

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2010-404-7741

UNDER the Companies Act 1993

IN THE MATTER OF NORTHERN CREST INVESTMENTS LTD (IN LIQUIDATION)

BETWEEN MANIFEST CAPITAL MANAGEMENT PTY LTD
Applicant

AND STEPHEN MARK LAWRENCE AND ANTHONY JOHN MCCULLAGH, AS LIQUIDATORS OF NORTHERN CREST INVESTMENTS LTD (IN LIQUIDATION)
Respondents

Hearing: 14 December 2011

Counsel: R B Stewart QC, M Heard and S T A Ellis for Manifest Capital Management Pty Ltd
D M Hughes and R Brown for Liquidators of Northern Crest Investments Ltd (in liquidation)
P Dale and D Grove for "Blue Chip" investors

Judgment: 20 December 2011

JUDGMENT OF HEATH J

This judgment was delivered by me on 20 December 2011 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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MANIFEST CAPITAL MANAGEMENT PTY LTD V LAWRENCE AND MCCULLAGH, AS LIQUIDATORS OF NORTHERN CREST INVESTMENTS LTD (IN LIQUIDATION) HC AK CIV 2010-404-7741 [20 December 2011]

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Introduction

[1] Northern Crest Investments Ltd (in liquidation) (Northern Crest) is a New Zealand company that carried on business in both New Zealand and Australia, promoting property investments. It was put into liquidation by this Court on 2 June 2011.¹ Northern Crest was formerly known as Blue Chip Financial Solutions Ltd and was listed on both the New Zealand and Australian Stock Exchanges. Following suspension of its listing on the Australian Stock Exchange, the company's name was changed, on 1 April 2008, to Northern Crest.

[2] When putting Northern Crest into liquidation, Associate Judge Christiansen appointed Messrs Lawrence and McCullagh as its liquidators. On 9 June 2011, the Federal Court of Australia granted interim relief, recognising Messrs Lawrence and McCullagh as liquidators and conferring powers on them in Australia.² Subsequently, the liquidation was recognised as a foreign main proceeding in

¹ *Northern Crest Investments Ltd v Haywood* HC Auckland CIV 2010-404-7741, 2 June 2011 (Reasons 3 June 2011) Associate Judge Christiansen. The order putting Northern Crest into liquidation was made immediately after the Associate Judge had dismissed its application to set aside a statutory demand: Companies Act 1993, s 291(1)(b).

² *Lawrence and McCullagh v Northern Crest Investments Ltd (in liq)* [2011] FCA 672 (Jagot J). Orders were made under the Cross-Border Insolvency Act 2008 (Cth).

Australia.³ As a result, the New Zealand appointed liquidators have control over the administration of assets of Northern Crest, in both Australia and New Zealand. They have power to deal with the admission or rejection of debts proved by creditors, whether based in New Zealand, Australia or elsewhere.

[3] Manifest Capital Management Pty Ltd (Manifest) is an Australian company that claims to be a creditor of Northern Crest. Its claim was rejected by the liquidators. Manifest seeks leave to apply to reverse the liquidator's decision to reject its proof of claim. If leave were granted, it seeks an order requiring the liquidators to admit its claim to proof.⁴

[4] Manifest has also applied to remove Messrs Lawrence and McCullagh as liquidators of Northern Crest. It has filed an affidavit from Mr Michael Reeves, sworn on 26 October 2011, in support of that application. The liquidators seek an order that this affidavit be ruled inadmissible on the grounds that it refers, improperly, to without prejudice communications involving Mr Reeves and one of the liquidators, Mr Lawrence.⁵ If I were to rule that Mr Reeves' evidence was admissible, the liquidators seek (without opposition) leave to file a further affidavit to respond to it.

[5] In this judgment, I consider Manifest's challenge to the rejection of its proof of debt and the liquidators' application to have Mr Reeves' affidavit ruled inadmissible.

Does Northern Crest owe Manifest money?

(a) *Should leave be granted?*

[6] Section 284(1)(b) of the Companies Act 1993 provides:

³ *Lawrence and McCullagh v Northern Crest Investments Ltd (in liq)* [2011] FCA 925 (Emmett J).

⁴ Companies Act 1993, s 284(1)(b).

⁵ Evidence Act 2006, ss 57 and 65.

284 Court supervision of liquidation

- (1) On the application of the liquidator, a liquidation committee, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—

...

- (b) Confirm, reverse, or modify an act or decision of the liquidator:

....

[7] A decision of a liquidator to reject a proof of claim falls within s 284(1)(b).⁶ Leave is required for a putative creditor to challenge a decision to reject a proof of debt. That is because of the Court's reluctance to interfere with the good faith exercise of a liquidator's discretionary powers and its desire to avoid unnecessary challenges that might undermine a liquidator's duty to carry out his or her functions in an efficient manner.⁷ In deciding whether to grant leave, the Court acts as a gatekeeper, to ensure that only appropriate challenges proceed to a full hearing.

[8] This is a case in which leave should be granted. The liquidators made a relatively peremptory decision to reject the claim. Before doing so, they did not obtain all relevant information. Nor were steps taken to examine relevant witnesses, even though power to do so in Australia had been conferred on the liquidators by the Federal Court.⁸ Additional evidence is now before me. Two of the witnesses for Manifest have been cross-examined. Manifest is entitled to have its challenge considered by this Court on the basis of the evidence that is now available.⁹ My task is to undertake a fresh assessment of whether the claim should be admitted to proof. Leave to apply is granted.

⁶ *Heath & Whale on Insolvency* (LexisNexis looseleaf) (Liesle Theron); at para 20.39; by reference to regs 15 and 16 of the Companies Act 1993 Liquidation Regulations 1994. In particular, reg 15(2) excludes all claims that have been rejected from participation in a dividend where no notice of a timely application under s 284 has been given.

⁷ *Trinity Foundation (Services No 1) v Downey* (2005) NZCLC 9 263,917 (Associate Judge Lang) at para [18], upheld on appeal: see (2006) 3 NZCCLR 401 (CA) at para [31]. See also *Heath & Whale on Insolvency* (LexisNexis looseleaf) at para 22.8(a), (Liesle Theron), s 253 of the Companies Act 1993 (duty of liquidator to act "in a reasonable and efficient manner) and *Eagle and Gothard v Petterson* HC Auckland CIV 2011-404-7387, 16 December 2011 at paras [51] and [52].

⁸ *Lawrence and McCullagh v Northern Crest Investments Ltd (in liq)* [2011] FCA 925, at order 3.4. See also para [46] below.

⁹ See also *Trinity Foundation (Services No 1) v Downey* (2005) 9 NZCLC 263,917 at paras [94]–[99].

