims against Mr Haywood. In essence it refers to those matters reviewed by the aforesaid paragraphs 13 – 18 of Mr Eakin's affidavit.

[50] Mr Haywood says that before he had a chance to read the email Mr Eakin called him at 6:46pm and told him that he should not be too concerned about the contents of the email and that they were seeking his cooperation. Mr Haywood says Mr Eakin told him that they would have paid him what was due but they could not because the landlord's claim and the solicitors Minter Ellison had taken all of their cash flow. Mr Haywood exhibited a copy of notes he says he made of the conversation.

[51] Earlier on 11 October 2010 Mr Haywood made demand upon MSH when they defaulted on a payment due to him. Later, on 4 November Mr Haywood's

solicitor served notice of intention to appear in support of a liquidation application filed against NCI by Minter Ellison Rudd Watts and by the landlord, Robert Jones Holdings Limited.

[52] Mr Haywood deposes that at no time prior to that date had there been any suggestion of a dispute regarding the amount owed to him by MSH.

[53] Mr Haywood deposes that all accounts he prepared for NCI or related entities were subject to an external audit. He said he only prepared accounts for NCI for the 2008 financial year. He did not sign off the 2009 accounts. The 2008 accounts were subject to extensive review he says by the auditors due to the circumstances surrounding the "Bluechip Group" and the collapse of the New Zealand arm in 2007.

[54] Mr Haywood says at all times he was working under the direct supervision of Mr Eakin and/or Mr Bryers and as much is confirmed by a letter from Mr Eakin dated 8 September 2010 in which Mr Eakin confirms:

> For the avoidance of any doubt, at all times whilst he was a director (prior to the companies being placed in receivership and liquidation), [Mr Haywood] was under the control and direction of senior management of the Group.

[55] Mr Haywood asserts that all tax returns were filed by the companies' local tax agent accounting firm. Further in relation to all tax issues generally, these were not dealt with by him but rather by general advice accountants, WWP Accountants in conjunction with Mr Bryers. He notes the principal of WWP Accountants is also the chairman of the NCI board, Mr Wilson.

[56] Referring to a letter by Mr Eakin dated 1 October 2010 addressed to MSH (for the attention of Robert Erb) Mr Haywood notes Mr Erb was Mr Wilson's right hand man who compiled the accounts and prepared the GST returns and submitted those to the Australian Tax Office.

[57] With respect to Mr Eakin's claim that Mr Haywood was responsible for the liquidation of Barkley Walsh Pty Limited (Barkley), Mr Haywood notes that all GST returns were prepared and sent to the Australian Tax Office by WWP Accountants.

[58] Mr Haywood notes:

(a) That Mr Eakin and Mr Sekel who signed the settlement agreement were and still are directors of NCI.

(b) NCI does not undertake any trading activity in New Zealand because of the collapse of the Bluechip Group prior to that. The majority of work undertaken for NCI occurred in New Zealand and all the directors resided in New Zealand.

(c) WWP Accountants were responsible for filing BCFSAL documentation with the Australian Tax Office.

(d) He was never responsible for any dealings with Barkley and was not employed by that company for which Mr Bryers and Mr Wilson set direction in all actions.

(e) The accounts of BCFSAL were the subject of an external audit. Regarding the NZ$500,000 provisional tax Mr Haywood was instructed by Mr Bryers not to try to recover this as more pressing matters needed attention and Mr Bryers thought it best to leave the NZIRD alone.

(f) Mr Haywood was not responsible for preparing the GST returns for Moorcroft Holdings Limited (Moorcroft). He said this was dealt with in New Zealand.

(g) Concerning the Barkley issue, he notes that this arose in February 2010 and before the settlement agreement was signed with the promise of payment to him. There was no suggestion he says at that time that he was responsible for any losses.

[59] Then Mr Haywood provided claims regarding NCI's insolvency. He notes:

(a) The liquidation application filed by the landlord, Robert Jones Holdings Limited, took a substantial period of time to be resolved because NCI required time to pay what was due.

(b) Mr Eakin advised him that the reason Mr Haywood could not be paid was because they were dealing with the landlord's claim together with a claim for outstanding fees by NCI's solicitors.

