

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

CIV 2006-404-004391

IN THE MATTER OF the Companies Act 1993

BETWEEN FOUNDATION SECURITIES (NZ)
 LIMITED
 Plaintiff

AND DIRECT LABOUR SERVICES LIMITED
 (IN LIQUIDATION)
 First Defendant

AND CASE BOREHAM ASSOCIATES
 LIMITED (IN LIQUIDATION)
 Second Defendant

Hearing: 21 and 22 May 2007

Appearances: G P Denholm for Applicant
 S O McAnally for Plaintiff
 W G Manning for the Liquidators

Judgment: 22 August 2007

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
22 August 2007 at 11.45 a.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

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Introduction

[1] On 27 July 2006, the plaintiff, Foundation Securities (NZ) Ltd, filed an application for an order appointing liquidators of the first and second defendants.

[2] It alleged in its statement of claim that each of the defendants owed debts of \$25,000 pursuant to term loan contracts dated 24 August 2005, and further substantial sums in respect of GST payable on property transactions between the parties. It alleged that statutory demands had been served on both defendants on 3 July 2006, but not responded to. Without taking any steps to set aside the statutory demands, the first and second defendants filed statements of defence on 11 August 2006. The statements of defence admitted that the statutory demands had been served on them, but denied any indebtedness to the plaintiff.

[3] In a judgment dated 12 February 2007, Doogue AJ held that both defendants had failed to discharge the burden of rebutting the presumption of insolvency that arose on their failure to respond to the statutory demands. He held that there were no discretionary considerations that would justify withholding the orders sought by the plaintiff. Accordingly, he appointed liquidators under s 241(4) of the Companies Act 1993.

[4] On 28 February 2007 Robyn Marie Case, who was the sole director of the second defendant when it was placed in liquidation, made application to the Court pursuant to s 250 of the Companies Act for an order terminating the second defendant's liquidation. This judgment follows the hearing of that application on 28 and 29 May 2007.

[5] The main issues that fall to be decided are, broadly, whether the company is now solvent, or whether it can be brought to that condition by the injection of funds which the applicant says are available.

Background

[6] The plaintiff, Foundation Securities (NZ) Ltd, alleged against the defendants that it was owed by each of them the sum of \$25,000 pursuant to term loan contracts dated 24 August 2005, together with interest pursuant to the agreements.

[7] The agreements arose out of the purchase by the defendants, from the plaintiffs, of land and units situated at numbers 11 and 13 Clarice Place, Takanini (purchased by the first defendant) and 20 and 22 Clarice Place (purchased by the second defendant). The agreements for sale and purchase did not provide for payment of a deposit. However, the plaintiff alleged that, contemporaneously with execution of the agreements for sale and purchase, the parties had entered into term loan agreements. Pursuant to the term loan agreements, each defendant borrowed the sum of \$25,000 from the plaintiff, to be secured against the Clarice Place properties.

[8] The term loan contracts contained a provision, clause 10, that was in the following terms:

10. In addition to the Principal Sum, the Borrower acknowledges liability under this agreement to the Lender for any such Goods and Services Tax ("GST") that is determined by the Inland Revenue Department ("IRD") to be payable on the sale of the secured property from the Lender to the Borrower together with all "Default GST" as defined in the Auckland District Law Society Agreement for Sale and Purchase of Real Estate Seventh Edition (2) July 1999 form. Any such GST and Default GST paid by the Lender to the IRD shall form part of the Principal Sum and bear interest accordingly from the date of payment by the Lender and shall be due and payable immediately.

The Borrower warrants and undertakes to the Lender that the Borrower shall not dispose of the secured properties until the GST returns for both Lender and Borrower have been finalised and approved by IRD.

[9] Apart from seeking the recovery of the principal amounts of \$25,000, the plaintiff alleged that the further sums of \$98,784 and \$104,575.43 were owed to it respectively by the first defendant, and the second defendant, pursuant to clause 10 of each of the term loan agreements. That sum represented GST, including penalties and interest that had been determined to be payable by the Inland Revenue

Department on the sale of the properties. In an affidavit that he swore for the purposes of the hearing before Doogue AJ, Mr Holmes, a director of the plaintiff, explained that each of the agreements for sale and purchase of the Clarice Road properties (there were four such agreements) had provided for the purchase price to be plus GST, if any. He continued:

The purpose of clause 10 of both of the term loan contracts was to provide for the event of the Inland Revenue Department assessing GST as being payable on the four sales. It was the plaintiff's wish to charge GST on the sales but the defendants' agent (a Shane Wenzel, subsequently found to be a man of questionable integrity) resisted this. Clause 10 of the term loan contracts was the compromise reached.

It will be necessary to refer to Mr Wenzel again, later in this judgment.

[10] The statements of defence effectively amounted to bare denials of the alleged indebtedness of each defendant to the plaintiff. However, in an affidavit that she swore for the purposes of the hearing before Doogue AJ, Ms Case, the present applicant, set out the matters that were relied on by the second defendant. In substance they were first, that the term loan contracts had not been executed by the defendant and second, that the certificate of title references given for the land at 20 and 22 Clarice Place in the term loan contracts were incorrect. The certificates of title had been stated to be, respectively, NA 80C/903 and NA 80C/902. Ms Chase knew that to be wrong: to her knowledge those two certificates of title related to the properties at 11 and 13 Clarice Place. "Therefore", she deposed, "the second defendant denies any monies are owed to the plaintiff".

[11] An affidavit filed by one Matiu Ranapia, on behalf of the first defendant, made the same point about the term loan contracts concerning 11 and 13 Clarice Place: the certificate of title references having been described as NA 80C/900 and NA 80C/901 respectively for those properties. However, he also made another allegation, namely that the term loan agreements had never proceeded and asserted that to his knowledge the first defendant had never borrowed any moneys from the plaintiff. It is to be noted that Ms Case had not made a similar allegation on behalf of the second defendant.