(b) *The proof of claim*

[9] Section 304(1), (2), (3) and (4) of the Companies Act provide:¹⁰

304 Claims by unsecured creditors

- (1) A claim by an unsecured creditor against a company in liquidation must be made in the prescribed form and must—
 - (a) Contain full particulars of the claim; and
 - (b) Identify any documents that evidence or substantiate the claim.
- (2) The liquidator may require the production of a document referred to in subsection (1)(b) of this section.
- (3) The liquidator must, as soon as practicable, either admit or reject a claim in whole or in part, and if the liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, may revoke or amend that decision.
- (4) If a liquidator rejects a claim, whether in whole or in part, he or she must forthwith give notice in writing of the rejection to the creditor.

....

[10] Manifest alleges that it is owed \$AUD3 million by Northern Crest. It submitted a proof of claim, dated 29 July 2011. The prescribed form makes it clear that “full details” of the claim are required.¹¹ The form was completed and signed by Mr Gerard Eakin, Manifest’s sole director. Mr Eakin disclosed that the debt was owed under the “Manifest Capital Management Pty Ltd Underwriting Deed”, dated 21 March 2008.

[11] Correspondence followed, involving the solicitors instructed in New Zealand for Manifest (LeeSalmonLong, Auckland) and the liquidators (Kensington Swan, Auckland), about the validity of the claim. It is clear that the liquidators’ harboured concerns about whether a genuine debt existed.

[12] On 15 September 2011, Kensington Swan wrote to LeeSalmonLong. Relevantly, they said:

¹⁰ Companies Act 1993, s 304(3).

¹¹ See the Schedule to the Companies Act 1993 Liquidation Regulations 1994.

...

- 4 We understand Manifest filed a claim in the liquidation on the basis that it is owed fees pursuant to an underwriting agreement. No documentation has been provided by Manifest to the liquidators to substantiate what fees (if any) are owed by [Northern Crest].
- 5 We are further instructed that Manifest also filed a claim for what appears to be the same debt, in the liquidation of Barkley Walsh Pty Ltd (in liquidation). The liquidators therefore have serious concerns about Manifest's claim in [Northern Crest's] liquidation.
- 6 In light of the above, *the liquidators give formal notice that Manifest's claim is rejected pursuant to s 304(4) of the Companies Act 1993. As the liquidators have rejected Manifest's claim, it is not a creditor in the liquidation.*
- 7 Accordingly, Manifest has no standing to request that a creditors' meeting occur, or to make an application to enforce the same under s 286 of the Companies Act 1993.

.... (my emphasis)

[13] The following day, LeeSalmonLong responded to that aspect of Kensington Swan's letter:

...

MANIFEST'S PROOF OF DEBT

3. Manifest's proof of debt was filed on 5 August 2011. Your letter is the first response Manifest has had to its proof. If your clients had genuine concerns about Manifest's proof the ordinary response would be to ask for further information. Given that has not occurred it is perhaps unsurprising that in their rejection of Manifest's proof your clients make several assertions that we are instructed are wrong. Our instructions are that:
 - (a) Manifest's debt arises from a loan of AUD \$3.0 million made to [Northern Crest] as a precursor to a rights issue by [Northern Crest], which Manifest agreed to underwrite by the agreement between it and [Northern Crest] dated 21 March 2008.
 - (b) The Manifest loan was referred to in an affidavit from [Northern Crest's] auditors, Hall Chadwick, that was part of the evidence in the High Court proceeding brought by the Registrar of Companies in 2009.
 - (c) The Manifest loan appears in the books and accounts of [Northern Crest] (which we note the liquidators have placed reliance on in seeking to set aside transactions by other parties) and has appeared in [Northern Crest's] audited annual report since 2009.

- (d) [Northern Crest] will have records of the loan being received.
- (e) Manifest has not filed any proof of debt in the liquidation of Barkley Walsh PTY Ltd. Given the liquidators of Barkley Walsh PTY Ltd are partners in the PKF Sydney, and PKF Sydney has been acting in some capacity as local representative of the liquidators of [Northern Crest], it is surprising that this allegation has been made. It is patently incorrect.
4. Manifest does not accept your clients' rejection out of hand of its claim for a debt that is recorded in [Northern Crest's] audited accounts.
5. In the interest of your clients avoiding incurring unnecessary costs and personal costs exposure in responding to an application under s 284(1)(b) of the Act, our client is willing to provide further information in support of its proof of debt, however if your clients' position is that they will not review their decision then the efficient course is for it to apply without further notice. Please confirm.
- ...

[14] The liquidators made further inquiries. Having done so, they were not prepared to review their decision to reject the proof of claim. Advice to that effect was given by Kensington Swan to LeeSalmonLong, by letter dated 20 September 2011:

....

Manifest's proof of debt

- 2 The liquidators previously gave notice that Manifest's claim was rejected. Until such time further information regarding Manifest's claim is received, the liquidators remain of the view that the claim is not admitted. That said, the liquidators will consider any information put before them.
- 3 Our clients are of the view that information provided via Hall Chadwick cannot be relied upon as conclusive proof that there is a debt due from [Northern Crest]. Based on the information provided to date, it is the understanding of the liquidators that Hall Chadwick's involvement with the accounts was minimal and that the accounts were prepared as directed by Guy Robertson, Mark Bryers and Laurie Eakin.

....

[15] Kensington Swan's letter of 20 September 2011 had crossed with one sent by LeeSalmonLong. On 22 September, LeeSalmonLong wrote:

...

Manifest's proof of debt

- 2 Your letter appears to have been prepared prior to receipt of our letter of the same date. Our letter asked you to specify what further information is sought in respect of Manifest's proof of debt over and above the audited accounts, books, and records your clients hold. Please advise what additional information is sought.
- 3 You have observed that the accounts of [Northern Crest] were prepared at the direction of persons who (we presume) had knowledge of the affairs of the company. We are not aware of any other basis upon which a firm of accountants would prepare accounts. Please advise why you see that fact as leading to the conclusion that the accounts are not accurate.

