

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**  
**(CIVIL DIVISION)**

**MISC NO. 71/2008**

**IN THE MATTER** of an application to  
summons a meeting of  
creditors pursuant to section  
205 of the Companies Act  
1955 (NZ) as applied to the  
Cook Islands by the  
Companies Act 1970-71

**AND**

**MISC NO. 67/2008**

**IN THE MATTER** of Section 219 of the  
Companies Act 1970-71

**AND**

**IN THE MATTER** of **GEOFFREY HUGHES**  
**EXPORTS (PTY) LTD** a  
duly incorporated company  
having its registered office in  
Chatswood, Sydney, Australia  
**Applicant**

**AND**

**IN THE MATTER** of **PACIFIC DISTRIBUTORS**  
**LIMITED**, a duly incorporated  
company having its registered  
office in Nikao, Rarotonga,  
Cook Islands  
**Applicant**

Mr Manarangi for PDL  
Ms Rokoika for Geoffrey Hughes Exports (Pty) Ltd  
Date: 14 November 2008

**ORAL JUDGMENT OF WESTON J**

**Introduction**

1. This is an application to sanction a scheme of arrangement which would bind the unsecured creditors of Pacific Distributors Limited under section 205 of the Companies Act 1955.

2. The application was argued before me yesterday. I would prefer to have had more time to prepare a carefully reasoned judgment but my commitments in New Zealand over the next few weeks mean that I cannot realistically delay issuing this judgment. I understand there is now some urgency to resolve this application.
3. I have reached the clear view that the scheme should be approved and I now set out my reasoning in summary form.
4. The application to sanction the scheme of arrangements has been brought on for hearing at the same time as a winding-up petition by Geoffrey Hughes Exports. If I sanction the scheme that will inevitably impact on the petition. Consequently, I propose dealing with the scheme first before addressing the winding-up petition.
5. The essential thrust of the scheme is that the company will pay 60c in the dollar or thereabouts followed by a liquidation. That provides an oversight which will suffice by way of introduction. I discuss the detail shortly.

**PDL – on overview**

6. PDL was incorporated in March 2007. It took over the business of a number of existing entities including Meatco, Foodland and Oasis. By at least March 2008, there were financial difficulties. These culminated in the sale of the business to CITC on 1 August 2008. The sale to CITC produced the sum of \$7.7m. Various payments were made from this sum, the detail of which I will consider shortly. The balance was then held on account of the unsecured creditors of the company. There is not enough to effect a full payment to those creditors.

## **Procedural History**

7. On 16 September 2008 Geoffrey Hughes Exports issued a winding-up petition out of this Court. This precipitated an application to the Court to approve a meeting of creditors preliminary to the sanction of a scheme of arrangement. That application was filed on 29 September 2008.
8. The application to approve the meeting was supported by an affidavit of Mr O'Meara, manager of PDL. Ultimately, Mr O'Meara was to file five affidavits dealing with different aspects of the application. My understanding is that Mr O'Meara has been managing the wind-down of the business and supporting the scheme of arrangement. I have been advised that his employment has now come to an end.
9. This Court then considered that application and, over the course of several days, further information was provided as the scheme was refined. The advice to creditors of the proposed meeting was also developed. In particular, an affidavit of the two remaining directors was prepared and filed which confirmed the terms of the scheme of arrangement. The proposed scheme included a number of commitments by the directors and I required their confirmation of these by way of affidavit.
10. On 2 October I prepared a Minute directing a meeting to be called on 14 October 2008. I also dealt with advertising and the appointment of a chair for the meeting. In the last paragraph of that Minute, I recorded my then view that there was only one relevant class accredited. For reasons that I will address below, that view remains unchanged.
11. The creditors meeting occurred on 14 October 2008. Some of the details are recorded in the affidavit of Mr Brannigan, the designated

chair of that meeting. There is also a DVD of the meeting which I have reviewed. The sound quality is poor but I have gained something of the flavour of the meeting. It is clear that those present asked a great many questions of the directors and advisors who were also present at the meeting.

12. Mr O'Meara also filed an affidavit reporting on the meeting. He explained how creditors had been advised of the calling of the meeting. Most creditors were notified by email including all of the overseas creditors. There were three advertisements placed in the Cook Islands News. Mr O'Meara kept a detailed record of attendees and how they voted. In paragraph 7 of his affidavit he advised that "of the creditors who attended in person or by proxy, 89% of them voted in favour and 11% voted against the scheme of arrangement. Those who voted in favour of the scheme of arrangement represent 87% of the total value of creditors."
13. A total of 10 creditors voted against the scheme of arrangement at the creditors meeting. The total value of their claims was approximately \$500,000. The total indebtedness of PDL is approximately \$4.5 million. These figures bear out the summary of Mr O'Meara's affidavit quoted above.
14. I have already mentioned my provisional view that there was only one relevant category or class or creditor. Initially Ms Rokoika maintained an argument that her client was in a separate class. She expressly abandoned this at the hearing. I believe her concession was appropriate and that I was correct to treat the various creditors as comprising a single class.
15. On 4 November 2008 Mr Manarangi appeared in front of me to discuss arrangements to bring on the application to sanction the scheme of arrangements, I then gave directions which led to the hearing on 17 November. I directed that the winding-up petition