[12] In his affidavit of 9 November 2006 Mr Holmes responded to the two affidavits that had been filed, by Ms Case and Mr Ranapia. He pointed out that the purchase of the properties by the first and second defendants had in fact proceeded and he attached certificates of title showing that in each case the relevant transfer had been completed on 8 August 2005. What had happened had been a misdescription of the certificates of title in part of the term loan documentation with the result that the certificates of title for the land at 11 and 13 Clarice Place had been referred to in the term loan agreements with the second defendant, and the certificates of title for 20 and 22 Clarice Place had been referred to in the term loan agreements between the plaintiff and the first defendant.

[13] His affidavit also attached copies of the settlement statements which had passed between solicitors for the parties showing that GST exclusive prices had been paid, and of the notice that had been received from the Commissioner of Inland Revenue requiring payment of GST. In response to Ms Case's allegation concerning non-execution by the second defendant of the term loan contract, Mr Holmes pointed out that she had not attached the entire document to her affidavit. He attached a complete copy to his affidavit from which it appeared that the document consisted of a mortgage with attached term loan contract. The former apparently bore Ms Case's signature, but there was no signature on the attached term loan contract. He recorded his understanding that, insofar as the amounts of \$25,000 claimed against each defendant were concerned, the "defendants did not pay the entire deposits required, it having been agreed that \$25,000 (in each case) would be secured and paid later in accordance with the two term loan contracts".

[14] In his judgment of 12 February 2007, Doogue AJ approached the matter on the basis that a defendant which fails to apply to set aside a statutory demand on the ground that the debt is disputed will need to show some exceptional factor to justify the failure to apply, such factor being likely to reflect the existence of a genuine dispute. He referred to *Balmoral Marketing v Karapiro Spa Ltd* HC AK CIV 2005-404-6396 3 October 2006, Abbott AJ, as authority for that approach. He rejected the first defendant's assertion that the money had never been advanced, pointing out that Mr Ranapia had not stated directly that the first defendant was never indebted to the plaintiff for the amounts now claimed and noting that the plaintiff's case was based

on the fact that it had taken a debt in lieu of a deposit. Turning to the point raised about the misdescription of the titles, he described it as meritless, and one that should never have been taken. It was obvious that there had been a transposition of the titles sold to the second defendant with those sold to the first defendant, and vice versa.

[15] He did note, however, that there was what he described as a “mismatch between other aspects of the evidence and the plaintiff’s assertion that the term loan was designed to secure \$25,000 by way of part of the deposit.” That was because the agreements for sale and purchase in fact contained no provision for the payment of deposits, although the settlement statements in respect of the two properties purchased by the first defendant had given a credit for \$120,000. The Judge did not discuss this issue in respect of the second defendant, probably because Ms Case had not made an assertion, such as that made by Mr Ranapia, that the term loan agreement had not proceeded. The settlement statements attached to the affidavit of Mr Holmes, however, indicated that the same approach had been taken with a credit given for \$132,000 in respect of deposits on the properties purchased by the second defendants.

[16] Doogue AJ referred next to the evidence that had been given by a Mr Mercer, a chartered accountant retained to provide accounting services to both defendants. The explanation given for failure to act in response to the statutory demands was simply that those on whom they had been served omitted to hand them to the legal advisors of the companies in sufficient time to enable an application to be made to the High Court for the demands to be set aside, under s 290 of the Companies Act. He considered that the explanation given fell a long way short of establishing that this was an extraordinary case where the Court should depart from the “normal approach” so as to permit the defendants to dispute the debts even though they had taken no steps to set aside the statutory demands. He then asked whether he should exercise a residual discretion in favour of the companies, but held that the lack of detail in Mr Mercer’s affidavit could not found any suggestion that the application was unfair or otherwise an abuse of the Court’s process. He concluded by stating that he declined to go into the alleged disputes concerning the debt which the

plaintiff claimed against the first defendant and he took the same approach with respect to the second defendant.

[17] He then addressed the evidence concerning the solvency of the companies, concluding that neither defendant had proved its solvency on the balance of probabilities. He made the orders appointing liquidators accordingly. It should be noted that he did not directly address the issue that the second defendant had raised about non-signature of the term loan agreement. However, given that Ms Case had signed the mortgage to which the term loan was attached, I do not regard that as a significant issue.

[18] The only other matter that I mention by way of background is that the second defendant was a registered provider of tertiary education services, funded by the Tertiary Education Commission. It received monthly payments by way of funding from the Commission. For some years it appears to have functioned without problems concerning its liquidity. Its base was in Auckland but there were eight other branches throughout the North Island. The properties that it purchased in Clarice Place were evidently simply bought for the purposes of investment.

Legal principles

[19] So far as is relevant, s 250 of the Companies Act 1993 provides as follows:

250 Court may terminate liquidation

(1) The Court may, at any time after the appointment of a liquidator of a company, if it is satisfied that it is just and equitable to do so, make an order terminating the liquidation of the company.

(2) An application under this section may be made by the liquidator, or a director or shareholder of the company, or any other entitled person, or a creditor of the company, or the Registrar.

[20] The discretion given by s 250(1) is broad and turns on the Court's view as to whether it will be just and equitable to order the termination of the liquidation. Both Mr Manning and Mr McAnally referred me to *Re Bell Block Lumber Limited* (1992) 6 NZCLC 67,690 in which Tipping J held that the discretion to order the stay

of a liquidation should not be exercised unless the following three matters had been established:

- a) All creditors had been paid in full or satisfactory provision has been made for them to be paid in full or they consent to the application.
- b) The liquidators' costs have been fully paid or secured.
- c) All shareholders consent or would be no worse off than if the liquidation had proceeded to its conclusion.

