IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-000306
[2018] NZHC 2968

UNDER	Part 4 of the Insurance (Prudential Supervision) Act 2010 and Part 16 of the Companies Act 1993
IN THE MATTER OF	an application to appoint liquidators to the defendant company
BETWEEN	RESERVE BANK OF NEW ZEALAND Plaintiff
AND	CBL INSURANCE LIMITED Defendant

Hearing: 12 November 2018

Appearances: N S G Gedye QC and S A Barker for Reserve Bank
J S Cooper QC and A E Murray for Interim Liquidators
A S R Ross QC and J E M Lethbridge for Elite Insurance
M Kersey for LBC Holdings
J F Anderson QC and J A MacGillivray for Alpha
D A Salmon and J P Cundy for CBLI
H L Quinlan for Supporting Creditor

Judgment: 16 November 2018

REASONS FOR JUDGMENT OF COURTNEY J
[Confidentiality issue]

This judgment was delivered by Justice Courtney
on 16 November 2018 at 2.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date…….

Introduction

[1] The Reserve Bank of New Zealand applied under s 151(2) of the Insurance (Prudential Supervision) Act 2010 for an order that CBL Insurance Ltd (in interim liquidation) (CBLI) be placed in liquidation. The application was brought on three grounds: (1) breach of CBLI's required solvency margin (2) breach of the Bank's directions to CBLI regarding payments to third parties and (3) that it was just and equitable to wind CBLI up having regard to the fact that the company was balance sheet insolvent and in light of impropriety by the directors.

[2] Despite strenuous opposition by CBLI (through its directors Mr Harris and Mr Hutchison) over several months, the application ultimately proceeded unopposed, though CBLI formally conceded only the first ground, the breach of its solvency margin. At the outset of the hearing, Mr Salmon, on behalf of the directors, sought confidentiality orders limiting access to the court file and the extent of publication of some of the allegations and affidavit evidence relied on by the Bank.

[3] Mr Salmon characterised parts of the evidence relating to the second and third grounds as scandalous, with publication of them likely to cause significant reputational damage. The grounds for seeking the confidentiality orders were, essentially, that because the directors would not have the opportunity to test the evidence and no determination of the allegations would (or could) be made in the context of this proceeding, the directors' reputational interests outweighed the principle of open justice.

[4] I declined to make any such orders and indicated that I would give my reasons later, which I now do.

The principle of open justice

[5] The starting point for my decision was the principle of open justice and the reminder by the Supreme Court in *Erceg v Erceg* that:[1]

> The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be

[1] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

> free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect.

[6] Of course, as *Erceg* recognised:

> There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.

[7] A party seeking to be exempted from the principle of open justice must be able to show specific adverse consequences sufficient to justify that exemption and the standard required is a high one.[2] In arguing that the directors' position met this high standard, Mr Salmon relied on the observation that Fogarty J made in *Kidd v Van Heeren* that the reason for limiting access to affidavits prior to hearing is that evidence given in court, whether attended by affidavit or given orally, is amenable to testing by cross-examination which provides the opportunity for neutralising or placing in context damaging statements that appear in an affidavit.[3] To like effect, in *Greymouth Petroleum Holdings Ltd v Empresa Nacionale del Petroleo*, the Court of Appeal said about the reasons for the differing weight given to the principle of open justice before, during and after the substantive hearing that:[4]

> The parties are entitled to the full protection of confidentiality and privacy within reasonable limits, given that they have not at that point aired the dispute in public.

The application for confidentiality orders

[8] For many months, there had been restrictions on access to the court file and on publication of the material supporting the Bank's application. I had made those orders to ensure that the efforts to negotiate a Deed of Company Arrangement (DoCA) as a better alternative to liquidation could be undertaken without commercially sensitive information finding its way into the public arena. However, that rationale had fallen away by the date of hearing. I had already indicated that because the principles of open justice would carry more weight at the time of the substantive hearing, it was to be expected that there would be publication of information previously suppressed.

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2 *Erceg v Erceg* at [13].
3 *Kidd v Van Heeren* [2015] NZHC 1270.
4 *Greymouth Petroleum Holdings Ltd v Empresa Nacionale del Petroleo* [2017] NZCA 490, [2017] NZAR 1617 at [25].