and the application for sanction be heard together. I also directed that any person opposing the sanction of the scheme should file Notices of Objection by 16 November. Five creditors filed one of these, including Geoffrey Hughes Exports.

### **The Scheme of Arrangement**

16. There are 7 particular aspects of the scheme which I now address. First, the position of secured creditors. This category includes creditors who were secured by way of debenture as well as those who exercised rights under retention of title clauses. There was, at the hearing, some challenge to these and I address that shortly. The VAT and PAYE payments made by PDL were not challenged. The total payments for this category were an amount just over \$6 million. It is proposed that those payments be accepted as having been properly made with no adjustment made.
17. Secondly, there were four trade creditors who were paid on the basis they were said to be essential. One was the electricity supply company and this claim comprised over half of the total of these four trade creditors. The other three were rental payments made to related entities of PDL. It was a term of the sale to CITC that these payments be brought up to date. As with secured creditors, the scheme of arrangement assumes these payments will not be challenged.
18. Thirdly, professional fees on the sale. These totalled \$136,000 approximately. There was some criticism of the quantum but, apart from general grumbling, no specific challenge to the payment. It seems to me inevitable there would have been some costs incurred relating to the sale and I see nothing exceptional about these costs. There has been a further sum of \$30,000 put aside to meet anticipated legal costs associated with winding down PDL. Again, that seems to me to be appropriate.

19. Fourthly, the scheme proposed that all creditors of less than \$1,000 be paid in full. This was suggested on the basis that the costs of reconciling these various claims was out of proportion to the small amount involved in total which is approximately \$16,000. I address some criticisms of these payments when I discuss the grounds of opposition to the scheme below.
20. Fifthly, that PDL held approximately \$29,000 which it believed was held by it on trust. PDL proposes paying those moneys back in full. There was no challenge to this and again it seems to me an appropriate basis on which to construct the scheme.
21. Sixthly, various sums, including the sum of \$1.9 million of shareholders advances, were to be forgiven. I understand that Mr Carr, representing some of the creditors, established that these were genuine advances and represent a real concession by the shareholders. In addition, the directors would waive fees owed to them of \$68,000.
22. Seventhly, the directors have deposited \$150,000 into a solicitor's trust account. This amount of money has been described as the support fund. It is to be used to top up the company's funds so as to ensure if possible a minimum payment of 60c in the dollar. Whether this fund will actually be called upon will depend upon the extent of recoveries.

### **The objections**

23. I start with those objections raised on behalf of Geoffrey Hughes Exports and argued by Ms Rokoika. First, she was critical of the company's record keeping and argued that a scheme of arrangement would preclude steps being taken to pursue such alleged deficiencies. While I have no knowledge of the details of

such allegations, it appears to me that a scheme of arrangement would not have that effect: see *Buttle v Allen* [1994] 1 NZLR 396.

24. Secondly, she challenged the payments made to secured creditors and the essential trade creditors. This issue was also raised on behalf of Telecom and I address that when answering Telecom's arguments.
25. Thirdly, and if this scheme of arrangement is sanctioned, Ms Rokoika sought an amendment to the effect that the first and second proposed distribution be collapsed into the one distribution of 45c. I return to that shortly.
26. Submissions were then made on behalf of the Bond Store. It was said that a high proportion of the year to date's total orders were placed in the period immediately prior to the sale to CITC. When questioned about this, I understand, representatives of PDL said that nothing had arisen and that PDL was able to meet its obligations. There is no evidence before me on the topic. But, if the allegations are true, they are not necessarily relevant to the scheme of arrangement. If the Bond Store was misled by the actions of individuals, there may be remedies directly against those individuals but that would not necessarily increase the indebtedness of PDL itself to the Bond Store. Consequently I do not believe that this is a factor which needs to stand in the way of the scheme of arrangement.
27. Telecom made very extensive submissions. These ranged considerably beyond the scope of the Notice of Objection filed by Telecom. Nevertheless I allowed the submissions even though there were new topics raised which ultimately led to an adjournment of the hearing to enable further enquiries to be made. The key focus of Telecom was on the securities of ANZ, Westpac and W H Grove. In effect it was said there were no formal securities in place.