(c) A half yearly report for NCI after 30 September 2010 demonstrated that for the six months ending at that time NCI made a net loss of $3,007,000. Further the company had a negative equity of $7,756,000.

(d) Notwithstanding NCI's financial position it is clear the company is still trading in Australia.

Mr Eakin's reply evidence

[60] It explains the reasons for the delay in complying with this Court's order that NCI file its affidavit in reply to Mr Haywood's opposition affidavit by 18 March 2011. Mr Eakin says one reason for the delay was the difficulty in quantifying the claims against Mr Haywood; that the drafting of the statement of claim against Mr Haywood was taking longer than anticipated "due to the extent and complexity of the problems he has left in his wake". Mr Eakin stated that a Sydney law firm was engaged in respect of the matter. He enclosed a copy of a letter from that law firm to NCI's solicitor in Auckland. That letter was from the firm of Sekel Oshry and was dated 13 May 2011. It stated:

> RE: LITIGATION PROCEEDINGS AGAINST ROSS HAYWOOD
>
> We have been engaged to issue legal proceedings against Ross Haywood on behalf of Northern Crest Investments Limited.
>
> At this stage our terms of engagement are confidential and are subject to legal professional privilege.
>
> If you have any questions do not hesitate to contact me.
>
> Yours faithfully

David Sekel
Sekel Oshry Lawyers

[61] The writer of that letter, Mr Sekel, is a director of NCI. He was appointed on 28 May 2009.

[62] Mr Eakin deposes that the reason why NCI is migrating to Australia "is simply to enable it to be required only to comply with one set of regulatory requirements. Given that its entire current business activity is in Australia, the company decided several years ago to migrate".

[63] Mr Eakin claims:

> Mr Haywood's actions in his role as financial controller and with responsibility for taxation matters in New Zealand impeded this objective because of the catastrophic state in which he left the company's NZ tax affairs during the time he was responsible for them. [5]
>
> The nub of this very issue is the immense harm Mr Haywood has done to Northern Crest. We are still working to quantify and substantiate our claim against Mr Haywood. The initial amount demanded of Mr Haywood was A$1,545,000. It is expected that after our investigations and examinations had been completed, that amount will be substantially increased. [6]

[64] Another reason provided by Mr Eakin for the delay in responding to Mr Haywood's affidavit was:

> ... the information relevant to the financial situation of Northern Crest Investments Limited was and remains subject to non-disclosure requirements of the Australian Securities Exchange and we have been unable to provide detailed information requested until a series of disclosures to the Australian Securities Exchange (ASX) are completed in relation to the re-capitalisation process – out of concern that providing that information could be an infringement of the ASX rules...

[65] Mr Eakin explains that steps were to be taken in May 2011, to complete the recapitalisation process including a general meeting of shareholders "to approve issue of shares that were placed in April, further shares to related parties for expenses and remuneration owed (Directors), completing the convertible note, and approving right to issue a further 60 million shares to sophisticated investors".

[66] Mr Eakin notes that the second step is for the company to issue "a short form prospective prior to 20 May (and subject to approval from the NZ Companies Office and the ASX) for a rights issue seeking $8 million from existing shareholders, and/or underwriters should there be a shortfall in demand. The issue will close prior to 7 June".

[67] The third reason offered by Mr Eakin in the recapitalisation process was for NCI to issue "a convertible note for $2 million in May, although if further underwrites eventuate, then the note may be abandoned and the rights issue increased to $10 million. The issue is presently underwritten to the value of $5 million". Mr Eakin says there are no regulatory hurdles to this method.

[68] In response to Mr Haywood's claims that NCI's demands against him were not notified prior to 4 November 2010, Mr Eakin asserts NCI's demand was made on 9 November 2010 and preceded service of Mr Haywood's statutory demand on NCI. Mr Eakin challenges Mr Haywood's purpose in proceeding with his statutory demand. He states:

(a) NCI was in the final stages of raising approximately A$8 million (NZ$10 million) through a rights issue, for which a substantial amount of preparatory work had been done.

