SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PETER LYONS J

No 12713 of 2009

RE: WESTWOOD ENTERPRISES (QUEENSLAND) PTY LTD (ACN 083 054 139)

JOYCE ALICE McELLIGOTT	Applicant
and	
WESTWOOD ENTERPRISES (QUEENSLAND) PTY LTD (ACN 083 054 139)	Company

BRISBANE

..DATE 17/06/2010

ORDER

HIS HONOUR: On 14th October 2009 an order was made for the winding up of Westwood Enterprises (Queensland) Pty Ltd. The respondents were appointed as liquidators of Westwood. The applicant is an unsecured creditor of Westwood. She applies under s.482 of the Corporations Act 2001 (Cth) for an order terminating the winding up of Westwood.

The Court's power to make such an order is discretionary. A number of matters relevant to the exercise of the discretion were identified by Master Lee QC in *Re Warbler Pty Ltd* (1982) 6 ACLR 526. More recently, considerations relevant to such an application were considered in *von Risefer v. Mainfreight International Pty Ltd* [2009] VSCA 179. The judgment of the Court was given by Ashley JA, with whom the other member of the Court, Beach AJA, agreed.

His Honour referred to the decision of Master Lee and the eight criteria identified in that decision. Having done so, his Honour pointed out that not all items on the list carry equal weight; and that the solvency or otherwise of the company will loom large where the company was wound up because of inability to pay its debts as they fell due.

His Honour then cited with apparent approval a passage from the judgment of Barrett J in *Anderson v. Palmer* [2002] NSWSC 192 where his Honour said, "It cannot be expected that restoration of control of the company's destiny to its shareholders and directors...will be allowed by the court in the exercise of its discretion unless it can be seen that the

debts of the existing creditors have been or will be paid and that there is a sufficient degree of additional financial strength and stability to promote confidence in the company's ability to continue without any appreciable risk of reverting to liquidation. It would not be an appropriate or prudent exercise of the court's discretion to re-launch a company which, while for the moment technically solvent, was in such a border line position that it might well succumb again to compulsory winding up in the short term."

That proposition is consistent with the statement of principle found in *McPherson's Law of Company Liquidation* at [16.170] where the following appears: "Due to the requirement that the court consider matters of commercial morality and public interest in deciding whether to stay or terminate a winding up, it will normally be a prerequisite to any order under s.482 that the court be satisfied that the company is and will be solvent and either has paid or can pay its creditors in full, and will be solvent when returned to normal existence."

That statement has the support of a line of authorities, some of which are referred to by White J in *Double Bay Newspapers Pty Ltd v. The Fitness Lounge Pty Ltd* (2006) 57 ACSR 131 at [16].

In *von Risefer* Ashley JA also cited with approval a passage from the judgment of Hammerschlag J in *Gematech Pty Ltd v. Bardi Investments Pty Ltd* [2008] NSWSC 196 at [26] where the following was said:

"Firstly, the solvency of the Company is to be demonstrated by the applicants who bear the onus to do so by leading the 'fullest and best' evidence of the company's financial position... Proper verification of assets and liabilities is critical to rebut the presumption of insolvency. Unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative of insolvency..." (authorities omitted).

It is not impossible in the present case that Westwood is in fact solvent. However, in my view, the applicant has failed to demonstrate that.

The applicant relies upon a balance sheet prepared by the company's sole director for the company as at 14 June 2010. It records a positive net equity of $124,262. In doing that, it assigns values to five properties owned by the company, each of which is the subject of a secured debt. All of the surplus may be attributed to the values assigned to those properties over the secured debts. The balance sheet records what appears to be a reasonably reliable figure for cash held by the liquidators of $93,998 and an amount for unsecured creditors of $38,589. There are some other assets which are included at a valuation, namely a vehicle and some furniture. It also records loans to Joyce McElligott and Cheryl McElligott, who I understand to be daughters of the applicant, totalling $417,000.

An affidavit filed today on behalf of the applicant includes deeds from these people renouncing these debts on condition that the winding up is terminated or stayed. However, that affidavit also includes a similar deed from the applicant for a debt of $151,747.10. That is not included in the balance sheet on which the applicant relies. No explanation is given for its omission. It highlights the difficulties which the applicant faces when she seeks to rely upon unaudited accounts.

Moreover, the values which are attributed to the properties are not the subject of sworn valuations. I was told, without being taken to them, that exhibited to affidavits of persons who are not valuers, are copies of valuations for some of these properties. The liquidators have obtained what are referred to as kerbside valuations which show different values for the properties, with a worst case figure and a best case figure for each property. All of the values attributed to each property are not totally dissimilar, but they are by no means identical. Again, there is no sworn valuation evidence to support the figures advanced by the liquidators.

It seems to me that the balance sheet of the 14th of June 2010 does not satisfy the test stated by Hammerschlag J in *Gematech*, which appears as I have indicated, to have been approved in *von Risefer*.

One of the respondents, Mr Stimpson, has sworn an affidavit filed today which includes a statement of position for the

company. One matter which appears from that statement of position and not reflected in the applicant's balance sheet is the liquidators' remuneration currently outstanding. It is obvious that some fees will have to be paid to the liquidators beyond those which have already been paid. They are identified as being $37,736.

It is pointed out on behalf of the applicant that they have not been approved, and a submission is made on behalf of the applicant that the company's current financial position is significantly affected by fees already paid to the liquidator which it would appear from the material are in excess of $60,000. Factually it may be correct to say the fees which have been paid have an effect on the Company's financial position. It is, however, unrealistic to ignore the fact that payments have been made and, as I understand it, generally approved at a creditors' meeting.

