IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-000306
[2018] NZHC 2967

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
[Admissibility of evidence]

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] On 12 November 2018, I made an order placing CBL Insurance Ltd (in interim liquidation) (CBLI) in liquidation. The liquidation application, brought by the Reserve Bank of New Zealand, had been opposed by CBLI until the day of the hearing. In anticipation of a defended hearing the parties had been expecting to argue the admissibility of affidavits filed by the Bank on 18 October 2018. Although the application would proceed opposed, Mr Salmon, for CBLI continued to resist the admissibility of that evidence. He argued that I should not take it into account because (1) it was not truly reply evidence (2) it contained hearsay (3) it referred to documents that the Bank was obliged to disclose much earlier and (4) there were concerns over the extent to which documents privileged to CBLI had been used in the preparation of the evidence.

[2] The continued significance of this issue mainly related to CBLI's separate application for ongoing confidentiality orders; if the disputed evidence were excluded, it would remove it from consideration in the application for a confidentiality order.

[3] I ruled that the evidence in issue was admissible and indicated that I would provide the reasons for that decision, which I now do.

Affidavit of Mr Twisleton-Wykeham- Fiennes, 18 October 2018

[4] At [6] – [34] Mr Fiennes gave evidence about payments made by CBLI to United Specialty in February 2018. In Mr Fiennes' first affidavit, sworn 23 February 2018, he identified these payments as ones that the Bank considered had been made in breach of specific directions from the Bank. The most recent affidavit contains detail about the events that preceded the making of those payments. CBLI said that the evidence is not in reply and ought not be admitted. The Bank responded that the further detail has been provided to respond to Mr Harris' denial that the payments were a breach of the the Bank's direction and that there were good commercial reasons for them. I accept that to be the position and that the evidence was admissible.

[5] At [35] Mr Fiennes referred to a recently disclosed reinsurance policy for Great Eastern General Insurance. The Bank accepted that this was not strictly reply evidence

but says that it has been disclosed only recently by CBLI pursuant to a s 121 notice, should have been disclosed in February 2018 and is an apparent breach of the Bank's earlier directions relating to new or increased financial support of any non-CBL insurer. I accept that this evidence, although not strictly reply evidence, may be admitted because it is relevant and, given that it forms part of the basis for the alleged breach of the Bank's directions, is properly viewed as updating evidence.

[6] [37] – [38] referred to new material in the form of emails and documents recently received from the interim liquidators relating to the El Toro goldmine. The complaint was that in my decision of 10 August 2018 I required the Bank to make disclosure of further documents, which included material relating to El Toro, but the Bank did not comply with that order. The Bank said that it complied with the order as soon as the material was made available to it by the Interim Liquidators. I allow this evidence in. It was an unfortunate fact of this litigation that the size and complexity of the Interim Liquidators' task meant that some information which, ideally, would have been made available at an earlier stage, was not made available until later. But, aside from the lateness of the disclosure there was no specific prejudice identified from the admission of this material.

[7] [39] and [41] related to a retrospective solvency analysis of CBLI by Finity indicating that CBLI was balance sheet insolvent from 2013. CBLI complained that this is not reply evidence. The Bank said that it asked Finity to undertake the analysis to respond to LBC's evidence that no conflict would arise from Korda Mentha's appointment as administrators of CBLI, given the possibility of claims against LBC as CBLI's shareholder during that time. The Bank also said that this evidence addresses the proposition that the benefits of liquidation would not outweigh the benefits of a voluntary administration. I accepted that it was admissible on this ground.

[8] In [44] Mr Fiennes produced a file note recording discussions among the members of the Bank's Insurance Oversight group and insurance regulators in Gibraltar, Ireland and Denmark, who had regulatory oversight of Elite, CBLIE and Alpha. CBLI objects on the basis that this is hearsay evidence. I accept the Bank's

position that, although it is hearsay evidence, it ought to be admissible because it is not practicable to require the makers of the statements to give evidence.

[9] In [46] – [50] Mr Fiennes gave evidence of information recently received by the Bank from the Interim Liquidators about the existence of a financial surety agreement between CBLI and Blackrock Multi-Sector Income Trust under which CBLI guaranteed the obligations of Aviron LLC to a total of US$63 million plus interest, with liability expiring on the later of 31 December 2022 and one year and a day following full payment of the amounts due by Aviron. This was acknowledged to be new evidence, not in reply. But the Bank argued that it was in the nature of updating evidence and highly relevant to the assessment of whether there was a genuine alternative to liquidation as asserted by CBLI and LBC. I accept that this is the position and that this evidence should be allowed in. Although the latter issue had fallen away by the date of the hearing, it was relevant and admissible when filed.

[10] At [51] – [60] Mr Fiennes referred to two further bonds issued by CBLI in 2013 and 2014. The Bank acknowledged that this was not reply evidence. It said, however, that it was highly relevant and should be read. Among the observations Mr Fiennes made about these bonds included the fact that the first was written before CBLI had been issued with its full insurance licence and that the Appointed Actuaries Financial Condition Reports prior to 31 December 2017 made no mention of these financial commitments, which are recorded as being for NZ$66 million and NZ$34 million respectively. I accepted that this evidence is relevant to a number of the issues that arise in this case, including the question of balance sheet insolvency raised in relation to the just and equitable ground.

[11] Finally, [61] and [64] contained a summary of the potential impacts on CBLI of the Bank's assessment of liabilities and risks which included reference to some of the matters just identified. For obvious reasons, I allow that evidence to be given.

Affidavit of Geoffrey Michael Atkins affirmed 17 October 2018

[12] At [3] and [4] Mr Atkins referred to the restatement of CBLI's balance sheet for the period 2013 – 2016. It is correct that this was new evidence but, for the reasons

already explained in relation to [39] and [41] of Mr Fiennes' affidavit I allowed it to be adduced.

[13] At [7] and [8] Mr Atkins referred to the two surety bonds that Mr Fiennes discussed in his affidavit. For the same reasons, I allowed that evidence to be adduced.

Affidavit of Morgan Randall Evans affirmed 16 October 2018

[14] This affidavit was made solely for the purpose of producing a number of documents recently obtained by the Bank from the Interim Liquidators relating to the El Toro goldmine. Objection was taken to these exhibits on the basis that the Bank was required to discover them and did not and that CBLI has not had the opportunity to consider and respond to the new material. I accept that late disclosure is not ideal. But in the circumstances of this case, it was unavoidable. The El Toro goldmine has been the subject of pleadings and evidence by both the Bank and CBLI for some months. It would not have been appropriate to attempt a consideration of this issue without taking into account all of the available information. I note, too, that these documents were obtained from Mr Harris' own CBLI email account, placing him in a much better position to respond than he would have been had the information been unknown to him.

[15] Objection was also taken to the inclusion in Mr Evans' affidavit of documents to which CBLI claimed privilege. That objection was acknowledged and a redacted affidavit filed. The redacted affidavit was admissible.

Unknown use of privileged information

[16] Mr Salmon made strong submissions regarding the (unknown) extent to which the Bank may have used privileged material inadvertently provided by the Interim Liquidators in the preparation of the affidavits filed on 18 October 2018. He complained that a letter dated 5 November 2018 to the Bank's solicitors raising these concerns had gone unanswered.

[17] Having considered the context of the affidavits, I concluded that there was simply insufficient information to justify excluding evidence on this ground. For the

most part, the evidence was simply statements of fact or the production of documents which were not privileged.

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P Courtney J