(b) The only delay to "this crucially important raising has been normal course of action in disputes by short tracking to the liquidation process which has now successfully stalled the company's migration to Australia. Migration of the company to the Australian Companies Register is a prerequisite to completing the rights issue and recapitalising. The rights issue has already been underwritten formally A$5.2 million".

(c) Mr Haywood was employed as the group's accountant/chief financial officer. In that capacity he accepted the task of preparing financial accounts and preparing consolidated accounts.

(d) Mr Haywood never denied his obligations or duties of care and at no time mentioned the issue of no written employment contract as the reason for his resignation.

(e) Mr Haywood has directly, by way of his recklessness and failure to file the required accounts and returns, caused Northern Crest to sustain costs in excess of $1.5 million.

(f) During the period in question Mr Haywood was responsible for the oversight of (financial matters) and neglected to manage the process and to keep a track of it.

(g) Mr Haywood's failure "to update the information with the regulator and his failure to ensure that the statutory payments were made was an act of gross negligence which led to the problems with the Australian Taxation Office".

Principles

[69] They can be summarised as follows:

(a) An applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt.

(b) The mere assertion that a dispute exists is not sufficient. Material, short of proof, is required to support the claim that the debt is disputed.

(c) If such material is available, the dispute should normally be resolved other than by means of proceedings in the company's Court.

(d) An applicant must establish that any counterclaim or cross demand is reasonably arguable in all the circumstances. The obligation is not to prove the actual claim.

(e) It is not usually possible to resolve questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

Considerations

[70] Claims against Mr Haywood are raised in the context of his being an employee of NCI and other entities. The Court has not been, except in broad general terms, referred to particulars of alleged negligence, nor any legal authority demonstrating why Mr Haywood would be legally responsible for any alleged negligence whilst undertaking his employment.

[71] The only document providing particulars as to alleged claims is Mr Eakin's letter dated 9 November 2010. The Court is informed that Mr Sekel's law firm has received instructions but cannot impart any knowledge regarding those presently. Still, it seems that since 9 November 2010 particulars of negligence or breach of a fiduciary duty, or the like, have yet to be identified. There is nothing that identifies the nature of duties owed or identifies with particulars specifics of losses occurred. It is not acceptable to explain this lack by virtue of broad claims that the matter is still subject to investigation and formulation.

[72] The fact is that before 9 November 2010 no direct assertion of liability at all was raised, and since, none has with any apparent certainty has been identified.

[73] Mr Eakin's letter dated 9 November 2010 closely followed Mr Haywood's notice of support to the liquidation applications of Robert Jones Holdings Limited and Minter Ellison Rudd Watts.

[74] An inference available from the evidence provided by Mr Eakin is that evidence of claims against Mr Haywood were known in 2009. It is difficult to reconcile this position with NCI's willingness to guarantee NSH's debt to Mr Haywood in March 2010.

[75] NCI's claims, as articulated by Mr Eakin, against Mr Haywood concerning Barkley include a sum of $207,000 GST refund not able to be recovered, and a sum

of $200,000 in "lost product and brand investment". No particulars are given regarding these claims.

[76] Barkley is in liquidation. Any claim on its behalf must be brought by the liquidator. Moreover it is difficult to understand how damages could arise in relation to a GST refund. If there is a refund due then the liquidator will be able to recover it. In respect of the claim against Mr Haywood there is no documentation to support this allegation.

[77] Likewise, the claim for lost product and brand investment is unparticularised and not supported by documentary evidence. It is unclear to the Court how any legal basis for such a claim could arise.

[78] The claim on behalf of Moorcroft alleges a failure to lodge statutory returns on time and to obtain GST refunds. Mr Eakin asserts those failures were responsible for "consequential direct and indirect administration costs" of $300,000. No explanation of these costs is provided.

[79] Moorcroft is a New Zealand company. It is not insolvent. The Court has no information regarding particulars of the "statutory returns" concerned or on what basis a claim could be maintained against Mr Haywood. Also, there is no dispute to Mr Haywood's assertions that NCI's accountants were very much in control of statutory compliance. They filed all tax returns required. They apparently dealt with all tax issues generally. Even Mr Eakin confirmed by his letter dated 8 September 2010 that Mr Haywood was at all times under the control and direction of senior management of the "Group".

