IN THE COURT OF APPEAL OF NEW ZEALAND

CA158/2011
[2012] NZCA 351

BETWEEN	COMMISSIONER OF INLAND REVENUE Appellant
AND	NEWMARKET TRUSTEES LIMITED Respondent

Hearing: 24 April 2012

Court: O'Regan P, Ellen France and White JJ

Counsel: P H Courtney for Appellant
M J Fisher for Respondent

Judgment: 6 August 2012

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Commissioner's application for an order for the liquidation of the respondent is remitted to the High Court.

C The respondent is to pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] The issue in this appeal is whether Associate Judge Bell correctly exercised the discretion of the High Court under s 241(4) of the Companies Act 1993 when he decided not to order the liquidation of the respondent, Newmarket Trustees Ltd (Newmarket), an insolvent trustee company established and operated by a law firm.[1]

[2] The law firm, Castle Brown, established Newmarket to offer trustee services to its clients. The directors of Newmarket were partners in Castle Brown.

[3] Newmarket was a trustee of over 100 trusts. It did not have any beneficial interest in any of the assets owned by those trusts. Nor did it own any other property. It was effectively assetless.

[4] One of the trusts of which Newmarket was a trustee was a trust called the Southern Lights Trust (SLT) whose settlor, Mr Goh, was a client of Castle Brown and also the other trustee of SLT.

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1 *Commissioner of Inland Revenue v Newmarket Trustees Ltd* (2011) 25 NZTC ¶ 20-030 (HC) [the liquidation judgment].

[5] Unbeknown to Castle Brown, the trustees of SLT had been assessed for GST and income tax on assessable income derived from property transactions that had not been disclosed to the Commissioner of Inland Revenue (the Commissioner). Mr Goh failed to respond to the Commissioner's correspondence and to challenge the assessments. He also failed to disclose the correspondence and the assessments to Newmarket or Castle Brown. He was adjudicated bankrupt on 6 May 2010.

[6] In the meantime the Commissioner had taken steps to obtain payment of $293,251.23 for GST and income tax on the property transactions from Newmarket. On 16 November 2009 a statutory demand was served on Newmarket under s 289 of the Companies Act. An application by Newmarket to set aside the statutory demand was dismissed and an order was made requiring Newmarket to pay the debt within 20 working days.[2]

[7] When the debt was not paid, the Commissioner applied under s 241 of the Companies Act for an order for the liquidation of Newmarket. Newmarket applied for a stay of proceeding and a restraint of advertising. The Commissioner, however, mistakenly advertised the liquidation. The High Court then stayed the proceeding with the stay to be rescinded on the Commissioner meeting Newmarket's costs.[3]

[8] After the Commissioner paid the costs, the stay application was set down for hearing. At the suggestion of Associate Judge Bell, however, the application proceeded as a hearing of the liquidation application on the merits rather than as a stay application.[4]

[9] Associate Judge Bell dismissed the Commissioner's application for the liquidation of Newmarket and the Commissioner has appealed to this Court against that decision.

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2 *Newmarket Trustees Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,176 (HC).
3 *Commissioner of Inland Revenue v Newmarket Trustees Ltd* (2010) 24 NZTC 24,397 (HC).
4 The liquidation judgment at [25].

Further background

[10] In addition to the factual background summarised in the introduction, we note the following further background referred to in the liquidation judgment of Associate Judge Bell.

[11] Under the trust deed for SLT:[5]

(a) The discretionary beneficiaries were Mr and Mrs Goh, their relatives and trusts associated with them.

(b) The trustees, Newmarket and Mr Goh, were given wide managerial powers, including the power to carry on business.

(c) As settlor, Mr Goh had the power to appoint and remove trustees.

(d) There was a standard provision for indemnifying the trustees. In addition, Mr Goh personally indemnified his co-trustee against all costs, claims, losses, actions and proceedings of whatsoever nature arising out of the administration of the trusts. There was also a further right of indemnity from the trust fund in respect of the carrying on of any business.

(e) The trustees had wide discretionary power to employ agents and others and to appoint attorneys.

[12] Mr Brown, a partner of Castle Brown and a director of Newmarket, deposed in his first affidavit in support of Newmarket's application to restrain advertising and stay the liquidation proceeding that:[6]

> As with all of the trusts of which Newmarket Trustees is a corporate trustee, Newmarket Trustees endeavours to fulfil its role as corporate trustee cost effectively by leaving it to the co-trustee to be responsible for the day-to-day affairs of the trust but to keep Mr Castle or me informed of anything material or of consequence in the administration of its affairs.

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5 The liquidation judgment at [4]–[5] and [33].

6 Quoted at [6] of the liquidation judgment.

[13] In October 2006 an application for an IRD number was lodged with the Inland Revenue Department on behalf of SLT. While the form stated that the main "business activity" of SLT was "non-trading", it also stated that an annual turnover of over $40,000 was expected. A copy of the trust deed for SLT was provided to the Department. The form indicated that if turnover exceeded $40,000, GST registration was also required, but SLT did not register for GST. Newmarket apparently knew nothing about these tax matters.[7]

[14] Newmarket discovered for the first time that the Commissioner considered that the trustees of SLT owed GST and income tax when the Department wrote to its directors on 9 October 2009.[8]

[15] The Commissioner's default assessments and a movement of properties schedule, which were seen by Newmarket only during the proceeding, showed that there were transactions involving ten properties which had been bought and sold.[9] While Mr Goh was a party to the transactions for all of the properties, there were three where Newmarket was not involved.[10] There was a further transaction relating to a property that was held by Mr Goh and Newmarket, although not as trustees of the SLT Trust.[11] Newmarket's concurrence in the six transactions involving SLT to which it was a party was clear, except in one case where the conveyancing had been arranged by Mr Goh through another law firm.[12]

[16] Neither party provided evidence as to how the trustees serviced the loans taken out to buy the properties. Settlement statements put in evidence by Newmarket showed that any surpluses from sales were paid into the bank account of SLT.[13]

[17] We also note that there was no evidence of any system put in place by Newmarket or Castle Brown for ensuring that Mr Goh, as co-trustee, complied with

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7 At [7]–[9].
8 At [14].
9 At [13] and [15].
10 At [16](a).
11 At [16(b)]. The property was held for the Koru Trust, which was established in 2006.
12 At [16(e)].
13 At [18]–[19].

his obligations as trustee of SLT, or for monitoring his activities as co-trustee on behalf of SLT.

