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

Misc No. 7/2017

BETWEEN	**APEX AGENGIES LIMITED** trading as TOA PETROLEUM a duly incorporated company having its registered office at Rarotonga 1st Petitioner
AND	**PORTER GROUP HOLDINGS LIMITED** trading as TOA GAS a duly incorporated company having its registered office at Rarotonga 2nd Petitioner
AND	**PACIFIC SCHOONERS LIMITED** a duly incorporated company having its registered office at Rarotonga, Cook Islands Respondent

Date of hearing: On the papers

Counsel: Mr B Marshall for 1st and 2nd Petitioners
Mr W Rasmussen for the Penrhyn community
Mr D McNair for the captain and one crew member
Ms M Henry for the Bank of the Cook Islands
Mr P Dawson by phone from New Zealand on behalf of the Respondent

Judgment: 16 February 2017

JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ

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[1] Introduction and History: This proceeding concerns a petition brought by Apex Agencies Limited and Porter Group Holdings Limited, trading as TOA Petroleum and TOA Gas respectively, to wind up the Respondent company Pacific Schooners Limited.

[2] The matter was heard on an expedited basis on 3 February 2017 with counsel (other than Mr Dawson for the Respondent) and the Judge all being present in

Rarotonga and Mr Dawson and the Judge being connected by telephone from New Zealand.

[3] The matter was heard on an expedited basis partly because the principle – indeed almost the only – asset of Pacific Schooners is the ship “Tiare Taporo” currently lying in Avatiu Harbour. She – and the harbour facilities – were thought to be at risk should a cyclone strike Rarotonga. The expedited hearing was also partly to provide a community service to the commercial sector of the Cook Islands.

[4] To have an expedited hearing was challenged but, in an oral judgment delivered that day it was directed that the hearing proceed.

[5] It did so and, after the usual evidence in such matters was given, it was held that a case had been made out to make an order for the winding up of the Respondent company. However, the matter had to be adjourned as counsel for the Petitioners, Mr Marshall, had been unable to locate a person in the Cook Islands willing to act as liquidator and the ship could not be left without somebody having power to manage the vessel in the event of a cyclone.

[6] The petition was accordingly adjourned sine die for Mr Marshall to locate a person or persons who were prepared to act as liquidator in the Cook Islands, circulate the names of possible appointees to other counsel and then refer the matter to the Court.

[7] Liquidators and Fees: By way of a memorandum dated 9 February 2017 Mr Marshall asked that Messrs John Howard Ross Fisk and David John Bridgman of PwC New Zealand be appointed as liquidators. All other counsel except Mr Dawson had consented to the appointment and Mr Dawson had no objection though commenting that the fees proposed to be charged by the liquidators seemed excessive.

[8] The fee scale proposed by the liquidators ranged from $420 - $450 per hour for directors and liquidators, down through lessening hourly amounts for associate

directors and managers to senior associates at $240 per hour, associates at $160 per hour and support staff at $110 per hour.

[9] The Court approves the appointment of Messrs Fisk and Bridgman as liquidators but is not prepared to make the actual appointment until the following three additional matters have been attended to:

a) Since Messrs Fisk and Bridgman do not reside in the Cook Islands and PwC has no presence in the Cook Islands, to give the Court jurisdiction over the actions of the liquidators it will be necessary, before they are appointed, for each of them to file an undertaking in Court binding both themselves and PwC to carry out the liquidation of Pacific Schooners Limited in accordance with the provisions of the Companies Act 1955 (NZ) as applied in the Cook Islands by the Companies Act (1970-71) and to be answerable to the Court in that respect; and

b) For the liquidators to file in Court a plan detailing what actions they propose to take to safeguard the "Tiare Taporo" and the Port in the event of a cyclone hitting Rarotonga; and

c) Filing an undertaking in the Court that they, PwC and its staff are prepared to be paid for their services at a scale commensurate with the fees Cook Islands accountants would be likely to charge for the work involved.

[10] By way of explanation for the undertaking required by paragraph [9](c), the Court takes the view that the scale of fees proposed to be charged by Messrs Fisk, Bridgman and PwC would appear to be the fees chargeable by them for similar work in Auckland, New Zealand. If so, that is not the appropriate scale since they will be Cook Islands' liquidators operating in the Cook Islands and should thus be paid at Cook Islands' rates. It is for the Petitioners to liaise with Cook Islands' accountants as to the scale of fees they would normally charge for liquidation work such as this, obtain the agreement of Messrs Fisk, Bridgman and PwC to be remunerated at that

rate and to obtain the comments of other counsel involved in this matter as to the appropriate fees to be authorised by the Court.

[11] Costs: Mr Marshall seeks costs against the Respondent at 80% of the $6,485.00 so far charged to the Petitioners by way of legal fees plus full recovery of disbursements.

[12] Mr Marshall justifies that application by submitting that the amount of work involved in the matter was “substantial”, and “the Respondent’s conduct compelled the Petitioners to proceed all the way to the hearing” because they “failed to engage with the Petitioners in respect of this matter” and adopted a “head in the sand approach”.

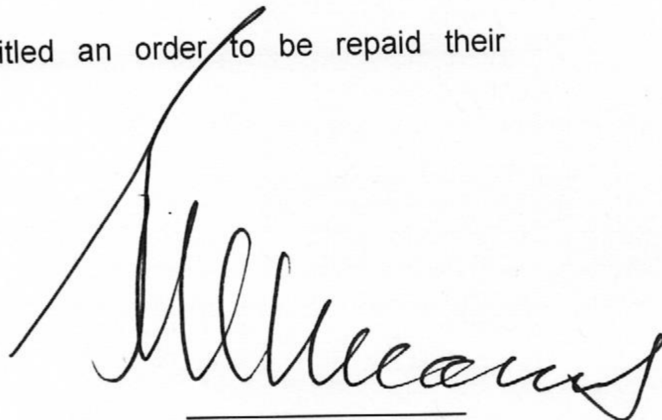
[13] Although the Petitioners are entitled to an award of costs, no basis is made out for any significant increase in the award above that normally awarded in winding up petitions in the Cook Islands.

[14] The arguments put forward by Mr Marshall to justify an increase in costs to 80% of the amount charged do not justify an increase in that range. It is well established that petitions to wind up companies based on default in complying with a notice under s 218 of the Companies Act 1955 are not debt collection exercises; they are an application to the Court to make an order terminating the capacity of a company to continue to trade when it is indebted, insolvent and unable to pay its debts as they fall due in the ordinary course of business.

[15] Mr Marshall is correct in saying that there were difficulties in arranging service of both the s 218 notice and the petition but it seems those difficulties were caused more by a failure on the part of the Respondent to change the notification of its registered office with the Companies Office to the place where it was actually carrying on business rather than a deliberate attempt to avoid its responsibilities.

[16] The Court is prepared to increase the normal order for costs in liquidation to a modest degree but, as it appears that further legal work will be required on behalf of the Petitioners and liquidators, it is not prepared to fix the costs at this stage.

[17] The Petitioners will, however, be entitled an order to be repaid their disbursements as fixed by the Registrar.



Hugh Williams, CJ