[16] There was no further correspondence on this issue. On 13 October 2011, Manifest filed its application challenging the liquidators' decision to reject its claim. The liquidators resist the application:

- 3 The grounds on which the Liquidators oppose the making of the orders are as follows:
 - a Manifest has provided further information in support of its claim in [Northern Crest's] liquidation in the form of a Variation of Underwriting Agreement and Declaration of Trust ("documents"). Attached as exhibits 'GE11' and 'GE12' to the affidavit of Gerard Eakin sworn 13 October 2011.
 - b the Documents have not previously been provided to the Liquidators by Manifest, despite the fact that they are material to Manifest's claim and have been requested by the Liquidators.
 - c The Documents are not within the records of [Northern Crest], and have not previously been sighted by the Liquidators.
 - d Given the delay in Manifest providing the documents, the Liquidators are concerned as to the authenticity of the Documents.
 - e The Liquidators have requested that Manifest make available for inspection the originals of the Documents so that the Liquidators can verify their authenticity.
 - f Manifest has failed to provide the originals of the Documents to the Liquidators.

g *If the Liquidators are satisfied that the Documents are authentic after inspecting the originals, the Liquidators will accept the claim filed by Manifest.*

.... (my emphasis)

(c) *The issue*

[17] The liquidators put Manifest to proof of its debt; in particular, the authenticity of two of the documents that evidence it. The respective contentions are:

- (a) The liquidators contend that Manifest advanced \$AUD3 million to a subsidiary of Northern Crest, Barkley Walsh Pty Ltd (Barkley Walsh). They have taken the view that documents dated 3 and 4 April 2008 (a variation of the underwriting agreement and a declaration of trust respectively) were brought into existence to evidence (incorrectly) that Northern Crest was the debtor. Barkley Walsh was put into liquidation, in Australia, on 27 May 2009.
- (b) Manifest asserts that the advance of \$AUD3 million was made to Northern Crest. It was made at a time proximate to Northern Crest's suspension from trading on the Australian Stock Exchange. The payment was designed to provide working capital to Northern Crest, before it made a rights issue to members of the public. By the time the advance was made, private investors, through Manifest, had already acquired shares in Northern Crest worth, on paper, about \$AUD22 million. The object of the advance was to enable Northern Crest to rebuild its business and avoid a loss of that magnitude being suffered.

(d) *The evidence*

[18] There are three relevant documents that record the terms of the agreements reached between Manifest and Northern Crest:

- (a) The “Underwriting Agreement”, dated 21 March 2008. A preamble records that Northern Crest proposed to offer for subscription to New Zealand and Australian resident shareholders a rights issue of ordinary shares, with a subscription price of 10 cents per share. Further, it recorded that Northern Crest had requested Manifest to underwrite the offer and that it had agreed to do so, up to a maximum of 30 million shares, on the terms set out in the agreement.
- (b) A Variation of Underwriting Agreement (the Variation), dated 3 April 2008. The preamble to that agreement refers to the Underwriting Agreement, but records that it was entered into on 2 April 2008, rather than 21 March 2008.
- (c) A Declaration of Trust,¹² in respect of the payment of \$AUD3 million by Manifest. That document is dated 4 April 2008. Barkley Walsh is named as the “trustee”. The preamble records that Manifest had deposited \$AUD3 million into an account number advised by the trustee,¹³ to be used as working capital for Northern Crest in terms of the Variation.

[19] The Underwriting Agreement recorded the arrangements for the working capital facility:

3. Deposit and Working Capital Facility

3.1 Deposit

Immediately after execution of this agreement, and in any event by no later than 4:00pm on 2 April 2008, the Underwriter agrees to deposit or cause to be deposited, in cleared and immediately available funds, the sum of \$3,000,000 (the Deposit) into a bank account with Macquarie to be held by Macquarie until the Termination Date.

¹² A governing law clause in the Declaration of Trust provides that the document is governed by the laws of New South Wales. The parties submitted to the non-exclusive jurisdiction of the New South Wales court. During argument, counsel confirmed that I was to proceed on the basis that New Zealand law was the same as New South Wales law, for the purpose of any interpretation issues that arise.

¹³ That was not strictly correct. Manifest’s evidence discloses that deposits were made on 4 and 7 April 2008. However, nothing turns on the point.

3.2 Working Capital Facility

The Underwriter will procure that following execution of this agreement ~~Macquarie will immediately provide a facility for \$3,000,000, (being an amount equal to the Deposit), to [Northern Crest], which [Northern Crest] will be able to draw under during the period up until the Termination date, to meet its working capital requirements or for such other purposes as are agreed between the parties (the Working Capital Facility).~~

[20] The Variation amended the terms of the Underwriting Agreement:

2. Deposit, Working Capital Facility and Unsecured Loan

2.1 Deposit

Immediately after execution of this agreement, and in any event by no later than 4.00pm on 10 April 2008, the Underwriter agrees to deposit or cause to be deposited, in cleared and immediately available funds, the sum of \$3,000,000 (the Deposit) into a bank account with Macquarie Bank Limited or Westpac Banking Corporation at the sole direction of the Company.

2.2 Working Capital Facility

The Underwriter agrees that the Deposit will be used by the [Northern Crest], which [Northern Crest] will be able to draw under during the period up until the Termination Date, to meet its working capital requirements or for such other purposes as required by the [Northern Crest] (the **Working Capital Facility**).

2.3 Unsecured Loan

The Underwriter and [Northern Crest] further agree that until clause 9 of the Underwriting Agreement operates the Working Capital Facility will be treated by both parties as an unsecured loan (the **Unsecured Loan**) to [Northern Crest] bearing no interest.

[21] The Declaration of Trust contained an acknowledgement that Barkley Walsh held the sum of \$AUD3 million “on bare trust for and solely for the benefit of” Northern Crest. Further, it was agreed that Barkley Walsh could use all or any part of that money to provide working capital for Northern Crest; indeed, for any other purpose agreed to” by Northern Crest.

[22] Clause 3.4(b) of the Declaration of Trust states:

3.4 Amendments and conflicts

...

- (b) All parties acknowledge and accept that this Declaration of Trust supersedes and prevails over the Declaration of Trust entered into between the Trustee and the Underwriter (described therein as “The beneficiary”) dated the 4th day of April 2008.

It appears that the Declaration of Trust and the predecessor referred to in cl 3.4(b) were both dated 4 April 2008.

[23] Mr Gerard Eakin is the sole director of Manifest. In oral evidence, he explained that Manifest operated “discretionary portfolios on behalf of its clients”. Investments had been made when Northern Crest was initially listed on the Australian Stock Exchange in 2006.

[24] Mr Eakin gave evidence that Northern Crest had been suspended from trading on the Australian Exchange in February 2008. By that time, some \$22 million had been invested in shares, on behalf of Manifest’s clients. Mr Eakin explained that the further advance of \$AUD3 million was to assist Northern Crest “get through a period of liquidity problems ... and to be able to relist” on the Australian Stock Exchange. He referred to a “very detailed business plan” over a period of about one month. The advance was to be repaid from the rights’ issue.