[18] As far as the other trusts for which Newmarket was a trustee are concerned, Mr Brown deposed that Newmarket was registered as the legal proprietor of some 145 properties and as the legal owner of shares in several companies. Castle Brown was concerned about the disruption to the affairs of about 150 of its clients and, as the Associate Judge noted,[14] the time and costs involved in arranging for records of title in Land Information New Zealand and share registries to be amended if Newmarket was put into liquidation.

[19] While there was evidence that Castle Brown had taken steps to notify its other clients of the situation that had arisen with Newmarket, there was no evidence as to the views of the great majority of the co-trustees or beneficiaries of the other trusts. In particular, there was no evidence that the beneficiaries of those trusts had been given the opportunity to obtain independent legal advice as to whether the insolvent Newmarket should be retained as the trustee of those trusts. One client of Castle Brown, who was a co-trustee or beneficiary of three trusts, filed an affidavit in support of Newmarket.

High Court decision

[20] Against this background, Associate Judge Bell first rejected a submission for the Commissioner that Newmarket could not now contest the amounts of tax demanded.[15] He held that, notwithstanding the apparent conclusiveness of the Commissioner's default assessments under s 109 of the Tax Administration Act 1994, they were potentially open to amendment and correction under s 113 of that Act.

[21] The Associate Judge then rejected a submission for Newmarket that it was a "bare trustee".[16] In doing so he noted:

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14 At [60].
15 At [26]–[31].
16 At [32]–[34].

> [33] As that case [*Burns v Steel* [2006] 1 NZLR 559 at [41]–[49]] shows, discussions [of] whether a trustee is a bare trustee usually lead to a consideration whether the trustees acts passively or has active duties. Under the trust deed in this case, Newmarket Trustees Ltd was more than a mere nominee or cypher. As trustee of the Southern Lights Trust, Newmarket Trustees Ltd has more to do than hold the legal title to assets until called upon to transfer them to beneficiaries. The trust deed confers wide discretionary powers on the trustees, both as to management of the trust assets and as to disposition. Newmarket Trustees Ltd's concurrence is required for all transactions and businesses the trustees might engage in. The trustees might delegate administrative and managerial tasks, as under s 29 of the Trustee Act, but both Mr Goh and Newmarket Trustees Ltd, as trustees, retained overall responsibility for complying with the duties and exercising the powers and discretions conferred on the trustees under the trust deed. Newmarket Trustees Ltd is more than a bare trustee.
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> [34] Newmarket Trustees Ltd left the day-to-day running of the trust to Mr Goh. Where trustees are simply holding assets, that may be appropriate. In hindsight, it can be seen that the trustees did not deal adequately with tax compliance. Newmarket Trustees Ltd does not appear to have appreciated that the buying and selling of properties could give rise to the tax liabilities which it has incurred.

[22] The Associate Judge accepted that the Commissioner had established a prima facie case for the liquidation of Newmarket.[17] He noted that while the amounts of the taxes due were contested, it was accepted that Newmarket incurred both income tax and GST on the property sales in which it "concurred" as trustee and that the amounts due exceeded the prescribed amount of $1,000. Because Newmarket had not complied with the statutory demand it was presumed to be unable to pay its debts under s 291(2) of the Companies Act. Newmarket did not claim that it was solvent.

[23] The Associate Judge then turned to consider the exercise of the Court's discretion under s 241(4) of the Companies Act.[18] The Judge noted the guidance given by Tipping J in this Court in *Commissioner of Inland Revenue v Chester Trustee Services Ltd*[19] that the general policy of the Companies Act that insolvent companies should be put into liquidation, if a creditor seeks such an order, should not be departed from lightly.[20] All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement

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17 At [35].
18 At [36]–[68].
19 *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [3].
20 The liquidation judgment at [36].

is outweighed by some factor or factors making it plainly unjust for liquidation to ensue.

[24] The Associate Judge held, however, that the approach in *Chester* was not entirely applicable to the discretion to put a company into liquidation under s 241(4) of the Companies Act. He said:

> [37] Chester was a decision under s 290(4)(c) — an application to set aside a statutory demand on "other grounds". If a statutory demand is not set aside and is not complied with, a presumption of insolvency arises — s 287(a). So on an application to set aside under s 290(4), the Court is required to consider in its discretion whether it is unjust to allow the presumption to arise. S 290(4)(a) and (b) give specific grounds why it may be unjust — substantial dispute whether debt is due and counterclaim, set-off or cross-demand respectively. S 290(4)(c) provides a wider, more general ground for not allowing the presumption to arise. In *Re a debtor, ex parte the Royal Bank of Scotland* [1989] 1 WLR 271, Nicholls LJ at 276 said about the corresponding provision under the English Insolvency Rules 1986:
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> > … the circumstances which normally will be required before a court can be satisfied that the demand 'ought' to be set aside, are circumstances which would make it unjust for the statutory demand to give rise to those consequences of the particular case. The court's intervention is called for to prevent that injustice.
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> [38] As the Court is considering only whether it would be unjust to allow the presumption of insolvency to arise, the discretion under s 290(4)(c) is a narrower discretion than that on the hearing of a liquidation application on the merits — the ultimate discretion. As one example only, acknowledged insolvency will doom an application under s 290(4), but will be simply one of the matters, admittedly a strong one, to take into account on the hearing of the liquidation application. The passage from the judgment of Tipping J is directed at the exercise of the ultimate discretion, albeit in the context of a s 290(4) application. It is important guidance on the exercise of the ultimate discretion, so long as it is kept clear that the Court of Appeal was not exercising the ultimate discretion in that case.