As to the outstanding fees to the liquidators, they are supported by work in progress and outlays reports exhibited to Mr Stimpson's affidavit. It seems to me inevitable that some additional fees will have to be paid to the liquidators and that the best evidence of those fees is the figure to which I have referred. It is at the very least a potential liability of the Company and is not reflected in the applicant's balance sheet.

Mr Stimpson's affidavit also refers to an amount of $34,920 said to be owing on account of unpaid land tax. Submissions

were made disputing that liability by reference to settlement statements for two properties sold last year where an amount which matched that figure appears to have been paid. For that reason Ms Hall, who appeared on behalf of the liquidators, and who was not in a position to seek immediate instructions about the accuracy of the evidence of Mr Stimpson on that point, submitted that reliance should not be placed on the figure said to be owing in respect of unpaid land tax and I propose to ignore it.

There is, however, reference in Mr Stimpson's affidavit to an additional amount of $20,000 said to be owing to Westpac. The basis for that statement appears to be in what is called a RATA, being a statement by the director of the company of its debts. That records a liability to Westpac Banking Corporation of $20,000.

That amount is not reflected in the amount identified in the applicant's balance of $38,589 for unsecured creditors. If one takes into account the amount owing to Westpac, and the best information about the additional fees payable to the liquidators, one sees that the amount payable to unsecured creditors exceeds the cash presently available to the liquidators. That is by no means determinative of the outcome of this application, but it provides some indication of the difficulties the applicant faces.

The statement of position provided by the liquidators proceeds on what is said to be a best case and worse case situation.

It includes related party debts in a figure of $867,000. It also includes likely future costs incurred by the liquidators both for their own work and for future legal fees. It proceeds on the basis of a sale of the properties owned by the company; the best case figure reflecting the best case value assigned to each property, and the worse case figure reflecting the worse case value assigned to each property.

It does not include the Westpac debt mentioned in Mr Stimpson's affidavit nor the land tax figure which, on the way the case has been conducted, it seems appropriate to ignore. It records a deficiency on the best case basis of $355,372 and a deficiency on the worst case basis of $995,479.

Taking account of the deed, which I have mentioned, these figures should be adjusted positively for the purpose of determining whether the company would be solvent if the winding up were stayed or terminated, of some $568,747.10. It can be seen on the best case that would result in a surplus and on the worst case, a deficit of some hundreds of thousands of dollars. As I have indicated, the figures in the statement of position depend upon unsworn kerb-side valuations.

To this point I have considered the position of the company by reference to its assets and liabilities. Since it has been in liquidation for some time now, there is no suggestion that it is currently trading and that there are additional debts to be taken into account to assess its solvency other than those which I have mentioned. As I have indicated, having regard to

the tests to be applied, I am not satisfied that the company is solvent although it is possible that additional evidence may have proven it to be so.

It would appear that the company was a vehicle for providing low cost housing on the Sunshine Coast; and that it is conducted with some degree of benevolence. That may reflect worthy motives on the part of those associated with it. However, the circumstances which warrant the making of an order terminating a bankruptcy are reflected in the decisions to which I have made reference, including what was said in *Re Warbler*, and in particular, the statements to which I have referred dealing with the importance of the solvency of the company.

I should add that an accountant was commissioned for the purpose of preparing financial statements of the company. I was referred to those statements. They record that the company's activities have resulted in significant losses. I mention that for two reasons. In this case, so far as the material goes, it tends to suggest that there is no real prospect that the company will have a tax liability once its tax returns are finalised, and an assessment issued. I have not therefore taken tax liabilities into account in considering the company's current solvency.

However the trading record of the company rather suggests that the manner in which it has been conducted is likely to result in the incurring of substantial debts. Its continued

operation appears to have depended heavily upon financial support from those associated with the director of the company. It is true that such support may be considered when one is assessing the solvency of a company, but one must have some concern about the ability of the persons associated with the director to continue providing financial support.

The other basis on which the application was resisted was the fact that financial records had been sought by the liquidators from those associated with the company, but not all of the financial records had been supplied. An affidavit filed today by the director states in substance that the reason for not providing all of the documents was that a number of them were required by the accountants who were preparing financial statements. On the present state of the evidence, there is no reason not to accept that explanation.

The significance of the matter was said yesterday to be that it explained the fact that the liquidators had not provided more complete information about the company's present financial status; although there is a suggestion in the material that documents were sought with a view to establishing whether or not any impropriety had occurred in relation to the company's management. I do not rely on that consideration as a reason to refuse the application.

Accordingly, I dismiss the application.

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HIS HONOUR: I'm inclined to impose a condition that the receivers give reasonable notice to - where is the annexure to the order?

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HIS HONOUR: I'll change the date of the order to the 17th of June. I've added at the end of paragraph 1 the words: "and the beneficiaries of the trust"; in paragraph 3 (a) I've added the words: "Relating to the duty set out in section 420A"; in paragraph 4 the initial words now read: "The second respondent, Lorraine Rhonda McElligott provide" et cetera. And the last line reads: "within 28 days".

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HIS HONOUR: In the meantime the order which I'll initial will be placed with the papers. I make an order in terms of that draft.

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HIS HONOUR: The receivers and managers are to give reasonable notice of any intended sale of trust assets to Joyce Alice McElligott, Lorraine Rhonda McElligott and Cheryl Alice McElligott.