[25] In his first affidavit, Mr Eakin gave evidence about the mechanism for repayment of Manifest’s debt:

22. The mechanism for repayment was that when the share offer that Manifest was underwriting was complete, if Manifest was required to take up shares then any funds drawn down by [Northern Crest] were to be used to offset Manifest’s obligation to pay for shares it was obliged to subscribe for. If Manifest was not required to subscribe for shares, or if [Northern Crest] had drawn down more funds for working capital than the value of shares Manifest was obliged to purchase, then [Northern Crest] was to repay Manifest the balance once it received subscriptions.
23. [Northern Crest] through its executive Director Mr Mark Bryers nominated a newly formed subsidiary (Barkley Walsh Pty Limited) to receive the funds from Manifest. As the funds were not going directly to [Northern Crest] a deed of bare trust was prepared recording that funds advanced were advanced under the varied

underwriting agreement, and were to be used only for [Northern Crest's] working capital requirements or as otherwise agreed or directed by [Northern Crest].

24. Manifest advanced AUD \$3.0 million to [Northern Crest's] nominee Barkley Walsh on around 4 April and 7 April 2008. The funds were advanced in three tranches as detailed in the bank statement of Barkley Walsh that Mr Gosse is to exhibit. The advances were not directly from Manifest's own account but from investment accounts.
25. Manifest authorised all of the payments requested by [Northern Crest] to the nominee account of Barkley Walsh. The AUD 3.0 million advanced by Manifest to [Northern Crest's] nominee Barkley Walsh was all paid out of Barkley Walsh's account at [Northern Crest's] request. [Northern Crest] has not repaid any part of Manifest's advance. Nor has it completed the share offer contemplated by the underwriting agreement. As it eventuated, the share issue cannot presently be completed due to [Northern Crest's] liquidation.

[26] In cross-examination, Mr Eakin accepted that the Underwriting Agreement had been prepared by Minter Ellison, Solicitors, Auckland, on instructions from Northern Crest. Mr Eakin could not explain why the document was dated 21 March 2008. He confirmed his understanding that it had been executed around 2 April 2008, the date to which the Variation of 3 April 2008 refers.

[27] Mr Eakin confirmed that Manifest did not instruct its own lawyers. Rather, he had asked Northern Crest "to have credible lawyers draw up an agreement that was a standard industry style of agreement". Ultimately, Mr Eakin was responsible for approving the terms of the agreements, on behalf of Manifest.

[28] Mr Eakin believes that the reason for the Variation was that, between 2 and 3 April 2008, Macquarie Bank had declined to provide the facility of \$3 million originally agreed.¹⁴

[29] I asked Mr Eakin about the process of negotiation. He had previously affirmed that his discussions had taken place with Mr Bryers, on behalf of Northern Crest. The following exchange occurred:

¹⁴ See cl 3.2 of the Underwriting Agreement, set out at para [19] above.

QUESTIONS FROM THE COURT:

Q. Were the terms of the underwriting agreement and the variation negotiated between Mr Bryers and yourself?

A. Yes.

Q. Was there in fact a negotiation or were these documents simply provided to you to sign?

A. They were provided to me to sign after we'd discussed what had happened and what plan B was.

Q. Once the variation was signed, what was discussed between you and Mr Bryers as to how your debt would be repaid in the event that the rights issue did not go ahead within a reasonable time?

A. We didn't discuss that.

...

Q. Are you able to tell me why it was that things meandered on probably until 2010/2011 without anything happening and this interest being – this loan being interest free?

A. Well the whole thing, I guess, was based on the rescue plan and reconstruction was going to work. That received a big shock later in 2008 when the finance sector in New Zealand collapsed, the finance company sector, and there was a big pot of receivables and, from memory, I think it was like 70 or \$80,000,000 of receivables due from developers which were part of the plan. And their recovery became a lot more problematic, in fact it became impossible, and so progress was made in reducing the cost base of the company, refocusing the business, dealing with creditors along the way. And it was always just that far out of reach that it was about to happen, was going to happen, you know, in the next few months, and it just never quite got there.

Q. Is it fair to put the nature of the transaction as, effectively, an investment by Manifest to see whether the company could be resurrected and if so to retrieve the value of what's been lost?

A. Almost.

Q. Okay.

A. I think it's fair to say that we had convinced ourselves and the company convinced us that the plan could see the company resurrected, and then that would enable at least some of the value to be recovered on the stuff that had already gone in through trading over time as it rebuilt its profits and value on the market.

[30] Mr Gosse was also called by Manifest. At material times he was the Chairman of Northern Crest's board. He had been appointed as a director on 21

August 2006 and resigned two years later, in 2008. Mr Gosse accepted that he had signed two copies of the Underwriting Agreement, bearing different dates, but could not explain why he had done so. His evidence was that there “was a lot happening at that particular time”, and Northern Crest was “very keen for the money” and when “Mark Bryers came up with the money through Manifest, ... there was an urgency to get the whole thing done”.

[31] Mr Gosse confirmed that Minter Ellison did not prepare the Variation and Declaration of Trust. He thought that they may have been prepared by Mr Bryers or somebody else associated with Northern Crest. When asked why a Minter Ellison document was used on 2 April but not on 3 and 4 April 2008, Mr Gosse responded:

- A. ... we would normally try and use a proper lawyer, but in the essence of timing we would sometimes try and do something which is presumed to be taken from a template of some sort.

[32] The liquidators place reliance on documents made available to them which, they contend, throw doubt on the notion that the Underwriting Agreement, the Variation and the Declaration of Trust were all executed around the same time, in early April 2008.

[33] Mr Hughes, for the liquidators, referred to Northern Crest’s Annual Report for 2010. That report identified what was termed as a “fundamental error” in the way in which the Manifest debt had been recorded in the books of the Northern Crest group. That was contained in a note to the financial statements:

Note 3

Fundamental Error

In the 2009 financial report the loan payable to Manifest Capital Management Pty Limited of \$3,633,000 was recorded as payable by [Barkley Walsh]. The Company has determined that the loan is in fact owing by the parent company and has amended the 2009 financial report accounts accordingly. As the transaction was entered into in April 2008 there was no impact on the accounts for the year ended 31 March 2008.

As the loan is interest free there is no impact on the statement of financial performance and no tax effect. There is also no impact on accumulated losses. Furthermore the Consolidated financial report in the 2009 year was correctly stated.

[34] Northern Crest's interim financial report for 2009 recorded that Barkley Walsh had been placed in liquidation, on 27 May 2009, and that the Northern Crest group was working with the liquidator to have the liquidation stayed. At that stage, the debt from Manifest was shown as owing by Barkley Walsh. The liquidators consider that their position on this issue is strengthened by an entry in the minutes of the Northern Crest board meeting of 22 January 2010:

It was noted that the impact of deconsolidating Barkley Walsh was to remove AUD 3 million of debt and AUD 3 million of losses from the group accounts. It was further noted that the loan from Manifest was recorded as a liability of Barkley Walsh as at 31 March 2009 – not a liability of Northern Crest. The board needed to consider the impact of this vis a vis Manifest in the event that Barkley Walsh was liquidated.