[25] In applying this approach, Associate Judge Bell took into account the following factors:

(a) Bankruptcy or liquidation of an insolvent trustee might serve a useful purpose in providing an efficient remedy and in enabling a liquidator to exercise a corporate trustee's rights to seek indemnity out of trust asserts or from beneficiaries.[21]

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21 At [39].

(b) Here, however, the Commissioner had accepted that Newmarket did not hold any assets as trustee of SLT and that there were no assets beneficially owned by Newmarket that could be made available to creditors in a liquidation. The Commissioner had also acknowledged that there had been no conduct on the part of the directors of Newmarket which could lay a foundation for claims against them for breach of their duties as directors of the company. This concession laid to rest any concern about possible failure of the directors to be alive to the company's tax liabilities.[22]

(c) Even where a company apparently held no assets, it might be appropriate to make a winding up order to allow the affairs of the company to be investigated.[23]

(d) Here, however, the Commissioner did not press for an order on the basis that there was some aspect requiring investigation or that liquidation was required to enable investigation generally.[24] Any aspect of the transactions that required investigation could be more effectively investigated by the Official Assignee in Mr Goh's bankruptcy.[25]

(e) While the Commissioner relied on the acknowledged insolvency of Newmarket and its inability to pay the taxes as adequate grounds for a liquidation order, it was appropriate to consider the insolvency "in the light of current practice for corporate trustees operated by professionals".[26] Associate Judge Bell said:[27]

> Many legal and accounting practices offer trustee services to their clients. Clients find it useful to have a professional, such as a lawyer or accountant, assisting by providing trustee services for their trusts. Lawyers and other professionals are not prepared to offer their services as

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22 At [40].
23 At [41]–[42].
24 At [43]–[47].
25 At [46].
26 At [48].
27 At [48].

> trustees if they run the risk of personally incurring liabilities. One way by which they avoid liabilities is to ensure that whenever the trustees enter into a contract, there is a provision that the professional trustees will not have any personal liability and that any liability will have to be met by the trust assets or by other trustees.

The Associate Judge pointed out that many standard form contracts now contain terms to that effect.[28] He referred by way of example to the agreement for sale and purchase by the Real Estate Institute of New Zealand and the existence of loan agreements, mortgages and similar documents of banks and other financial institutions which have comparable provisions.[29] The Associate Judge accepted that there was no general expectation that professionals who were independent trustees should expose themselves to personal liability for trust debts.[30] As it was not possible for a trustee to contract out of many non-contractual liabilities such as taxes and rates, trustees used a corporate structure to shield themselves from personal liability. Structures for professionals to avoid personal liability were the rule, not the exception. When Castle Brown incorporated Newmarket as an assetless trustee, it was "following a recognised and accepted practice."[31]

(f) The admitted insolvency of Newmarket did not make a difference. The decision in *Commissioner of Inland Revenue v Chester Trustee Services Ltd* should be distinguished on the grounds that the Court was not exercising the ultimate discretion to order liquidation, the company had not operated commercially and there were no assets to be realised.[32] Further, the Associate Judge held that no supposed moral risk arose as a factor in the discretion in this case.[33] On the latter point the Associate Judge said:[34]

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28 At [48].
29 At [49].
30 At [50].
31 At [51].
32 At [53].
33 At [55]–[57].
34 At [58].

> The suggested risk of misappropriation is directed at the risk from bankrupt persons, not corporate trustees. That suggested risk cannot be extended to professionals, who use a company to offer trustee services. As a matter of day-to-day practice, solicitors responsibly and faithfully hold funds on trusts for clients. The fact that a trustee company associated with the solicitors might not be able to pay its non-contractual liabilities does not create any risk that those solicitors or a trust company run by them might not properly handle assets held on trust. Any supposed moral risk does not arise as a factor in the discretion in this case.

[26] The Associate Judge then referred to the practical consequences in this case:

> [59] Perhaps preparing for the worst, Castle Brown incorporated a new trustee company, Newmarket Trustees (2009) Ltd, no doubt intending to use it as a replacement trustee company, if the defendant were placed in liquidation. Aside from a matter of company name, the Commissioner does not suggest that there is any concern over Castle Brown having another trustee company also without assets. If there is no objection to the law firm offering trustee services with a replacement company without assets, there can hardly be any objection to the firm continuing to offer trustee services with its existing trustee company without assets.
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> [60] The defendant says that if it is ordered into liquidation, the remaining 118 trusts of which it is now trustee will need to remove it as trustee, including arranging for records of title in Land Information New Zealand and share registries to be amended. There will be many hours of work. Mr Brown estimates that the total disbursements are likely to be in the region of $15,000.
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> ...
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> [63] The Commissioner's response is that Castle Brown could have avoided these costs if it had incorporated a number of trustee companies (a practice followed by some law firms), so that the impact of one going into liquidation could be reduced. That response does not address the issue in this court – whether these unnecessary costs should be imposed. A victim's failure to wear protective clothing does not justify an assault. The response also shows the Commissioner's equanimity to assetless corporate trustees.