[21] It is to be noted that that decision was made under s 250 of the Companies Act 1955, which did not contain power to terminate the liquidation of a company. The latter power was introduced for the first time by s 250 of the Companies Act 1993. I am content to proceed, in the absence of any submission to the contrary, on the basis that the considerations held to be relevant under s 250 of the 1955 Act will also be matters about which the Court will wish to be satisfied before it will grant an order for termination under s 250 of the 1993 Act. However, I think that the Court should avoid any suggestion that they are an exclusive set of criteria for the exercise of what is a very broadly expressed power, which the legislature contemplated should be exercised wherever it is just and equitable to do so. It might not, invariably, be just and equitable that the liquidator's costs be paid in full (what if they were manifestly excessive?) and situations might arise where it could be said that it should be sufficient if all but a small minority of shareholders agreed. I agree with the observation of Paterson J in *Kiwi Steel NZ Limited v Insulated Building Systems Limited (In receivership and Liquidation)* HC AK M 380/98 18 August 1998 that "the s 250 power should not ... be circumscribed by the rules which applied to permanent stays under the previous statutory provisions."

[22] As Winkelmann J observed in an interlocutory judgment delivered at an earlier stage of the present proceeding, while proof of the three matters identified by Tipping J might be necessary pre-conditions to the termination of a liquidation, the Court will not be constrained to a consideration of those matters only, in determining whether or not it is just and equitable to terminate a liquidation. The Court will also

have regard to the public interest, and be concerned to protect the interests of the present creditors of the company, as well as the interests of those parties who would, in future, have dealings with it if the liquidation were terminated. (see *Foundation Securities (NZ) Ltd v Direct Labour Services Ltd (In Liquidation) and Case Boreham Associates Ltd (In Liquidation)* HC AK CIV 2006-404-4391, 19 March 2007) at [19-20]. Winkelmann J quoted the observations of Buckley J in *Re Telescriptor Syndicate Limited* [1903] 2 Ch 174, 180:

Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *re Hester* (1989) 22 Q.B.D 632, at 641 some trenchant observations of Fry LJ will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interest of the creditors. It has a duty with regard to the commercial morality of the country [sic]: ...I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding up of a company and in the bankruptcy of an individual.

[23] Both Mr Manning and Mr McAnally submitted that these cases accurately stated the law, and I did not understand Mr Denholm to submit to the contrary. In one respect, Mr McAnally adopted a different stance to that of Mr Manning and Mr Denholm. He contended that it is not possible, on an application such as this, for the Court to enquire into the reasons held to have justified the original order placing a company into liquidation. Mr Denholm maintained, to the contrary, that in considering whether or not it is just and equitable to make an order terminating the liquidation it is open to the Court to consider the reasons given for placing the company in liquidation. If that consideration showed, for example, that the Court had been wrong to conclude that the company was insolvent, or that it had had a valid defence to the debts claimed against it, it should be open to the Court to take that into account under the “just and equitable” test.

[24] For his part Mr Manning submitted that the discretion given by s 250 is wide and should not be read down. However, he argued that it should not be sufficient for an applicant merely to assert some error or problem affecting the decision to place a

company in liquidation. Rather, the applicant would need to adduce cogent evidence in support of that assertion. He submitted also, by analogy to the approach taken in cases where it is sought to set aside a judgment, that it will be appropriate for the Court to consider the ability of the company to give security for the judgment creditors and the materiality of the judgment debt in the context of the company's overall insolvency.

[25] Mr McAnally did not refer me to any authority for his proposition, and I am not able to accept it. As I have already said, a broadly expressed statutory power exercisable where it is just and equitable to do so should not in principle be read down. However, the questions arising under s 250 are not exactly the same as those needing to be considered on an application for an order appointing liquidators, and the enquiry is potentially more wide-ranging under the former. Even if it appeared, on the consideration of an application under s 250, that the order placing the company in liquidation may have been tainted by some error, that would not necessarily be decisive. The other issues outlined earlier would still need to be considered. That might result in a decision to decline the application, if the Court was not able to conclude, in the circumstances as they then existed, that it would not be just and equitable to terminate the liquidation.

[26] In the present case, it is not necessary to prolong the discussion of these matters because the resolution of the application follows in a quite straightforward way from the direct application of the relevant considerations under s 250, principally the question of whether the company is solvent or could be made to be by the injection of funds that the applicant claims are available for that purpose. Before turning to consider those issues, I mention again that the Court must be satisfied that it is just and equitable before it can make an order terminating the liquidation under s 250. The applicant for the order must, I think, have the burden of satisfying the Court as to the existence of facts that would justify that conclusion. Here, the liquidators sought leave to cross-examine the second defendant's deponents, and leave to do so was granted by Winkelman J in her judgment of 19 March. However, there was no corresponding application by the second defendant in respect of the affidavits on which the liquidators and the plaintiff relied.

The second defendant's insolvency

[27] Ms Case relied on the evidence of an accountant, Mr Mawdsley, and her own evidence, to assert that the second defendant is solvent. Mr Mawdsley swore two affidavits, on 27 February and 23 March 2007. In the first, he deposed to having prepared, on the instructions of Ms Case, a balance sheet for the second defendant ("the company") as at 31 December 2006. The balance sheet had been based on a trial balance that had been prepared by Mr Mercer, who, as already mentioned, had previously provided professional accounting services to the company. Subsequently, Mr Mawdsley prepared a revised balance sheet, which he said was based on information that he had obtained from a report prepared by the liquidators. The first balance sheet showed total assets of \$2,121,848 and total liabilities of \$1,781,126, giving a net asset position of \$340,721. The revised balance sheet showed a net asset position of \$197,995.