(e) Analysis

[35] Has Manifest proved that it is owed \$AUD3 million by Northern Crest? Like any civil claim, Manifest must establish, on a balance of probabilities, that the debt is owed.

[36] I agree with the liquidators that there are a number of troublesome features about the transaction and the evidence of it. In particular:

- (a) There is no explanation as to why the Underwriting Agreement provided to the liquidators with the initial proof of claim was dated 21 March 2008. The liquidators ought to have been able to rely on Mr Eakin's declaration that the document bearing that date formed the basis of the contractual obligation allegedly owed by Northern Crest to Manifest.
- (b) The transaction was occurring at a time when Northern Crest was facing significant problems. It had been suspended from trading on the Australian Stock Exchange. It had no working capital of any substance. It is likely that it faced being tarnished by what had happened with the Blue Chip group in New Zealand; something evidenced by the fact that the company's name was changed to Northern Crest on 1 April 2008.

- (c) Northern Crest caused information to be put into the public domain, in its 2010 annual report, indicating that a debt which had previously been shown as owing by a subsidiary, Barkley Walsh, was, in fact, payable by Northern Crest. That was done at a time when Barkley Walsh had been placed in liquidation.

[37] This is a claim in which Manifest is being put to proof. The liquidators cannot adduce any evidence to rebut affirmatively the evidence given by Mr Eakin and Mr Gosse. They rely, instead, on inconsistencies in the documentary evidence and, as I apprehend it, a lack of clarity of recall on the part, particularly, of Mr Eakin in explaining how the transaction came to be effected and the way in which documents were drawn. After all, Mr Eakin had made a decision, as part of a discretionary investment process, to invest \$AUD3 million in an endeavour to salvage an otherwise lost investment of \$22 million by those interests on behalf of whom Manifest was acting. It might be thought that he would remember more about the negotiating process than he has let on.

[38] Further, I find it curious that, in seeking to prove a debt in the Northern Crest liquidation (particularly one which was pursued with some vigour), only the Underwriting Agreement was drawn to the liquidators' attention initially and neither the Variation nor the Declaration of Trust produced until Mr Eakin's affidavit of 13 October 2011 was filed and served.

[39] Notwithstanding those concerns, there is other cogent evidence that indicates that Manifest did advance money for the benefit of Northern Crest and is entitled to prove in the liquidation for the outstanding debt.

[40] The starting point is the Underwriting Agreement. No challenge has been made to its authenticity. It was prepared by a reputable firm of solicitors in New Zealand and executed on behalf of both Manifest and Northern Crest. There is no mention of Barkley Walsh in that document.

[41] The Underwriting Agreement evidences the purpose of the arrangement; namely, Northern Crest was to make a rights offer of the type disclosed and that

Manifest would underwrite it up to a maximum of 30 million shares, or \$AUD3 million. The money was to come, initially, from a facility procured by Manifest from Macquarie Bank. It was to be available for Northern Crest's use, as working capital. There is nothing to suggest that the advance was intended to be a gift.

[42] While the Underwriting Agreement is dated 21 March 2008, Northern Crest is shown as the party for whose benefit the money was being paid. Blue Chip Financial Solutions Ltd's name was not changed to Northern Crest until 1 April 2008. I infer that Minter Ellison would not have prepared a document, for execution by Northern Crest, before the name was changed. That inference supports the view that execution occurred on 2 April 2008, as recorded in the Variation.

[43] As at the beginning of April 2008, Northern Crest was financially strapped. That is why it needed working capital. In oral evidence, Mr Gosse, its chairman at the time, described Northern Crest as being in "survival mode". That state of affairs is consistent with a financial institution such as Macquarie Bank declining to provide a facility. It is also consistent with the need for Manifest to do so,¹⁵ as part of a salvage operation.

[44] I confess to finding implausible the explanation for the need to prepare a Declaration of Trust. I suspect there was some other unarticulated reason for it. The evidence suggests that the money was paid into Barkley Walsh's account because, at the time, Northern Crest did not have a bank account. If \$AUD3 million were being paid into it, it is difficult to understand why (if that state of affairs really did exist) it could not open a bank account for that purpose.

[45] The way in which the Declaration of Trust is drawn makes it clear that the moneys advanced under the Variation were held on trust for Northern Crest. The "fundamental error" disclosed in the 2010 annual report may well have arisen out of a realisation that the reason for placing the debt in the accounts of Barkley Walsh was flawed. That realisation may only have occurred after the liquidation of Barkley Walsh.

¹⁵ See cl 2 of the Variation, set out at para [20] above.

[46] It is surprising that Manifest could not have been more open when discussions began to provide all information, including background information of the type provided by Mr Eakin in response to supplementary questions put to him in oral evidence, to explain the true nature of the arrangement. That said, I consider the liquidators acted precipitately in rejecting the proof of debt so early in the piece. They could easily have requested additional documentation before doing so and, if still not satisfied of authenticity, used their examination powers to obtain information from officers of Manifest and Northern Crest before making a decision. Their ability to do that in Australia is apparent from the recognition of the New Zealand liquidation in that jurisdiction.¹⁶

[47] This is a case in which real money was advanced by Manifest, for the benefit of Northern Crest. Having weighed the evidence, I am satisfied that Manifest has discharged the onus on it to establish the debt. The factors in favour of that conclusion are more compelling than those pointing in the opposite direction. I find that a debt is owing from Northern Crest to Manifest in the sum of \$AUD3 million. While some higher figures can be found in the evidence from time to time, I restrict the amount for which the claim can be proved to that contained in the proof of claim lodged by Mr Eakin, on behalf of Manifest.

Admissibility of Mr Reeves' affidavit

(a) Background

[48] Mr Reeves is a company director who lives in Wellington. He deposes that, before its liquidation, he had provided advice on corporate governance and structuring issues to directors of Northern Crest. Since the liquidation, he has been involved in correspondence and discussions with the liquidators of Northern Crest, particularly Mr Lawrence.

[49] Mr Reeves has filed an affidavit in support of Manifest's application to remove the liquidators. In it, he gives evidence of the content of discussions with

¹⁶ In particular, *Lawrence and McCullagh v Northern Crest Investments Ltd (in liq)* [2011] FCA 925, at order 3.4.

Mr Lawrence, even though he accepts that they took place, by agreement, on a “without prejudice” basis.

[50] Ordinarily, such communications are privileged and cannot be used in subsequent proceedings¹⁷ against a person who makes an admission contrary to his or her own interest. However, the privilege may be overridden if a *prima facie* case were established that the communication was made or received “for a dishonest purpose”.¹⁸

[51] Sections 57(1) and 67(1) of the Evidence Act 2006 provide:

57 Privilege for settlement negotiations or mediation

- (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
- (a) was intended to be confidential; and
 - (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

...