[27] The Associate Judge noted that when an assetless taxpayer is put into liquidation on the application of the Commissioner, the Commissioner pays the liquidators' remuneration, which in the case of a company with no assets and no need for further inquiries and investigation, is typically in the range of $4,000 to $8,000. The Associate Judge could see no benefit to the Commissioner in spending

this money on a liquidation.[35] The position might be different if there were other creditors and there were assets to be realised and distributed.[36]

[28] Having referred to these various factors, the Associate Judge then concluded:

> [68] On the exercise of the ultimate discretion, the insolvency of the defendant carries considerable weight. If there were no other factors, there would be an order for liquidation. However, in the circumstances of this case, I cannot see that any benefit would arise from ordering the defendant into liquidation. There are no assets held by the company that could be made available for creditors. The only potential line of inquiry is to pursue the surpluses from the sales of trust properties. The Commissioner does not rely on that as requiring liquidation in this case. Any inquiries can be undertaken more easily through the administration of Mr Goh's bankruptcy. Moral risk concerns do not arise. In addition to the lack of benefits, there are the costs of liquidation that will fall on the Commissioner. There are also the costs of removing the defendant from the 118 trusts, appointing a replacement trustee (which might involve an application to this Court under the phoenix company provisions of the Companies Act) and changing records of title. The work and expenses will be considerable. Also relevant but carrying less weight is the greater opportunity for the defendant to seek adjustments of the Commissioner's assessments. The costs arising from the company going into liquidation and the lack of benefit outweigh the insolvency factor. The company should not be put into liquidation.
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> [69] I have come to this decision on the particular facts of this case. Insolvency law is a mix of principle and pragmatism. The Companies Act is to be used in a practical way. It does not require liquidation when that will not serve any useful purpose.
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> [70] In cases of an insolvent corporate trustee, it will be useful to consider not just the company but the remedies of the creditor against trustees, trust assets and beneficiaries generally. While liquidation can be a useful remedy, creditors should be alive to other remedies. When a trustee is also a trustee of other trusts, the impact of liquidation on those trusts is relevant. When a trustee is insolvent, it will not generally be useful to try to resolve matters by an application under s 290 of the Companies Act or by an application for stay. Instead the success of any liquidation application is likely to rest on the exercise of the ultimate discretion.

The Commissioner's appeal

[29] The Commissioner's case is that the High Court was plainly wrong in how it exercised the residual discretion under s 241(4) of the Companies Act and that this Court should remake the decision and make an order for the liquidation of Newmarket.

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35 At [66].
36 At [67].

[30] For the Commissioner, Mrs Courtney submitted that the Associate Judge erred in:

(a) finding that the default assessments were potentially open to amendment and correction under s 113 of the Tax Administration Act contrary to the decision of the Supreme Court in *Tannadyce v Commissioner of Inland Revenue*;[37]

(b) failing to take into account that Newmarket as co-trustee of SLT was jointly and severally liable for SLT's unpaid tax liability and not entitled to delegate payment of its tax liabilities to its co-trustee, Mr Goh;

(c) taking into account the cost of making alternative arrangements for other trusts of which Newmarket was trustee on the basis that a corporate structure provided an acceptable means of risk sharing between professionals and other trustees; and

(d) failing to recognise that wider public interest considerations of deterrence and removal of risk for Castle Brown's other trusts, as well as principles of trustee law, meant that Newmarket, as an insolvent trustee company, should be put into liquidation.

[31] In the course of argument Mrs Courtney pointed out that, if this Court were minded to make the order for liquidation, further documents, including a certificate of unpaid debt and a liquidator's consent,[38] would need to be obtained. She accepted that the alternative would be to remit the case to the High Court for the documents to be provided and the order made there.

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[37] *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

[38] Rule 31.21 of the High Court Rules and s 282 of the Companies Act 1993.

Newmarket's response

[32] Newmarket takes issue with each of the Commissioner's grounds of appeal. Mr Fisher submitted that the Associate Judge had not erred because:

(a) notwithstanding his view that the assessments were potentially open to amendment and correction, he also accepted that the underlying tax debt was indisputable for the purpose of the liquidation proceeding;

(b) he correctly accepted that Newmarket was jointly and severally liable for the tax debts of SLT; this was the very basis of his finding that a prima facie case had been made out; and

(c) he was entitled to take into account the impact that liquidation would have on the other trusts for which Newmarket acted as trustee. In a corporate trustee situation, such persons are in an analogous position to creditors or contributories in the sense that they are persons who may be interested in or affected by a liquidation order. It was therefore appropriate for the Court to take account of their interests, as well as the interests of the Commissioner as sole creditor, and to have regard to the substantial work which would be required and the costs which would be incurred in organising a replacement trustee.

[33] In essence Mr Fisher submitted that the Associate Judge had in all respects correctly exercised the Court's unfettered discretion under s 241(4) of the Companies Act. Mr Fisher submitted that the Associate Judge had appropriately distinguished this Court's decision in *Commissioner of Inland Revenue v Chester Trustee Services Ltd* and had implemented the objects and purposes of the legislation on a principled basis. There was therefore no ground on which this Court should set aside the Associate Judge's decision.

[34] Newmarket also relied on the following "concessions" made by the Commissioner in the High Court that Mr Fisher submitted were of fundamental

importance as they had a significant bearing on the exercise by the Associate Judge of the Court's discretion:

(a) Newmarket did not hold any assets;

(b) there were no assets beneficially owned by Newmarket that could be made available to creditors in the liquidation;

(c) there had been no conduct on the part of the directors of Newmarket that would lay a foundation for claims against them for breach of their duties as directors;

(d) the Commissioner did not press for an order on the basis that there was some aspect of Newmarket requiring investigation or that liquidation was required to enable investigation generally; and

(e) the Commissioner did not suggest that there was any concern over Castle Brown having another trustee company also without assets.

[35] Mr Fisher submitted that the Commissioner should not be entitled to resile from these concessions in an appeal against the exercise of a judicial discretion and in the absence of any good reason for being allowed to do so. To allow the Commissioner to resile from his concessions would do real injustice to Newmarket, especially as the evidence of Mr Brown and Mr Castle was not challenged by the Commissioner in the High Court and supported the Associate Judge's findings.