[28] Mr Mawdsley was cross-examined by Mr Manning, and confirmed that the exercise that he had carried out had been one simply involving the compilation and arrangement of information that had been provided to him by Ms Case and Mr Wenzel. His evidence was that:

They requested me to prepare a balance sheet and asked me to offer my opinion as to whether they were solvent, I wasn't instructed to make sure that they were solvent.

[29] Consistently with that approach, when he forwarded the accounts to Ms Chase under cover of a letter dated 12 February, Mr Mawdsley wrote:

12 February 2007

The Director
Case Boreham Associates Limited
15 Oakleigh Avenue
Takanini
Auckland

Dear Robin
Solvency of Case Boreham Associates Limited

After my review of the attached Statement of Financial Position (Pages 1 & 2), which formed part of the Management Accounts for the year ending 31 December 2006, I am satisfied that the assets exceed the liabilities at that date. Please note that

I have not verified these balances and have placed reliance on the balances as presented to me.

Therefore, providing that you are satisfied with substance of the accounts, I see no reason why you as sole director cannot sign the Director's Solvency certificate as required by Section 108 of the Companies Act 1993.

Yours Faithfully

Butch Mawdsley
RES Business Development Ltd

The Director

[30] Further, in a statement of disclaimer that also accompanied the accounts, Mr Mawdsley stated, over his firm's name:

We have compiled the Special Purpose financial statements of CASE BOREHAM ASSOCIATES LIMITED for the year ended 31 December 2006.

This compilation is limited primarily to the collection, classification and summarisation of financial information supplied by CASE BOREHAM ASSOCIATES LIMITED and does not involve the verification of that information. We have not performed an audit or review on the financial statements and therefore neither we nor any of our employees accept any responsibility for the accuracy of the material from which the financial statements have been prepared.

Further, the statements have been prepared at the request of and for the purpose of CASE BOREHAM ASSOCIATES LIMITED and neither we nor any of our employees accept any responsibility on any ground whatsoever, including liability in negligence, to any other person.

[31] It is somewhat surprising that Mr Mawdsley was willing to prepare what he termed "Special Accounts" on this basis, knowing (because he had been told by Ms Case) that they were intended to be used "for a judgment", as he conceded to Mr Manning. He explained further, however, that he had not been sure that the reference to a judgment had been in the context of court proceedings. For the purposes of the exercise that he carried out Mr Mawdsley had been given a trial balance for the period 1 January to 31 December 2006 completed by Mr Mercer, but he conceded to Mr Manning that he had no access to the company's primary accounting records, had been very dependent on the accuracy of the information given to him and had taken no steps to verify it.

[32] The liquidators were critical of the inclusion in the accounts of two credit card balances as assets. The sums involved were a balance of \$54,370.26 on an Amex credit card, and \$32,463.89 on a Visa credit card. Mr Mawdsley explained that he had said to Ms Case that he had been a little concerned about some of the assets and that further work would have to be done to verify some of the balances because they were “clearly of a questionable nature”. Ms Case had responded in relation to the two credit card balances that she doubted that there were amounts of money in the credit cards “to that extent”. Apart from that, he had not asked to see the relevant credit account statements. In his affidavit of 27 February, Mr Mawdsley accepted that those amounts should be removed as current assets.

[33] However, Mr Mawdsley’s revised balance sheet was also subjected to extensive criticism by the liquidators. Mr Mawdsley had included as assets the sums of \$316,027.04, lent to SCI Finance Limited, \$35,400 lent to the CBA Family Trust and \$4,200 lent to two other companies (collectively referred to by Mr Mawdsley as the “inter-company loans”). In the revised balance sheet, the debts owed by SCI Finance Ltd and CBA Family Trust were listed with other items under a heading “Effective Shareholder Equity”. In an affidavit sworn on 8 March 2007, Mr Horrocks, a chartered accountant employed by the liquidators’ firm as a forensic accountant, deposed that it was a misrepresentation to treat the loans in that manner: the debtors had not exchanged debt for equity, and the debts did not represent subrogated liabilities. Consequently, the proper approach was to show the items as current assets debts due. However, he attached a copy of a bank statement for SCI Finance Ltd, showing that as at 7 January 2007 it was overdrawn in the sum of \$74.91. Further, he stated that, after inquiry, the liquidators were of the view that neither SCI Finance Ltd nor the CBA Family Trust had assets or any other means of satisfying their indebtedness to the company. He stated that the liquidators considered the amounts to be uncollectible, and that they should not be treated as current assets. Mr Horrocks was not cross-examined.

[34] In his second affidavit, sworn on 23 March, Mr Mawdsley simply stated (at paragraph 5.9) that the debit balance of \$355,627.04 should in fact be shown as a current asset in accordance with “generally accepted accounting practice.” In relation to Mr Horrocks’ evidence about the likely inability to recover those debts, he

asserted that Mr Horrocks had confirmed that the liquidators had not been able to determine whether SCI Finance or CBA Family Trust had any assets. He then said that, since the liquidators had not been able to verify the details, any opinion on the matter was “purely conjecture.” This was, of course, to misstate Mr Horrocks’, evidence, which I have summarised above. Mr Mawdsley accepted under cross-examination that he himself had made no inquiry about the ability of SCI Finance or, the CBA Family Trust to repay their debts. The liquidators, by contrast, reached their position after making appropriate inquiry.

[35] Among the steps that had been taken was the sending of letters demanding payment of the “inter-company loans”. The letters, dated 19 April 2007, were sent to the registered office of the companies, in both cases 15 Oakleigh Avenue, Takanini, and also to Ms Case personally. On 23 April 2007 she sent an e-mail to Mr Wood which read:

Dear Mr Wood,

Can you please provide evidence as the following amounts:

Rongotai Holdings	\$3,000.00
CBA Family Trust	\$35,400.00
SCI Finance	\$316,027.04
APD	\$1,200.00

Kind regards,

Robyn Case

[36] Then, on 27 April 2007 she sent a further e-mail to Mr Wood, headed “Re: Case Boreham and Associates Ltd (In Liquidation) Inter-Company debtors”. The e-mail stated:

Please be advised I am comprising [sic] a reply in relation to these entities on Monday.