67 Powers of Judge to disallow privilege

- (1) A Judge must disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if satisfied there is a *prima facie* case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

....

(b) Competing positions

[52] Mr Hughes submits that it was agreed that the discussions would take place on a without prejudice basis. In those circumstances, he submits there is no reason to go behind the privilege that would otherwise attach to negotiations, in terms of

¹⁷ Evidence Act 2006, s 57(1).

¹⁸ *Ibid*, s 67(1).

s 57(1) of the Evidence Act. He submitted that there were potential disputes between the directors of Northern Crest and the liquidators that were properly the subject of without prejudice communications.

[53] , Mr Lawrence has not filed an affidavit in response to that of Mr Reeves, for the purposes of the application to have Mr Reeves' affidavit declared inadmissible. While Mr Hughes told me, from the Bar, that Mr Lawrence disputes much of the content of Mr Reeves' affidavit, I am required to determine whether a *prima facie* case exists by reference to the existing evidence before me. In that sense, Mr Reeves' evidence is presently unchallenged.

[54] Mr Stewart QC, for Manifest, submits that the evidence cannot be regarded as falling within the "without prejudice" privilege, for two reasons. First, he contends that there was no dispute between the liquidators and those whom Mr Reeves purported to represent that could give rise to settlement negotiations of the type envisaged by s 57(1). Alternatively, he submits that the evidence of Mr Reeves is sufficient to establish a *prima facie* case of "dishonest purpose", under s 67(1).

(c) *Developments at the hearing*

[55] During the course of his closing submissions, Mr Stewart disclosed that Mr Reeves had made a contemporaneous audio recording of his discussions with Mr Lawrence and that it had been transcribed. No mention of this recording is made in Mr Reeves' affidavit. Nor had LeeSalmonLong advised Kensington Swan of their existence.

[56] I directed that the audiotape and transcript be made available (immediately after the hearing) to the solicitors for the liquidators. I gave Mr Hughes an opportunity to listen to the tape and read the transcript overnight and to file, if he wished, an affidavit from Mr Lawrence advising whether he accepted the content of those records. I also directed that the records not be released by the liquidators' legal advisers, to avoid the possibility of any further allegations of impropriety being levelled against Mr Lawrence as a result of wider dissemination.

[57] On 15 December 2011, Mr Hughes filed a memorandum indicating that senior counsel had been retained to advise the liquidators and that the audio recording and the transcript had been made available to him, on the same basis as I had previously directed. An extension of time was sought until 5pm on 16 December 2011 for an affidavit to be filed and served, of the type anticipated.

[58] A further affidavit from Mr Lawrence was filed on the afternoon of 16 December 2011. In addition, detailed submissions were filed on behalf of the liquidators. I received a further memorandum from counsel for Manifest contending that I should not read the material, as it fell outside of the scope of the leave reserved.

[59] Yesterday morning, I issued a Minute to counsel in which, after disclosing that I had not yet read the additional material filed by the liquidators, I said:

[4] In view of the disputes that now arise I am inclined, with one qualification, not to read any of the additional material and to give judgment based on the evidence before me and the submissions made on 14 December 2011. That qualification involves disclosure of the fact that Mr Reeves did tape the conversations and a transcript was prepared. That information was not available until after Mr Hughes cross-examined Mr Reeves and the fact that it has occurred is something relevant to an assessment of Mr Reeves evidence.

[5] If counsel for either party wish to put forward a contrary view they may request the Registrar to allocate a hearing before me at 9.30am tomorrow. I will hear from counsel on the documents I am entitled to read at that time, if a hearing were requested. The Registrar shall allocate a hearing if requested by one party and shall give notice to all parties once it is confirmed. If no hearing were requested I shall proceed as indicated in para [4] above.

[60] No party sought a further hearing, though counsel for the liquidators did ask for me to extend a suppression order made in relation to the content of Mr Reeves' affidavit if it were declared admissible. On that basis, I consider the admissibility of Mr Reeves' affidavit on the basis of evidence that was available to me at the conclusion of the hearing on 14 December 2011 and the fact that an audio recording of discussions was made by Mr Reeves and a transcript prepared.

(d) *Mr Reeves' affidavit evidence*

[61] On about 19 September 2011, Mr Reeves spoke to Mr Laurie Eakin (Mr Gerard Eakin's brother). He had been a director of Northern Crest. Mr Laurie Eakin had referred to a discussion that he had had with Mr Lawrence, in which Mr Lawrence had requested a meeting to talk about suggestions that the liquidators ought to be replaced. Mr Laurie Eakin told Mr Reeves that, because of prior dealings with Mr Lawrence in which he alleged that "his morality and credibility" had been questioned, he did not wish to meet with him again. No evidence was provided by Mr Laurie Eakin of the authority he gave to Mr Reeves.

[62] Mr Reeves also deposed that he had been authorised to attend a without prejudice meeting by Mr Gerard Eakin, on behalf of Manifest. That was confirmed in an affidavit sworn by Mr Gerard Eakin on 18 November 2011. Mr Gerard Eakin deposed, on 20 September 2011, he had given written authorisation, on behalf of the board of Manifest,¹⁹ for Mr Reeves to meet with Mr Lawrence "in respect of the matters discussed by [Mr Lawrence] with Mr Laurie Eakin on 19 September 2011". By 19/20 September 2011, Manifest's claim had been rejected.²⁰ In the absence of evidence to the contrary, I infer that Mr Gerard Eakin's authority for Mr Reeves to attend the meeting was linked (at least in part) to the disputed debt.

[63] Mr Reeves deposed that he telephoned Mr Lawrence and asked to meet with him to discuss options and a proposal for ending the liquidators' involvement in Northern Crest's liquidation. These discussions were taking place against the background of correspondence from LeeSalmonLong in which Manifest was pressing for a meeting of creditors to be held in Sydney and concerns were being expressed about the way in which the liquidators were conducting themselves. The exact nature and extent of Mr Lawrence's discussions with Mr Laurie Eakin, on 19 September, are unknown to me.²¹

¹⁹ Mr Gerard Eakin was the sole director of Manifest: see para [23] above.

²⁰ See para [12] above.

²¹ Mr Reeves' evidence is that Mr Eakin told him that Mr Lawrence had requested a meeting to discuss requests that the liquidators be replaced.

[64] It is unnecessary to set out Mr Reeves' allegations in detail. I characterise his evidence as seeking to demonstrate that, during the course of the discussions, Mr Lawrence was prepared to act in a manner inconsistent with his duties to creditors and the Court by seeking a payment of money (\$850,000) in return for not proceeding with any investigation.