The Commissioner's "concessions"

[36] In the course of argument before us, Mrs Courtney confirmed that the Commissioner accepted that Newmarket did not hold any assets as trustee of SLT and that there were no assets beneficially owned by Newmarket that could be made available to creditors in a liquidation. In the absence of any evidence to the contrary in the High Court or an application for leave to adduce evidence in this Court, the

Commissioner was bound to acknowledge that these matters of fact were correctly stated by the Associate Judge.

[37] As to "concession (c)",[39] Mrs Courtney made it clear that the Commissioner was unaware of any conduct on the part of the directors of Newmarket that would lay a foundation for claims against them for breach of their duties. Facilitation of an investigation of their conduct was therefore not an important factor in the decision to seek liquidation. Rather, the Commissioner says that applying this Court's decision in *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, Newmarket, as an insolvent trustee company, should, as a matter of principle, be put into liquidation.

[38] We add here that, on the basis of the evidence before us, it appears that the Commissioner's "concession" was a generous one. Indeed, while not accepting that the Commissioner should be permitted to resile from the "concession", Mr Fisher told us that Castle Brown accepted that their reliance on Mr Goh was unsatisfactory and that they needed to adopt "a more rigorous approach" to the administration of their trustee company in future. Castle Brown acknowledged a gap between best practice and their unsatisfactory conduct, but asserted that while they had been in default, they were not delinquent.

[39] In terms of "concession (d)", we agree with Mrs Courtney that the "concession" did not mean that there would be "no basis" for an investigation following liquidation if the liquidator decided that one was necessary. As Mrs Courtney submitted, if a liquidator were appointed, it would initially be for the liquidator to consider whether the directors of Newmarket had in fact complied with their duties under the Companies Act. Investigating the company's affairs is part of the principal duty of a liquidator to protect the company's assets.[40] The Court's power to investigate the affairs of a company arises only after a liquidation

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39 See above, at [34].

40 Companies Act, s 253(a).

commences.[41] A liquidator has the statutory powers to obtain the information justifying an application to the Court.[42] The fact that the Commissioner, as a creditor, may be unaware of any conduct on the part of the directors of Newmarket justifying an application to the Court does not mean that on further inquiry a liquidator may not discover such conduct.

[40] Furthermore, if, in the public interest, the appointment of a liquidator is warranted and the Commissioner is prepared to meet the costs of an inquiry, no injustice would be caused to the directors of Newmarket in their capacity as directors by the appointment itself. They would still have the opportunity to persuade the liquidator not to apply to the Court for an inquiry into their conduct and, if the liquidator nonetheless did so, to oppose it. The Commissioner's "concession" would not estop the liquidator from conducting an inquiry or making an application. The fact that the evidence of Mr Brown and Mr Castle was not challenged by the Commissioner in the High Court does not prevent the appointment of a liquidator on the ground that the liquidator should decide whether an inquiry into the conduct of the directors was required in the circumstances of this case. This is so particularly in the absence of any evidence from Mr Brown or Mr Castle relating to any system for ensuring that Mr Goh, as co-trustee, complied with his obligations as trustee of SLT or for monitoring his activities on behalf of SLT.

[41] In these circumstances we do not consider that the fact that counsel for the Commissioner may not have "pressed" for an order constituted a "concession" as such.

[42] Finally, in respect of the Commissioner's "concession" that he had no concern over Castle Brown having another trustee company also without assets, we agree with Mrs Courtney that this was not really a "concession" at all because it was a statement of the obvious. There was nothing the Commissioner could do to stop Castle Brown from continuing with an assetless trustee company, whether the liquidation happened or not. We also agree with Mrs Courtney that this did not mean

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41 Companies Act, s 301(1).

42 Companies Act, s 261; *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, above n 19, at [80].

that the Commissioner accepted that it was in the public interest that Newmarket should not be put into liquidation. The fact remains that Newmarket is an insolvent trustee company as a result of substantial tax liabilities incurred by one of its trusts; the co-trustee of SLT is bankrupt; and Newmarket is still responsible for over 100 other trusts. Contrary to the view of the Associate Judge,[43] the Commissioner's "concession" here does not lead inexorably to the conclusion that no liquidation order should be made. Further consideration of the public interest elements is required.

The conclusiveness of the default assessments

[43] We accept the submission for the Commissioner that in view of the decision of the Supreme Court in *Tannadyce v Commissioner of Inland Revenue*, which was delivered after the decision of the Associate Judge in the present appeal, the default assessments cannot be challenged by Newmarket in this proceeding because it would be up to the Commissioner to decide whether or not to re-open the assessments under s 113 of the Tax Administration Act.

[44] But, for two reasons, we do not accept that this provides a ground for overturning the decision of the Associate Judge:

(a) as the Associate Judge correctly accepted, the underlying tax debt was indisputable and on any view above the prescribed amount;[44] and

(b) the Associate Judge considered that the greater opportunity for Newmarket to seek adjustments of the assessments if liquidation was not ordered was relevant but carried "less weight" than other factors.[45]

[45] In other words, we agree with Mr Fisher that, while there was an error of law based on the subsequent decision of the Supreme Court, it was not a significant point in the Associate Judge's decision.

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43 At [59] and [68].
44 At [35].
45 At [68].

Newmarket's joint and several liability

[46] We do not accept the submission for the Commissioner that the Associate Judge failed to take into account that, as co-trustee of SLT, Newmarket was jointly and severally liable for SLT's unpaid tax liability.

[47] As Mr Fisher pointed out, the Associate Judge correctly accepted that Newmarket was jointly and severally liable for the tax debts of SLT. This was the basis of his finding that a prima face case had been made out.[46]

Newmarket's delegation to Mr Goh

[48] We do accept, however, the submission for the Commissioner that the Associate Judge failed to take into account that, as co-trustee of SLT, Newmarket was not entitled to delegate payment of its tax liabilities to its co-trustee, Mr Goh. In our view this factor was relevant in this case not because the conduct of the directors required investigation (the point "conceded" by the Commissioner in the High Court), but because it meant that Newmarket's case for seeking the Court's indulgence to avoid an order for liquidation was not strong.