Following the adjournment, it became apparent that this argument was erroneous and that in fact there were securities in relation to these three creditors and that all should properly be regarded as secured creditors.

28. Telecom also criticized the payment in full to creditors under \$1,000. It was said that this proposal was tactical, designed to achieve the necessary voting majority. I do not accept this. The total sum due to this group of creditors is very small compared to the total indebtedness. I accept as entirely credible PDL's argument that the cost of reconciling these creditors would be out of proportion to the amount involved.

### **Analysis of the law**

29. The application is brought under Section 205 of the Companies Act. I do not need to set that out here.
30. Of the various authorities cited to me, I have derived the most assistance from the decision of the High Court of New Zealand in *Southern World Airlines* [1993] 1 NZLR 597. In this decision the High Court endorsed an earlier decision of that Court in *CM Banks Ltd* [1944] NZLR 248 in which four tests are set out which should be satisfied before a scheme of arrangement is sanctioned. I am quite satisfied that the first three of these are made out on the facts before the Court.
31. The fourth factor requires that the scheme might reasonably be approved by an intelligent and honest business person. In the first place, it can be observed that a large proportion of creditors have supported the scheme. That is obviously a clear signal that the Court should not lightly ignore. Ultimately though, this factor can only be assessed as a matter of judgement and impression. I am



satisfied that the proposed scheme of arrangement might reasonably be approved by this hypothetical business person.

32. Williams J in the case of *Southern World Airlines* made it clear that, even if these four factors are satisfied, there remains a residual discretion to sanction the scheme or not. I now address one factor that can usefully be raised in this context. Conceivably through, it could have been raised in addressing the fourth factor just mentioned.
33. It was argued that the approval of the scheme would prevent a proper investigation of the affairs of PDL. That is arguably true of any scheme of arrangement where the scheme will put commercial expediency ahead of anguish self examination. Sometimes a rational business person may decide that a specified financial return is preferable to a long drawn-out investigation which may not necessarily generate a greater return. *Buttle v Allen* makes it clear, in any event, that the scheme of arrangement does not necessarily stand in the way of an investigation into the affairs of the directors. If there has been misconduct, and I stress there is no evidence before me about this, interested creditors can pursue that further should they desire to do so.
34. Taking all factors into account I believe that the Court should approve the proposed scheme of arrangement but subject to some additional conditions which I now discuss.

#### **The terms of the scheme of arrangement**

35. I approve the terms of the draft order subject to the following:
36. First, the order must make it clear that the payment to creditors may exceed 60c in the dollar if recoveries are better than expected. In

these circumstances it would not be necessary to resort to the support fund.

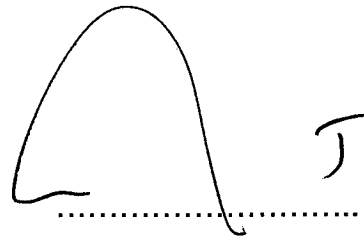
37. Secondly, the payment of the expected dividends will culminate in the liquidation of PDL. I have been asked to make directions as to the identity of a liquidator, but I do not believe that to be appropriate. Nevertheless, I do recommend that the members of the company take care at the point they are selecting a liquidator to achieve as much independence as is possible.
38. Thirdly, there needs to be more prescription as to when payments are to be made. I direct the scheme of arrangement shall provide for the following payments:
- (a) the first dividend comprising 30c to be paid by 19 November 2008;
  - (b) the second dividend comprising 15c by 1 December 2008;
  - (c) the third dividend comprising up to 15c by 1 February 2009 but earlier if finances allow;
  - (d) any further dividend beyond 60c is to be paid by 1 April 2009.

Leave is reserved to PDL or to any unsecured creditor to apply to the Court to review these dates or to seek directions if payments are not made on time.

39. Following the final dividend, I direct that PDL shall enter into a voluntary liquidation within a two week period from that last payment. Again, leave is reserved to vary that time limit if for any reason it is inexpedient or inconvenient.
40. Fourthly, the order needs to clarify that the implementation of the scheme of arrangement is now the responsibility of the directors as assisted by the company's lawyer who I assume will be

Mr Manarangi. The draft order already provides for the directors to provide their services free of charge but it would be useful if it went further and specified that they had a continuing role. The order should make it clear that counsel's costs are to be met from the company's assets.

41. Counsel should report to the Court following the second payment and at each payment thereafter. I direct Mr Manarangi to prepare a further draft order and to submit it to me for approval.
42. Finally, I need to stay the winding-up petition. Following the final dividend payment from PDL, whether it is at the third or fourth step as I set out above, the petition will be automatically dismissed with no order as to costs.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller loop and a short horizontal stroke. To the right of the signature is a small, handwritten mark resembling a 'J' or a similar character.

**Weston J**