[65] While there is a suggestion that the money was to be used, substantially, to meet the liquidators' fees, it is *not* alleged that Mr Lawrence was corruptly asking for the money to go to him directly, or for it not to be disclosed to creditors in a liquidators' report. Indeed, Mr Reeves provides evidence to suggest quite the opposite:

32. I asked Mr Lawrence who would pay the \$850,000 and who would receive it. He said that the liquidators would receive it as liquidators but he did not really care who paid it. I asked whether a tax invoice would be provided. He said that he had not thought about the detail but he was sure there would be a way a tax invoice could be provided. I said that I had discussed the \$850,000 proposal with Manifest and it had found it staggering. I asked about the basis for the figure.
33. Mr Lawrence said that a good proportion was fees. I asked about the rest of it. Mr Lawrence said he would have to talk to his partner about whether that would be disclosed.
- ...
37. On leaving the meeting Mr Lawrence said he was sure the lawyers could come up with a structure that would deal with tax issues.

[66] The primary allegation is that, in the course of these discussions, Mr Lawrence sought a significant sum from Mr Reeves' "people" which, if paid, would mean the liquidators would cease to act. Mr Reeves' evidence suggests that one of the issues discussed involved the extent to which the liquidators might investigate the conduct of officers involved in Northern Crest's affairs prior to liquidation. There was also the possibility, promoted by Mr Reeves' understanding of the "creditors'" wishes, that the company's affairs be investigated for the purpose of determining whether a Deed of Company Arrangement could be entered into.

[67] A Deed of Company Arrangement²² is one entered into as part of the voluntary administration regime.²³ That insolvency regime is generally initiated by “directors to provide a more expedient and efficient means of taking positive steps to deal with a company that is either insolvent or may well become so”.²⁴ The voluntary administration procedure may be commenced by a liquidator. An administrator appointed by a liquidator may apply to the Court to terminate the liquidation.²⁵

[68] Mr Reeves deposes that he raised the possibility of a “third option”: that Mr Lawrence remain as liquidator and for a compromise to be put in place, if that were the wish of creditors. He contends that Mr Lawrence rejected that suggestion.

[69] Mr Reeves says that he believed Mr Lawrence’s proposal was “improper”. Accordingly, he did not respond to it. Nevertheless, he deposes that Mr Lawrence has called him on a number of occasions since they met to ask for a response. Mr Reeves says that he was not obliged to respond to him.

(e) *Analysis*

(i) *Was there a dispute?*

[70] The notion that settlement discussions are protected by the without prejudice privilege, is premised on the parties discussing an actual dispute that requires settlement. Mr Reeves’ affidavit discloses that he was authorised to act on behalf of both Mr Laurie Eakin (as a director of Northern Crest) and Manifest. Mr Reeves acknowledged that all relevant discussions took place on the basis that they were being held on a without prejudice basis, but adds:

12. Mr Lawrence sent me an email confirming the meeting and saying it would be on a without prejudice basis (exhibit “MR 1”). I am aware that Mr Lawrence may say that the discussions we had are all without prejudice and inadmissible. I understand that that there are

²² Companies Act 1993, ss 239ACM–239ACX.

²³ *Ibid*, Part 15A.

²⁴ *Heath & Whale on Insolvency*, (LexisNexis looseleaf) at para 17.8(a) (Associate Professor Brown).

²⁵ *Heath & Whale on Insolvency*, (LexisNexis looseleaf) at paras 17.90–17.107 (Associate Professor Brown). See also Companies Act 1993, s 239J(1) and (5) and Subpart 13 of Part 15A.

exceptions to the without prejudice rule and that admissibility is a matter for the Court.

[71] In cross-examination, Mr Reeves was asked whether he had been apprised by Manifest of the ongoing discussions between it and the liquidator. Mr Reeves responded:

A. Not to any significance. And like I said, I wasn't aware of a dispute as such, I was aware of the fact that the liquidator wasn't particularly happy with one or more of the directors, and I was aware that Manifest and the directors would prefer the liquidator to be gone and for a new liquidator to be appointed. That's really about the extent of my knowledge.

Q. So given that you weren't aware of a dispute, despite agreeing to the conversations being without prejudice, you never intended them to be?

A. No I wouldn't say that. Some people want conversations to be without prejudice and because, wrong or right, it may make them feel more comfortable.

Q. Well in fact at paragraph 12 of your evidence you say that you understood there were exceptions to the without prejudice rule and that admissibility is a matter for the Court.

A. That's correct.

Q. So you thought you'd go into that conversation, speak freely on a without prejudice basis and then you'd determine what you thought was privileged and not privileged?

A. No, and if I could qualify that, when I went to the meeting instigated by Mr Lawrence I had an open mind and that those discussions were going to be of a without prejudice basis to see what Mr Lawrence had to say and suggest, until it got to a certain point I was of the view that it was covered by a type of qualified privilege in terms of without prejudice.

Q. Now it's the position that each time you spoke with Mr Lawrence it opened with an agreement between the two of you that the conversation would be without prejudice?

A. Yes.

Q. And in fact that was confirmed in emails between the two of you also wasn't it?

A. Yes.

[72] Neither Mr Laurie Eakin nor Mr Gerard Eakin has given evidence of the scope of the authorities that they conferred on Mr Reeves. Nor have they said why

Mr Reeves was being asked to undertake discussions of this type. In the absence of such evidence, I am prepared to infer (for the narrow purpose of the admissibility inquiry) that there were disputes, involving Manifest (in relation to its alleged debt) and Mr Laurie Eakin (in relation to the way in which the liquidation should be conducted) that justified discussions being held on a without prejudice basis. I therefore rule against Mr Stewart's submission on that point.

(ii) *Is the privilege overridden on "dishonest purpose" grounds?*

[73] Before the Evidence Act codified the circumstances in which a prejudice privilege might be overridden on the grounds of "dishonest purpose", the object of the exception had been examined by both this Court and the Court of Appeal, in *Gemini Personnel Ltd v Morgan and Banks Ltd*.²⁶ While *Gemini* concerned legal professional privilege, s 67(1) extends both to that and the without prejudice privilege.²⁷ The principles relating to "dishonest purpose" remain the same, whichever privilege is in issue. I examined the ambit of the exception in *Fullerton-Smith v Fullerton-Smith*²⁸ and much of what follows, by way of legal analysis, is taken from that judgment.

[74] At first instance, in *Gemini*, Laurenson J attempted to identify the ambit of the "fraud" exception to privilege. While the cases that precede the Act speak of "fraud" rather than "dishonest purpose", nothing turns on that, for present purposes. Laurenson J said:

[68] The question is therefore, to determine, within the area of non-criminal fraud, the nature of the fraud which is sufficient to warrant removal of the protection of privilege. As I have already indicated, in my view, the answer to this is supplied by a consideration of whether or not the fraudulent conduct, eg breach of a fiduciary duty, is attended by dishonesty, ie conscious deception or sharp practice. In other words three elements are required before privilege can be excluded:

- (a) The conduct must be prejudicial to the interests of another;
and

²⁶ *Gemini Personnel Ltd v Morgan and Banks Ltd* [2001] 1 NZLR 14 (HC) at para [68] and [2001] 1 NZLR 672 (CA) at paras [26]–[34].