[49] It is well established that, as a general rule, trustees may not delegate their duties or powers.[47] The reason for the rule is that trustees are chosen for their individual particular skills.[48] It is also well established that the general rule against delegation extends to a prohibition on delegation to a co-trustee.[49]

[50] The general rule is subject to exceptions, namely when delegation is specifically permitted by the trust deed or by statute or is practically unavoidable and the particular agent is employed in the ordinary scope of his or her business.[50] The

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46 At [35].

47 *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at 679; and *Niak v MacDonald* [2001] 3 NZLR 334 (CA) at [16].

48 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 5.3.1(8); and John Brown (ed) *New Zealand Master Trusts Guide* (3rd ed, CCH, Auckland, 2011) at [5.13].

49 *Niak v MacDonald* at [16]; and *Thorpe v Hannam* (2010) 3 NZTR 20-014, (2010) 11 NZCPR 471 (HC) at [21]–[23].

50 *Niak v MacDonald* at [16].

principal statutory exceptions arise under the Trustee Act 1956. The exceptions permit the appointment of agents effectively to implement decisions of the trustees and to carry out administrative tasks,[51] and the appointment of another by way of power of attorney if the trustee is going to be overseas or is otherwise unable to attend to the affairs of the trust.[52] The statutory power to appoint agents to implement decisions and to carry out administrative tasks does not empower trustees to make a general delegation of their powers.[53]

[51] It follows from the general rule against delegation, even to a co-trustee, that unless the trust deed provides otherwise trustees must act unanimously.[54]

[52] These well-established principles of trustee law no doubt lay behind the findings made by the Associate Judge in the present case that:

(a) while Newmarket and Mr Goh, as SLT's trustees, were entitled by the terms of SLT's trust deed and s 29 of the Trustee Act to delegate administrative and managerial tasks, they retained overall responsibility for complying with the duties and exercising the powers and discretions conferred on them under the trust deed;[55] and

(b) Newmarket left the day-to-day running of the trust to Mr Goh, but did not appear to have appreciated that the property transactions could give rise to the tax liabilities.[56]

[53] These findings were not disputed by Mr Fisher.

[54] We consider, however, that the well-established principles of trustee law required the following further findings to be made in this case:

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51 Trustee Act 1956, s 29.
52 Trustee Act, s 31.
53 *Niak v Macdonald* at [16].
54 *Niak v Macdonald* at [16]; *Visini v Cadman* [2012] NZCA 122 at [17]; Butler, above n 48, at [5.3.1(10)]; and Brown, above n 48 at [5.14].
55 At [33].
56 At [34].

(a) SLT's decisions to enter into the property transactions, which involved the buying and selling of trust assets, could not be delegated by Newmarket to Mr Goh and required the two trustees to act unanimously. A finding of "concurrence" on the part of Newmarket understated Newmarket's responsibilities as a trustee.[57]

(b) Responsibility for recognising SLT's liability for income tax and GST on the property transactions and for ensuing that the liability was met rested with both trustees and could not be delegated by Newmarket to Mr Goh. A finding of lack of appreciation on the part of Newmarket again understated Newmarket's responsibilities as a trustee.[58]

(c) Newmarket had no system in place for ensuing that Mr Goh, as co-trustee, complied with his obligations as trustee of SLT or for monitoring his activities on behalf of SLT.

[55] If these further findings had been made, the full implications of Newmarket's position would have been recognised. In particular, the nature of Newmarket's personal liability for the tax would have been clear. The personal liability of a co-trustee in a situation such as this was considered by Anderson J in *AMP General Insurance Ltd v Macalister Todd Phillips Bodkins* where, in a concurring judgment, he said:[59]

> [41] The trustees carried out a number of land development projects, the legal aspects of which were handled by Mr Todd's firm, principally through him. Such activities attracted GST, income tax, PAYE and ACC levies. By virtue of the tax statutes the trustees were personally liable, jointly and severally, for those imposts. Mr Todd and Mr Walker were unaware of their personal liability until officers of the Inland Revenue Department said they would be looked to personally for payment.
>
> [42] In imposing personal liability the tax statutes do no more than recognise the general principle that liabilities incurred by a trustee in relation to a trust are always the personal liabilities of the trustee. This is an aspect of the nature of a trust, which is not a person but an equitable obligation to

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57 At [16(e)].
58 At [34].
59 *AMP General Insurance Ltd v Macalister Todd Phillips Bodkins* [2006] NZSC 105, [2007] 1 NZLR 485.

> deal with property for the benefit of beneficiaries. A creditor has a personal right to sue a trustee and to get judgment and make the trustee bankrupt. As Latham CJ put it when referring to a trustee's liability in *Vacuum Oil Company Pty Ltd v Wiltshire*:
>
> > In respect of debts incurred by him in so carrying on the business he is personally liable to the trading creditors – the debts are his debts.
>
> [43] The personal liability of a trustee is counter-balanced by equity, which allows full indemnification of the trustee out of the trust's property, or for the trustee to apply the trust property in discharge of the liability. Unfortunately for Mr Todd and Mr Walker, they did not learn of their liability at a time when there were any assets to which they could have recourse.

[56] We consider that the full nature and extent of Newmarket's responsibilities as co-trustee and its personal liability for the tax were relevant factors when the High Court was deciding whether to exercise its discretion to order the liquidation of Newmarket. The fundamental breaches by Newmarket of its trustee responsibilities and its failure to recognise and meet its tax liability, which led to its insolvency, ought to have been taken into account by the Associate Judge. It is apparent from his reasons, however, that he did not do so when he declined to exercise the Court's ultimate discretion.[60]

Impact of liquidation on other trusts

[57] We also accept the submission for the Commissioner that the Associate Judge erred in taking into account the cost of making alternative arrangements for other trusts of which Newmarket was trustee on the basis that a corporate structure provided an acceptable means of risk sharing between professionals and other trustees. In our view, while it was not wrong for the Associate Judge to refer to this factor, it led him to overlook the key point, which was the end result that Castle Brown's other trusts would be left with an insolvent trustee on an ongoing basis in circumstances where Castle Brown had not given any indication that they would seek to regularise the position over time.