[37] However, nothing further was received, and no payment was made by the debtors.

[38] In all the circumstances, I consider on the balance of probabilities that the inter-company loans are unlikely to be recoverable and should not be treated as assets for the purpose of assessing the second defendant's solvency.

[39] Mr Mawdsley had also included as assets of the company an amount of \$82,800.61 referable to an anticipated GST refund. However, in cross-examination Mr Manning put to him a letter dated 27 March 2007 from the Department of Inland Revenue, in which it was indicated that rather than there being a refund of GST owing, GST of over \$9,900 was likely to be owed. The letter had, of course, been received by the liquidator after Mr Mawdsley had prepared his accounts, but Mr Mawdsley properly conceded, in view of the letter, that the prudent accounting treatment of the GST refund would have been to delete it, and substitute the indebtedness mentioned in the IRD's letter.

[40] The liquidators were also critical of Mr Mawdsley's inclusion of the sum of \$76,472.33 as a current asset, representing "accounts receivable". In his affidavit of 8 March 2007, Mr Horrocks recorded advice that he had received from Mr Mercer that the debtor's figure of \$76,472.33 represented invoices issued by the company to former staff for training services at or after the time they left the company's employ. It was Mr Horrocks' assessment that there was no realistic prospect of the amount being paid, and that they should be written off accordingly. Once again, I note that Mr Horrocks was not cross-examined.

[41] Mr Mawdsley, in his affidavit of 27 February 2007, suggested that the invoices would indeed be paid based on a review of "subsequent receipts as per Westpac bank account". However, Mr Horrocks gave evidence that the "subsequent receipts" were in fact sums received from the Tertiary Education Commission, in respect of which funding invoices were never raised. Consequently, the receipts upon which Mr Mawdsley relied, bore no logical relationship to the sum of \$76,472.33 claimed to represent accounts receivable. I have no reason to doubt Mr Horrocks' evidence to that effect. Again, on the balance of probabilities, I conclude that it is most unlikely that the items shown in Mr Mawdsley's balance sheet for "accounts receivable" are unlikely to be recovered.

[42] Putting these various criticisms together, Mr Manning submitted that Mr Mawdsley's special purpose balance sheet had overstated the current assets of the company by at least \$500,000. That submission was justified on the facts that I have found. Given that, under the revised balance sheet, the company was shown as having a net asset position of \$197,995, an overstatement of current assets by \$500,000 so as to produce that net position would clearly indicate that as at 31 December 2006, the company was insolvent. There is no suggestion that its position had materially improved by 12 February 2007, when Doogue AJ placed the company in liquidation. Moreover, there are other criticisms that can justly be made of Mr Mawdsley's special purpose balance sheet.

[43] Mr Mawdsley assigned a value of \$57,076.18 for fax machines and photocopiers located in schools. Mr Horrocks in his affidavit of 8 March 2007 expressed the view that those machines would have little or no realisable value in a "sell down situation". Whether or not that view is correct, there appears to have been no depreciation allowed in respect of those items, nor in respect of another sum, of \$47,549, for plant and equipment.

[44] Further, and significantly, there was no mention in the accounts prepared by Mr Mawdsley of the debts owing to the plaintiff. In fact, Mr Wood attached to his fifth affidavit a schedule of creditors' claims in three parts. The first concerned claims which *prima facie* appeared to be payable. Those claims totalled \$1,272,332.75. In a second category, claims which were provisionally accepted, but on which further information was being sought from the claimant, were items totalling \$1,013,218.26.

[45] In her fourth and fifth affidavits, sworn on 16 April and 25 May 2007 respectively, Ms Case disputed many of the debts which in the opinion of the liquidator, are *prima facie* payable. It is I think, for present purposes, unnecessary to resolve the dispute, in view of the conclusions that I have already set out above. It is relevant to mention again in this context, however, that Mr Wood was not cross-examined, while Ms Case, who was cross-examined, did not acquit herself with distinction in the witness box. For reasons that I will address shortly, I did not regard her as a credible witness.

[46] Finally, I note that as at 9 May 2007, the liquidators' costs and legal expenses stood at \$144,373. It is alleged by Ms Case that the fees are excessive. However, even if they were substantially less than they are, it is plain that the company would not be able to pay anything towards them. These further considerations simply underline the conclusion already reached that the company is insolvent. In terms of the relevant considerations under s 250 of the Act, summarised earlier, I am not in a position to decide that all creditors have been paid in full or that satisfactory provision has been made for them to be paid in full. Plainly, it also cannot be said that all creditors consent to the application (both the plaintiff, and another creditor, Ascent Business Directions Ltd, are opposed to it) and neither have the liquidator's costs been fully paid or secured.

[47] That being the case, an order under s 250 could not properly be made, unless there were a substantial injection of new capital into the company. A proposal for such a recapitalisation was in fact advanced by the applicant, and I now turn to discuss it.

Recapitalisation

[48] In the written submissions that he handed up at the hearing, Mr Denholm addressed the proposed injection of capital into the company under a heading "Capital Fund". He submitted:

23. It is confirmed that the Applicant has arranged moneys from private sources in the sum of \$244,000 and \$108,000 respectively (\$352,000.00) to be provided to the Liquidators.
24. It is submitted the capital sum accumulated by the Applicant together with the balance of monies in the company's account at the date of liquidation plus the moneys available from the sale of the Clarice Place units will be more than sufficient to repay all creditors and secure payment of the Liquidators' costs so an Order Terminating Liquidation of the Second Defendant may be made by the Court.