[9] Mr Salmon accepted that it was for the Bank to advance the grounds that it wished but argued that because CBLI acknowledged the breach of its solvency margin it was unnecessary to explore the remaining grounds in any detail and unnecessary to permit publication of the evidence relied on in support of them. He submitted that the public interest would not be harmed by the material being kept confidential, given that there were other fora in which the other allegations could be tested.

[10] Mr Salmon emphasised the Bank's acknowledgement that the serious allegations made against the directors could not be determined in this proceeding. This meant that allegations and evidence that had the capacity to cause serious reputational damage would be canvassed without any finding made in relation to them. Moreover, the Bank would be protected by privilege and thereby able to make statements about the directors that might not be made in public without that protection.

[11] It is correct that the allegations against the directors would not be determined in the context of the liquidation hearing in the sense of the Bank discharging a burden of proof to a particular standard. But the Court must, nevertheless, make a decision as to whether to exercise its discretion under s 151(2) to wind the company up and the pre-requisite for the exercise of that discretion is that it "is satisfied" that the grounds relied on are made out. The meaning of the phrase "is satisfied" has a settled meaning. In *R v Leitch*, the Court of Appeal said of it (in the criminal context):[5]

> The need to be "satisfied" calls for the exercise of judgment by the sentencing Court. It is inapt to import notions of the burden of proof and of setting a particular standard, eg beyond reasonable doubt. As this Court said in *R v White (David)* [1988] 1 NZLR 264 … "The phrase 'is satisfied' means simply 'makes up its mind' and is indicative of state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification."

[12] In a liquidation application under s 151(2), therefore, the Bank is entitled to advance the grounds it wishes in support of its application and the Court is required to come to a decision as to whether those grounds are made out. Both the grounds being advanced, the evidence in support of those grounds and the Court's determination as

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5 *R v Leitch* [1998] 1 NZLR 420 at 428. See also *R v A* [2009] NZCA 380 and *Working Capital Solutions Holdings Ltd v Pezaro* [2014] NZHC 1020.

to whether the grounds are made out are matters of public interest that, in the usual course, would be reported.

[13] On the issue of the opportunity of the directors to respond to and challenge the evidence relied on by the Bank, Mr Salmon argued that the directors had not had a proper opportunity to challenge that evidence because some of it had been provided late and, given that the application was unopposed, the cross-examination of Bank witnesses that would have occurred had CBLI continued to defend the application would now not occur. He submitted that without the ability to cross-examine, the directors were deprived of a proper opportunity to respond to the allegations, thereby raising an issue of natural justice, with the directors at risk of significant reputational damage on the basis of untested allegations.

[14] I did not accept this submission. The substance of most of the allegations had been known to the directors for months and Mr Harris had filed four affidavits. The most recent of the Banks affidavits, which were largely by way of reply or updating evidence, were provided some three weeks prior to the substantive hearing. Even allowing for the fact that the directors have been very busy in attempting to formulate a DoCA as an alternative to liquidation, it cannot be said that they have not had the opportunity to respond. The only witnesses required for cross-examination prior to CBLI's opposition being withdrawn were the Bank representative, Mr Fiennes, and one of the Interim Liquidators, Ms Johnstone. Neither were involved in the circumstances with which the allegations at issue are concerned. The Bank evidence regarding alleged impropriety of the directors rested almost entirely on documents sourced from CBLI itself. It cannot be the case that a director who does not oppose a liquidation application can nevertheless control the evidence put before the Court in support of the application by complaining that he or she has been unable to cross-examine the Bank's witnesses.

[15] This was not a typical liquidation application brought a creditor. The Bank was acting in its capacity as regulator under IPSA and so fulfilling a statutory function. There is, therefore, a high public interest in the Bank's own conduct as well as in the circumstances surrounding CBLI's failure. The Bank brought its application on three discrete grounds and, absent very strong reasons, it is in the public interest that those

grounds are known, along with the evidence relied on for them. In these circumstances, and where the directors had had a fair opportunity to respond to the allegations, I was not persuaded that such reputational injury as was feared could outweigh the principle of open justice.

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P Courtney J