[80] The claim advanced against Mr Haywood in respect of NCI concerns an alleged failure to recover IRD provisional tax paid in the sum of $500,000. This, Mr Eakin asserts, has resulted in additional costs and losses of $50,000. The evidence discloses this was a payment made on NCI's behalf on 1 April 2005, before Mr Haywood was employed by NCI. The IRD has since, by letter dated 26 May 2010 advised NCI why no refund is due. The claim against Mr Haywood concerns his

apparent failure, whilst an employee, to recover something which it now appears was always irrecoverable.

[81] Mr Eakin advances a claim that Mr Haywood allowed a judgment debt to be recorded against NCI by his failing to update the company's details, including specifically its Australian address. But, there are no particulars regarding this nor any suggestion about the consequences of same.

[82] Mr Eakin advances a general claim of a failure to oversee the 2008 audit, and the consequential damage that occurred to the company from additional costs. Again, there are no particulars, and no quantum is stated.

[83] The various claims concerning MSH have already been in general terms detailed. Of those, as of the other claims there are no particulars nor supporting documentation, nor has there been clearly identified any legal basis for a claim. Also, because MSH is in liquidation any claim would have to be made by a liquidator, and none has to-date been advanced.

[84] Mr Grove submits that overall no evidence at all has been provided in support of the alleged claims. In Mr Eakin's letter to Mr Haywood dated 4 November 2010 no details of a claim was suggested. Instead NCI indicated they wanted to "work through a deal". Before then Mr Bryers had indicated a desire to bring payments due to Mr Haywood up to date. Clearly at that time Mr Bryers continued to have a significant involvement with NCI. Mr Haywood has exhibited a copy of notes he said he made of his conversation with Mr Bryers. Mr Eakin asserts the notes reportedly made of his conversation with Mr Haywood were a contrivance. But, Mr Bryers has not filed an affidavit challenging Mr Haywood's account.

[85] Despite the message conveyed by Mr Eakin's email of 9 November 2010 Mr Haywood reports, before reading that email, speaking to Mr Eakin who stated payments due to Mr Haywood would be made if there was money to do it but there was no money.

[86] I accept Mr Grove's submissions about the lack of particularisation of claims or the identification of a legal basis upon which to pursue those claims against Mr Haywood. Mr Haywood was careful in his detail of his employment contractual obligations with NCI entities and concerning what those entailed and to whom he was responsible. That explanation contrasts with the degree of responsibility suggested by Mr Eakin to be imposed upon and responsible for the consequences that NCI now complains of in response to the statutory demand served upon it. What is significant about Mr Haywood's claims in this respect is the lack of direct response by Mr Eakin to it. Critically he does not respond at all to the following statements of Mr Haywood:

> WWP Accountants and CFO Solution Group were obtained to take on the day to day accounting function as well as prepare the annual report with my assistance. I started the transition to them in December 2008. All steps taken by me were at the direction of Mr Bryers who was the company's chief financial officer. [17]
>
> Mr Eakin asserts at paragraph 11 that I in some way mismanaged the company. At all times I acted under the instructions of Mr Bryers and the Board. All the tax returns were filed by the company's local tax agent accounting firm WWP accountants. [35]
>
> In relation to the tax issues generally, these were not being dealt with by me. They were being dealt with by the company's tax lodgement and general advice accountants, WWP Accountants in conjunction with Mr Bryers. The principal of WWP Accountants is also the chairman of the NCI Board, Mr Wilson. [36]

[87] Rather it appears the main purpose of Mr Eakin's reply affidavit is to impress upon the Court the critical purpose of NCI's presentation dated May 2011 headed "Rights Issues Investor Presentation", which I earlier referred to in paragraphs 64 – 67 herein.

[88] Of course this Court has no evidence before it to explain the efficacy of claims about what is happening or for what purpose. Mr Eakin says he is prohibited from providing particulars. However, it is not inappropriate for this Court to compare claims suggesting a viable future for NCI, with the most recent financial information contained in the 30 September 2010 report.

[89] There is evidence available to this Court that indicates NCI's desire to deregister the company in New Zealand. If that occurs, this Court has no authority

to order the liquidation of the company. But, for NCI to be deregistered in New Zealand the directors must confirm that the company is solvent.