[49] I record that a similar proposal was mentioned when the present application was before the Court on 30 March 2007. Courtney J was due to hear the application on that day. However, at the commencement of the hearing, she had been advised

that Ms Case had, that morning, tendered a bank cheque to the liquidators in the sum of \$108,000, and provided a notice requiring a creditors' meeting for the purpose of appointing new liquidators. In addition, attached to Mr Denholm's submissions on that day was a letter from solicitors acting for a trust confirming that, following the settlement of certain property transactions, it was anticipated that there would be a further \$244,000 available. Mr Denholm advised Courtney J that Ms Case intended to apply that money towards the liquidators' costs and the debts of the company.

[50] Courtney J regarded these events as significant developments from the company's view and Mr Manning then expressed concern about proceeding with the application on that day. For those reasons, and because she thought that the matter might not be able to be dealt with in any event within the one day that had been set aside for the purpose, Courtney J adjourned the matter for further hearing in a two-day fixture commencing on a date to be fixed.

[51] She recorded what had transpired in a minute that she issued on that day. At [3] of her minute she said:

These are significant developments from the company's point of view and Mr Manning expressed concern about proceeding with the application today. First, there is no evidence on which the liquidators could be certain that the money referred to in the solicitor's letter would in fact be made available to the company. Secondly, it is very unclear as to the manner in which the funds would be made available. Mr Manning points out that, unless the money is made available by way of a recapitalisation of the company, then the solvency of the company will still be in issue because the advances would simply constitute further debt.

[52] In the written submissions that he handed to Courtney J on that day, Mr Denholm wrote:

Capital Fund

20. It is confirmed that the Applicant is arranging moneys from private sources in the sum of \$240,000.00 and \$118,000.00 respectively (\$362,000.00) to be provided to the Liquidators. Annexed as Schedule 2 is a copy of a letter from GD Conveyancing Shop confirming the availability of net funds in the sum of \$244,000 to be disbursed at the direction of the Robins Family Trust.

[53] The letter that was annexed to his submission, evidently from lawyers trading as the "Conveyancing Shop", confirmed that they were acting for the trustees of the

Robins Family Trust, that they were obtaining a mortgage over properties comprised in three titles at Ngatea, that the mortgage would be for advances in the sum of \$319,585 (less costs and disbursements), that a mortgage over one of the properties at Ngatea in the sum of \$60,000 would be discharged but that the other two properties were unencumbered. It was said that upon settlement of the various transactions referred to in the letter there would be approximately \$244,000 to disburse from the settlement proceeds at the direction of the Robins Family Trust.

[54] As I have already noted, Ms Case was called for cross-examination at the hearing on 21 May, and Mr Denholm took the opportunity of asking her some questions about the funds that were now proposed be provided to the company. First, she referred to an amount of \$108,000 currently held in the trust account of Foy and Hulse, Mr Denholm's instructing solicitors. I infer from Mr Woods' fifth affidavit that the cheque in that amount to which Courtney J referred was not in fact tendered unconditionally, and not banked, the money remaining in the applicant's solicitors' trust account. Ms Case said that the balance of \$244,000 was "held in a bank account to which I have direct access". The moneys were "cleared funds", and they could be drawn down within a day if she so desired. Further, the funds would simply be paid to the company, and would not be secured by way of mortgage or any other kind of charge. On the other hand, there was a qualification: she was not prepared to pay the moneys into the company whilst it was in the hands of the current liquidators. She explained:

I would foresee those funds would be paid by me to the company on the company being taken out of liquidation by this Court or if the Court saw fit to transfer this liquidation to another liquidator or if the Court saw fit to have an independent accounting review take place. And in the event that the funds given would show that the company would be solvent as a result of those funds.

[55] Ms Case was then cross-examined by Mr Manning. To Mr Manning, she said that the sum of \$352,000 had already been gifted to her. The gift had come from friends and family members who supported her in the present application. When asked who had donated the sum of \$108,000, she said simply that it had been a family member, and she declined to say who. The gift was not the subject of a Deed of Gift, or documented in any way. However, she had a trust account receipt for that sum.

[56] As to the \$244,000 her evidence in cross-examination was that it had come from a range of sources. As to \$100,000 it was an inheritance from her father's estate. She said that that money was held in a bank account that she had "access to" and it was at either the Westpac Bank in Tauranga or Whakatane. However, the account was not in her name. Rather, it was in the name of the ICU Trust. Mr Manning asked her whether it was the trust that had been the beneficiary under her father's will, but she said that that was not the case. Mr Manning then asked whether the moneys had been distributed by the executors of her father's estate and she replied in the affirmative. They had paid it to her, and she had paid it into the bank account of the ICU Trust.

[57] She could not recall who the trustees of the ICU trust were, nor whether she was one of the trustees. Mr Manning pressed her as to the date on which the ICU Trust had been established, but she said she did not know. Mr Manning asked her next whether she was a discretionary beneficiary of the trust and again she said that she did not know. He asked her whether Mr Wenzel was a beneficiary of the trust and again she said she did know. In summary, it was her evidence that the \$100,000 was held in a bank account in the name of the ICU Trust, she did not know who the trustees were, or who had appointed the trust, or who the beneficiaries of the trust were. However, she had "signing rights" on the bank account. Pressed on that point, she said that she had given herself the signing authority on the account. Next, Mr Manning asked her whether the balance of \$144,000 was also held in the same bank account and she confirmed that it was. Then Mr Manning reminded her that after she had said in her fourth affidavit (sworn on 16 April 2007) deposing to the existence of the capital sum of \$352,000, Mr Manning had written to Mr Denholm requesting provision of the information that had been the subject of his questions in cross-examination.