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[60] At [68]–[70].

[58] There is little doubt that in deciding not to appoint a liquidator in this case, the Associate Judge was strongly influenced by his views relating to the propriety of solicitors offering trustee services through trustee companies,[61] an absence of any concern about Castle Brown continuing to operate another trustee company without assets,[62] and the practical consequences of the liquidation of Newmarket and the incorporation of the replacement trustee company for Castle Brown's remaining trusts.[63]

[59] While Mr Fisher submitted that these factors were all relevant to the exercise of the Court's discretion in this case and were therefore correctly taken into account by the Associate Judge, we do not agree. Our reasons follow.

[60] First, the fact that lawyers may be able to offer trustee services through trustee companies is not of itself a reason why there should necessarily be any hesitation in ordering the liquidation of an insolvent trustee company. The propriety of lawyers offering services through trustee companies, particularly to multiple trusts, is a separate matter currently under consideration by the Law Commission.[64] The New Zealand Law Society also has responsibility for considering whether and, if so, how such trustee companies should be able to operate.[65] The question is whether the particular insolvent trustee company in this case should be put into liquidation.

[61] Second, we do not accept that the absence of concern about Castle Brown continuing to operate another trustee company without assets means that an order for the liquidation of Newmarket, which is insolvent, should not be made. As the general policy of the Companies Act is that insolvent companies should be liquidated, there must be a good reason why in a particular case the insolvent

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61 At [48]–[51] and [57]–[58].

62 At [59].

63 At [60] and [68]–[70].

64 Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issue Paper* (NZLC IP28, 2011) at [8.12]–[8.16].

65 Lawyers and Conveyancers Act 2006 ss 65, 67, 94 and 95. There are already regulations and rules relating to lawyers' trust accounts and nominee companies: Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and Lawyers and Conveyancers Act (Lawyers: Nominee Company) Rules 2008.

company should not be put into liquidation.[66] The focus should be on the circumstances of the particular insolvent trustee and not on the possibility of a replacement company operating satisfactorily. Here, where there is no dispute that Newmarket was operated unsatisfactorily, the question is whether there was any good reason why a liquidation order should not have been made. We address this question further in the next section of our judgment.

[62] Third, the fact that the liquidation of Newmarket would have practical consequences for Castle Brown's remaining trusts is not a reason in this case why the order should not be made because:

(a) responsibility for taking the steps necessary to replace Newmarket as trustee of the other trusts would rest on Castle Brown, not the other trusts;

(b) the costs involved in taking these steps would be met by Castle Brown, not the other trusts; and

(c) apart from the affidavit from one client of Castle Brown, there is no evidence that the other co-trustees and beneficiaries would agree to an insolvent Newmarket remaining as trustee of their trusts.

[63] We therefore turn to the exercise of the discretion under s 241(4) of the Companies Act.

The discretion

[64] Under s 241(4) of the Companies Act the High Court "may" order that a company which is unable to pay its debts be put into liquidation. While the Court retains a discretion not to order the liquidation of an insolvent company, it will not usually exercise that discretion in the absence of good reasons for doing so.[67]

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66 *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, above n 19, at [3] per Tipping J and at [45] per Baragwanath J.

67 See the cases collected in *Brooker's Company and Securities Law* (online ed, Brookers) at [CA241.04].

[65] While the decision of this Court in *Commissioner of Inland Revenue v Chester Trustee Services Ltd* related to the exercise of the discretion under s 290(4)(c) of the Companies Act, we consider that its approach is equally applicable to the exercise of the discretion under s 241(4). We do not agree with the Associate Judge that the decision is distinguishable. This is clear from the language of Tipping and Baragwanath JJ. Tipping J held:[68]

> … the general policy of the (Companies) Act that insolvent companies should be put into liquidation, if a creditor seeks such an order, should not be departed from lightly. To justify such departure there must be some other factor, be it policy, principle or simply the justice of the particular case, which outweighs the prima facie entitlement of the creditor to an order putting the insolvent company into liquidation. If the focus is on the justice of a particular case, the discretion must always be exercised on a principled basis and not on some ad hoc conception of what individual justice might require. All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement is outweighed by some factor or factors making it plainly unjust for liquidation to ensue. The ground advanced by the insolvent company must be sufficiently compelling to overcome the general policy of the Act with regard to insolvent companies.

Baragwanath J held:[69]

> ... the insolvency policy of the companies legislation is clear: (1) insolvency results in winding up; and (2) insolvency is proved by inability to establish a substantial dispute over the debt or by way of cross-claim.

[66] Applying that approach to the circumstances of the present case, which, like *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, involves an insolvent trustee company established and operated by a law firm, we are not satisfied that there was any sufficiently compelling ground of principle or justice to overcome the general policy of the Companies Act with regard to insolvent companies. In our view the factors relied on by the Associate Judge did not meet that standard.

[67] Our principal reason for reaching this conclusion is that there is no good reason why Newmarket as an insolvent trustee company should not be put into liquidation. On the contrary, there are good reasons why it should be.

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[68] At [3].

[69] At [45]. Hammond J agreed with Tipping and Baragwanath JJ at [7].

[68] The starting point in this case is to recognise that the Court has an overriding duty to ensure that trusts are properly administered.[70]

[69] Next, it is important to recognise that an insolvent trustee company, like a bankrupt trustee, will normally be considered unfit to be a trustee.