[90] There is no doubt at all that NCI is insolvent. Successful claims by NCI against Mr Haywood are not going to improve the fundamental and the underlying position of insolvency of NCI in New Zealand. Any optimism indicated by its "Rights Issues Investor Presentation" needs to be assessed by the financial accounts of September 2010 which indicated a considerable net loss and an even greater negative equity.

[91] The sooner liquidators are appointed the sooner an investigation can be made into the company's trading that led to the collapse of its New Zealand arm. In the outcome of the Blue Chip collapse the liquidation of NCI may provide an opportunity for an independent review of matters which have affected thousands of investors.

Conclusions

[92] NCI has not raised a dispute regarding the sum sought under Mr Haywood's statutory demand.

[93] NCI has not raised a valid defence by way of counterclaim, cross demand or set off.

[94] In this case there has been no suggestion or evidence provided that NCI is able to pay the debt due to Mr Haywood. The evidence shows NCI is insolvent. There are significant reasons to expedite liquidation.

Associate Judge Christiansen

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-002804

UNDER	Companies Act 1993
IN THE MATTER OF	Section 289 of the Companies Act 1993
BETWEEN	KIP INVESTMENTS LIMITED Plaintiff
AND	PATCROFT PROPERTIES LIMITED Defendant

Hearing: 1 June 2011

Appearances: D Grove for the Plaintiff
Mr O'Donnell, Director of the Defendant

Judgment: 1 June 2011

ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

Solicitors/Counsel:
D Grove, Barrister, Auckland – Danielgrove@45chancery.co.nz
Copy to:
A McCullagh and S Lawrence, PKF Corporate Recovery & Insolvency (Auckland) Ltd – admin@pkfcr.co.nz
Mr O'Donnell, Patcroft Industries Limited, 1599 State Highway 1, Wellsford

[1] Mr O'Donnell a director of the defendant appeared and advised that the defendant's solicitor was overseas. Mr O'Donnell sought an adjournment of the plaintiff's application of an interim liquidator, in order to consult with his solicitor.

[2] The plaintiff applies for the appointment of interim liquidators pursuant to s 246 of the Companies Act 1993.

[3] Issues between the parties were finally resolved by a decision of the Supreme Court dated 10 May 2011. In that outcome the Court restored to the plaintiff the judgment it obtained for damages following the unlawful termination by the defendant of the plaintiff's business lease.

[4] Today Mr Grove has advised this Court that the judgment in favour of the plaintiff is in the vicinity of $329,000 inclusive of interest and costs.

[5] The present application for appointment of an interim liquidator has been brought in circumstances where the defendant's only asset is likely that claim the defendant may have against its former solicitors on whose advice the defendant acted to terminate the plaintiff's lease. Mr Grove has explained that any proceeding issues against that former solicitor has to be filed by 13 June 2011 or otherwise will be time barred.

[6] There is a risk therefore that the only asset available for enforcement of any judgment may be lost.

[7] The plaintiff has requested the defendant's solicitors to confirm an action is to be pursued against the former solicitors. That confirmation has not been forthcoming.

Decision

[8] This Court is satisfied pursuant to s 246(1) of the Companies Act that it is necessary or expedient for the purpose of maintaining the value of the assets of the defendant to appoint interim liquidators to the defendant. Accordingly there will be

an order appointing Mr A J McCullagh and Mr S M Lawrence as interim liquidators of Patcroft Properties Limited. Approval is given to the liquidator's chargeout rates in terms identified by the liquidator's consent memorandum dated 13 May 2011.

[9] Pursuant to s 246(3) of the Companies Act the rights and powers of the interim liquidators shall initially be limited to the task of issuing any proceedings they consider appropriate to preserve the asset position of Patcroft Properties Limited.

[10] Leave is reserved to apply on short notice for the purpose of reviewing this order or for the purpose of reviewing the extent of the liquidator's powers authorised by it.

[11] There is an order that the costs of and incidental to this application be costs in the liquidation.

[12] The time of the making of the order for the appointment of interim liquidators is **12:15pm**.

Associate Judge Christiansen