[58] The substantive part of Mr Manning's letter, dated 18 April 2007, read as follows:

The proceeding was adjourned on 30 March to allow your client to explain precisely the source of the funds, the manner in which they would be made available to the company, and to provide certainty that that would in fact occur. (Refer para 3 of Courtney J's minute of 30 March). Far from doing that, your client's affidavit simply asserts the existence of a "capital fund" of

\$352,000 “in cleared funds to be deposited in a solicitor’s trust account ... over which [your client] has jurisdiction”. It fails to provide any documentary evidence as to the existence of the fund, or as to the certainty of its availability to the company for the purposes of recapitalisation. Further, it fails to provide any detail whatsoever as to the source or sources of the fund.

In order that the Liquidators may assess the proposal (and respond to your client’s affidavit), would you please provide those details by faxed return. In doing so, please advise whether and to what extent the capital fund is derived from the financing arrangements described in the letter from Thada Inglin dated 30 March 2007, which you tendered to the Court on that day.

[59] The reference to Thada Inglin was to the author of the Conveyancing Shop letter. Mr Denholm replied on 23 April 2007, essentially referring to paragraphs 2 and 3 of Ms Chase’s fourth affidavit and indicating that she was reluctant to provide any further particulars because of “interference which occurred with the source of funds she raised via the Robins Family Trust”. His reference was to inquiries that the liquidator had caused to be made independently of a Mr Nigel Robins, who had established the Robins Family Trust. The Robins Family Trust had been identified by Ms Case as a source of funding for the second defendant early in March 2007, but enquiries made of Mr Robins established that Mr Robins had been unaware that the funds were to be used for the recapitalisation of the second defendant.

[60] Other questions asked by Mr Manning procured confirmation by Ms Case that the money would be paid simply by way of gift to the company, although she had made no inquiry as to the gift duty that might be payable. Mr Manning also questioned her about the letter, dated 30 March 2007 that Mr Denholm had placed before Courtney J. In response to his questions, she adopted the stance that although the letter stated that \$244,000 would be available at the conclusion of the conveyancing transactions referred to in the letter to disburse “at the direction of the Robins Family Trust”, it did not actually state that that money would be paid to Case Boreham Associates Ltd and that, at the time the letter had been written, the Robins Family Trust had not made any decision about the use of the funds. Pressed about the basis upon which the letter had been put before the Court, Ms Case essentially fenced and would not give Mr Manning’s questions a direct answer.

[61] Ms Case’s cross-examination had not been completed by the end of the first day of the hearing, and it was due to re-commence the following morning. In the

meantime, following a discussion between counsel and me, it was agreed that Ms Case would endeavour to obtain a bank statement showing the deposit of the funds into which the \$244,000 had been paid and also a copy of the ICU Trust document.

[62] What happened when the Court resumed on 29 May 2007 is best recounted if I reproduce a copy of the record that I caused to be made in the notes of evidence:

THE COURT.-

This morning's hearing commenced with Ms Case who is currently being cross-examined by Mr Manning, asking me a number of questions, focussing on counsels' right to ask her questions not related to documents submitted in affidavit evidence. I responded by indicating that counsel was able to cross-examine on any relevant matter whether or not it concerned a document that was in evidence. I then explained to her that her role was to answer questions and not to question either counsel or me. At that stage, a gentleman by the name of Wenzel rose to his feet to assert that a document had been illegally placed before the Court. I pointed out that he had no right to address the Court at that point and asked him to desist. I also referred to the fact that yesterday he had been the source of a number of comments, which although indistinct were nevertheless audible from the back of the Court and if he wished to remain he would need to do so in silence. On his appearing to wish to continue to debate matters I adjourned, requiring the Registrar to summons the police so that Mr Wenzel could be removed from the Court. I have now returned to the Court at 10.29 a.m. and I have dictated this record in the presence of counsel and the parties.

[63] When able to resume his cross-examination, Mr Manning asked Ms Case for a copy of the relevant bank statement, but she indicated that she had not had time to obtain it. She then confirmed that she had a copy of the trust deed for the ICU Trust but she declined to show it to Mr Manning. She then advised me of her belief that Mr Manning had a copy of "an ICU Trust that has been illegally obtained and that is not a copy of the Trust that I have access to the bank account upon".

[64] Mr Manning explained that his questions concerned the ICU Trust into whose account the moneys had been paid. She confirmed that she had the relevant trust deed with her, but again declined to show it to Mr Manning. I then ordered her to produce it at which stage she sought an adjournment. I inquired of her as to the basis upon which she had sought an adjournment and she said that it was because Mr Manning had produced an "illegal document". I explained to her that no document had been produced by Mr Manning and that there was no proper basis

upon which the hearing could be adjourned. I required her to produce the document that Mr Manning had asked her to produce. She declined again to do so.

[65] At that point, I discussed the position further with counsel. Although Ms Case was under cross-examination, I considered it important that she be able to receive legal advice as to her position. Somewhat reluctantly, Mr Manning agreed and I adjourned so that Ms Case could confer with Mr Denholm about the implications of her refusal to produce the document.

[66] After the adjournment, Mr Manning asked Ms Case whether Mr Wenzel had been present during her discussions with Mr Denholm and she confirmed that he had been. He again asked her to produce the deed of trust to the Court and she declined. I then asked for submissions as to what should occur. Having heard counsel I made the following ruling:

THE COURT.-

The previous adjournment was afforded to enable Ms Case to take advice from counsel, Mr Denholm, notwithstanding that she was under cross-examination at the time. That process having taken place over about 20 minutes, the hearing has resumed and continued to this point where Mr Manning has again asked the witness to produce a document which the witness admits to having in her possession.

Mr Manning maintains that her continued refusal to produce that document in accordance with her request is a contempt of Court. Mr Denholm has questioned the relevance of the document, saying that all the Court should be interested in is as to whether or not the funds are available. The context of this argument is that it is part of the applicant's case that there is a sum of \$352,000 available to recapitalise the second defendant. It is sought to terminate the liquidation of that company on the basis that the sum able to be made available in that amount would be more than sufficient to meet any valid debts of the company.