[70] As a general rule in England the Court will almost invariably order the removal of a bankrupt trustee on the grounds that his or her impecuniosity may result in temptation to misappropriate trust funds and demonstrates an absence of prudence and success in managing business affairs.[71] In Australia it has been suggested that a bankrupt trustee will be removed "almost as of course",[72] but in other cases removal has depended on whether the bankruptcy impinges on fitness to continue as a trustee.[73] We see no reason why a similar approach should not be followed in New Zealand.

[71] In respect of the question of the removal of a corporate trustee in liquidation, the Australian courts have recognised that, as the trust property does not vest in the liquidator, the liquidator of a corporate trustee has the power to administer the trust of which the company was trustee and hence there may be circumstances in which the company should remain as trustee with the liquidator administering the trust until a new trustee is appointed.[74]

[72] None of the Australian cases have suggested, however, that an insolvent trustee company should not be put into liquidation. In each case the question has

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70 *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) at 386; *Miller v Cameron* (1936) 54 CLR 572 at 580–581; *Hunter v Hunter* [1938] NZLR 520 (CA) at 529; *Kain v Hutton* CA23/01, 25 July 2002 at [17]–[19].

71 *Re Barker's Trusts* (1875) 1 Ch D 43 (Ch) at 43–44; *Re Adams' Trust* (1879) 12 Ch D 634 (Ch) at 637; *In re Hopkins* (1881) 19 Ch D 61 (CA) at 63-64; Butler, above n 48, at [4.1.2(1)]; David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton*: *Law of Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at [71.9]; and John Mowbray and others *Lewin on Trusts* (18th ed, Sweet and Maxwell, London, 2008) at [14–14].

72 *Miller v Cameron*, above n 70, at 575.

73 G E Dal Pont *Equity and Trusts in Australia* (5th ed, Lawbook Co, Sydney, 2011) at [21.125].

74 Compare *Re Crest Realty Pty Ltd (in liq)* [1977] 1 NSWLR 664 (NSWSC) at 672; *Irvine Australia Shareholding and Underwriting Ltd (in liq)* (1996) 22 ACSR 765 (VSC) at 783 and 785–786; *Wells v Wily* [2004] NSWSC 607, (2004) 183 FLR 284 at [24]–[31]; *Kardiasmenos v Pioneer Management Pty Ltd* [2005] NSWSC 770 at [36]–[38]; *Dreiberg v Bettles* [2007] NSWSC 1204 at [4]; and *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Ltd* [2012] NSWSC 343 at [90]–[98].

been whether the company in liquidation should remain as trustee. This question has involved consideration of the administration of the trust in the interests of the beneficiaries. Again, we consider a similar approach should be followed in New Zealand.

[73] The need to ensure that the assets of the trust and the interests of the beneficiaries are protected is likely to militate against the appointment or retention of a bankrupt trustee or an insolvent trustee company. As this Court said in *Commissioner of Inland Revenue v Chester Trustee Services Ltd*:[75]

> It is an axiom of the law of trusts that a trustee must be fit to discharge its functions or be liable to be discharged from office.

[74] The undesirability of a bankrupt trustee or an insolvent trustee corporation is reflected in s 51(2) of the Trustee Act, which expressly empowers the Court when satisfied that it is expedient or necessary to do so to make an order appointing a new trustee in substitution for a trustee who:

> (d) is a bankrupt; or
>
> (e) is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved.

The power of the Court to remove trustees under this statutory provision is ancillary to the principal duty of the Court to ensure that trusts are properly administered.[76]

[75] Against the background of these principles of trustee law, we are satisfied that an insolvent trustee company should as a general rule almost invariably be put into liquidation. This would enable the Court to ensure that the trust is properly administered either by the liquidator or a replacement trustee.

[76] In our view there was no good reason why the general rule should not apply in Newmarket's case. We were not persuaded that any of the factors advanced for Newmarket justify a different outcome. On the contrary, we agree with Mrs Courtney that wider public interest considerations of deterrence and removal of

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75 At [81].

76 *Letterstedt v Broers*, above n 70; *Hunter v Hunter*, above n 70, at 529; and *Attorney-General v Ngati Karewa and Ngati Tahinga Trust* HC Auckland M2073/99, 5 November 2001.

risk for Castle Brown's other trusts mean that Newmarket, as an insolvent trustee company, should be put into liquidation.

[77] For these reasons, we consider that, in the exercise of the Court's discretion under s 241(4) of the Companies Act, an order for the liquidation of Newmarket was inevitable. None of the factors relied on by the Associate Judge was sufficient to avoid this outcome. In the words of Tipping J in *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, there was no "sufficiently compelling" ground to overcome the general policy of the Companies Act with regard to insolvent companies.[77]

[78] We are therefore satisfied that the Associate Judge exercised the discretion under s 241(4) on an erroneous basis. In focussing on the professional benefits of corporate trustees and the cost to Castle Brown of making alternative arrangements for the other trusts, the Associate Judge overlooked the wider public interest considerations and well-established principles of trustee law which meant that as a matter of principle, Newmarket, as an insolvent trustee company, ought to have been put into liquidation.

Remit to High Court?

[79] Having decided that the Associate Judge's decision was wrong, we are satisfied that in the circumstances of this case we should remit the application for the appointment of a liquidator to the High Court to make the appointment under s 241(4)(a) of the Companies Act. As Mrs Courtney acknowledged, before an order for the liquidation of Newmarket can be made the Court will need to receive further documents, including a certificate of unpaid debt and a liquidator's consent. These documents should be provided to the High Court which may then deal with the application again.

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[77] At [3].

Result

[80] For the reasons we have given the appeal is allowed and the Commissioner's application for an order for the liquidation of Newmarket is remitted to the High Court.

[81] Newmarket is to pay the Commissioner costs for a standard appeal on band A basis together with usual disbursements.

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