The trust document, which Mr Manning has sought to have produced concerns an ICU trust into whose bank account has been paid the sum of \$244,000. That is, a substantial part of the \$352,000 on which the applicant relies. Whether or not that money could be used for the purpose of recapitalising the company must depend upon the terms of the deed of trust covering, as they undoubtedly will, the permitted objects on which trust moneys may be expended.

Mr Denholm concedes that the availability of the money is a relevant issue. Whether or not the money is available as the witness asserts must depend upon the terms of the trust deed which Mr Manning seeks to have produced.

I do not see in the circumstances how it can credibly be argued that the document is not relevant. Indeed, it was because of that view that some 40 minutes ago I think, I initially ordered the witness to produce it. She has declined to do so.

I now formally hold her in contempt of Court.

[67] As a consequence of Ms Case's refusal to produce the trust deed, Mr Manning was effectively left unable to inquire into whether expenditure of the funds by effectively making a gift to the second defendant company would have been in accordance with the terms of the trust deed. Given Ms Case's stance that the money would not be made available until after the liquidation was terminated, her lack of candour concerning the terms of the trust was untenable. The Court could not be confident, in the circumstances, that the money would indeed be made available.

[68] The other source of funds that had been mentioned by Mr Denholm was the proceeds of the sale of the units at 20 and 22 Clarice Place. Mr Denholm did not descend into any detail in respect of this aspect of his argument, other than to assert that after the sale of the properties there would be a net profit of \$270,000. I have not been able to ascertain where the figure of \$270,000 comes from. In her fourth affidavit, sworn on 16 April 2007, Ms Case deposed that the properties had a current "Government Valuation Assessment" of \$360,000, in each case, giving a total of \$720,000. She said that the valuations demonstrated that there was a net value, after deduction of the mortgage sum, of \$194,968.82. That would give a total indebtedness on the properties of \$260,000. Mr Wood attached to his fifth affidavit a letter from the mortgagee, Australian Mortgage Securities (NZ) Ltd, in which it was stated that the principal owing and secured against the properties was \$517,000, with interest and fees taking the amount required to settle at 26 April 2007 (the date of the letter) to \$526,419.90. That would give a figure for the second defendant's equity in the property close to that given by Ms Case in her affidavit. However, there are a number of problems with treating that as an achievable outcome at the present time.

[69] First, the properties have been developed by the erection in each case of two units and the subdivision necessary to place the units on separate titles has not been

completed. Fees and levies due to the Papakura District Council, so that process can be completed, will exceed \$26,000. Moreover, there are outstanding agreements for sale and purchase of the properties from the second defendant to SCI Finance Ltd and/or nominee in which the two existing titles are to be sold, in each case for the sum of \$265,000. The total proceeds of that sale, \$530,000, would be barely enough to cover the indebtedness under the mortgages. SCI Finance is owned by a company called Business Advisory Trust Services Ltd. That company in turn is owned by ICU Trustees Ltd. Ms Case declined to answer questions directed as to whether or not she had been a trustee of the ICU Trust in 2006 when the directors of ICU Trustees Ltd had been appointed. She asserted that she was unable to respond, because Mr Manning had been asking her questions on the basis of an unlawfully obtained document. In effect, it was another wilful refusal on her part to be candid with the Court.

[70] Be that as it may, I could not be satisfied on the basis of the evidence that there would be a significant amount of capital available to the second defendant from any sale of properties at Clarice Place. I observe also that it is surprising that, having purchased the properties from the plaintiff in 2005 under contracts which provided for a purchase price of \$330,000 plus GST, in each case, the properties should be the subject of agreements for sale and purchase entered into on a rising market for \$265,000, in each case. Evidently, however, Ms Case as the second defendant's sole director decided that that should occur.

[71] In his closing address Mr Denholm indicated with respect to the "fund" of \$352,000, upon which reliance had previously been placed, that the applicant no longer suggested that the money would be made available to the company by way of gift. This was a remarkable *volte-face* in the applicant's argument. It was left unclear as to how the money could be provided to the company, without simply increasing its indebtedness.

Conclusion

[72] I have earlier set out my conclusion that the company was insolvent, when Doogue AJ appointed the liquidators. On the basis of the evidence I have discussed

above, it remains insolvent, with no prospect of there being any injection of funds so as to improve its position.

[73] In the circumstances, I have concluded that it would be neither just nor equitable to make an order terminating the liquidation of the company, and the application must fail.

[74] It is unnecessary for me to deal with various other issues which were raised by Mr Manning, including his argument that it would be undesirable in the public interest for the application to be granted, based on the extent to which, on the evidence, Mr Wenzel (an undischarged bankrupt facing various charges brought against him by the Official Assignee and by the Serious Fraud Office) had been involved in the affairs of the company and might be again if the application were granted. Further, I do not need to resolve his public interest argument based on Ms Case's conduct as a director of the second defendant, and on her allowing (as I am satisfied she did) inaccurate accounting material to be placed before the Court for the purposes of the present application.

[75] Nor do I need to take into account (and I have not done so in reaching the conclusions set out above) the advice that has been tendered by Mr Manning, in a memorandum dated 26 June 2007, that on 31 May 2007 the Deputy Registrar for Companies had made an order pursuant to s 385(3) of the Companies Act prohibiting Ms Case from being a director or promoter of a company, or being concerned in or taking part, whether directly or indirectly, in the management of a company, for a period of three years and ten months commencing 1 June 2007.

[76] The application is dismissed. The plaintiff and the liquidators are entitled to their costs on the application. If costs cannot be agreed, counsel seeking costs may file memoranda within 15 working days of the delivery of this judgment. The applicant may respond within 10 working days of receipt of those memoranda.