²⁷ Section 67(1) (set out at para [51] above) refers to the privileges conferred by ss 54–59 and 64 of the Evidence Act 2006. Legal professional privilege is conferred by s 4.

²⁸ *Fullerton-Smith v Fullerton-Smith* HC Hamilton CIV 2011-419-615, 26 August 2011.

- (b) Sufficient to attract a civil remedy; and
 - (c) Be attended by dishonesty, ie conscious deception or sharp practice.
-

[69] On my analysis such a definition would not remove the protection of privilege in any case where a client quite legitimately sought advice in relation to breaching a contract or even committing a tort, even if the advice if acted upon, subsequently proved to be incorrect.

[75] On appeal, the Court of Appeal took, as its definition, a passage from *O'Rourke v Darbishire*²⁹ cited with approval in *Matua Finance Ltd v Equiticorp Industries Group Ltd*,³⁰ in which Viscount Finlay said:

This is clear law, and, if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. *But it is not enough to allege fraud.* If the communications to the solicitor were for the purpose of obtaining professional advice, *there must be*, in order to get rid of privilege, *not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact.* It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. *It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications.* In the present case it seems to me clear that the appellant has not shown such a prima facie case as would make it right to treat the claim of professional privilege as unfounded. (my emphasis)

[76] The issue was re-considered by Kós J, in *Red Bull GMBH v Manhaas Industries Ltd*.³¹ In that case, the plaintiffs suspected that two representatives of the defendants were (as Kós J put it) “collectively cooking up a new revocation application” in direct breach of an obligation under a settlement agreement in respect of a disputed trademark.³² The Judge referred to the “very limited exception” where a communication is made or received “for a dishonest purpose”.³³ Referring to Laurenson J’s articulation of the test in *Gemini* as “perhaps less stringent”, Kós J

²⁹ *O'Rourke v Darbishire* [1920] AC 581 (HL) at 604

³⁰ *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650 (CA) at 653-654 (Cooke P).

³¹ *Red Bull GMBH v Manhaas Industries Ltd* HC Wellington CIV 2010-485-1866, 29 July 2011.

³² *Ibid*, at para [37].

³³ *Red Bull GMBH v Manhaas Industries Ltd* HC Wellington CIV 2010-485-1866, 29 July 2011 at paras [39] and [40].

suggested that “fraud, sham or trickery” was required to defeat the privilege.³⁴ I tend to agree with Kós J’s formulation, which appears more nearly to capture the sentiments expressed by Viscount Finlay that were cited with approval by the Court of Appeal in *Gemini*.³⁵

[77] Does Mr Reeves’ affidavit go far enough either to demonstrate “conscious deception or sharp practice” (Laurenson J’s approach in *Gemini*)³⁶ or “fraud, sham or trickery” (Kós J’s approach)?³⁷ In this case, nothing turns on the precise test because I am satisfied that Mr Reeves’ evidence does not meet either. Although his evidence is uncontradicted by a sworn statement from Mr Lawrence, I need to be satisfied that it provides a plausible foundation for a claim of “dishonest purpose” before I can act on it.³⁸ I am not so satisfied. In my view, when viewed critically, there is much scope for doubt about the nature and extent of Mr Reeves’ assertions of what was said between Mr Lawrence and himself.

[78] My main concerns stem from what Mr Reeves has omitted from his affidavit, rather than what is actually in it. Necessarily, an affidavit dealing with discussions of this type is selective in nature. I am concerned that Mr Reeves did not disclose his covert recording of the meeting, or the consequent preparation of a transcript. It would have been easy for the transcript to have been exhibited to Mr Reeves’ affidavit. That would have provided (subject to any disputes Mr Lawrence may have raised about its accuracy) a full record of the meeting. Its absence leads me to infer that the content of the affidavit is unlikely to provide sufficient contextual information to ascertain the true nature of Mr Lawrence’s comments.

[79] An illustration of my concern is the discussion about the Deed of Company Arrangement.³⁹ Termination of the liquidation is a consequence of execution of a Deed of Company Arrangement. There could be nothing improper in a liquidator identifying an amount that would be required to be paid to meet the costs and

³⁴ Ibid, at para [40]. See also *Crescent Farm (SIDCUP) Sports Ltd v Sterling Offices Ltd* (1972) Ch 553 (ChD) at 565. This view gains support from Mahoney, McDonald, Optican and Tinsley, *The Evidence Act 2006: Act & Analysis* (Thomson Reuters, 2nd ed, 2010) at para EV 67.02.

³⁵ See para [75] above.

³⁶ See para [74] above.

³⁷ See para [76] above.

³⁸ *O’Rourke v Darbishire* [1920] AC 581 (HL) at 604; set out at para [75] above.

³⁹ See para [66] above.

expenses of the liquidation (including his or her own fees) as part of the process of determining whether to proceed in that way. While the amount allegedly mentioned by Mr Lawrence is very high, by then there had been work undertaken in Australia and three hearings in the Federal Court of Australia, as well as the liquidators' activities in New Zealand. These concerns reflect the observations of Viscount Finlay, in *O'Rourke v Darbishire*, as approved by the Court of Appeal in *Gemini*.⁴⁰ I cannot rule out the possibility, even on Mr Reeves' evidence, that the discussions took place in that context. In that situation, I am not prepared to act on Mr Reeves' affidavit to find that Mr Lawrence acted for a "dishonest purpose", in terms of s 67(1) of the Evidence Act.

[80] In my view, the liquidators' application should be granted. It is possible that, at trial, cross-examination of Mr Lawrence (in the light of full contextual information) might extract evidence that would meet the statutory threshold. It would then be open for the cross-examiner to pursue the issue with Mr Lawrence and for Mr Reeves' to be called by way of rebuttal, if there were differences of fact as to what was said.

Consequential directions

[81] In light of my finding that Manifest is entitled to claim in the liquidation, it is necessary to consider its application to remove the liquidators or, alternatively, to compel the liquidators to call a further meeting of creditors. In addition, there may be questions of pooling,⁴¹ arising out of the liquidations of other associated "Blue Chip" companies. Mr Dale, for the "Blue Chip" creditors submitted as much and indicated that an application may be filed before the Christmas vacation. I agree with counsel that any such application ought to be dealt with by me, in conjunction with the remaining applications made by Manifest.

[82] In addition, as a result of a postal ballot of creditors held recently, the liquidators must determine whether claims made by some of the "Blue Chip" creditors are admissible in the liquidation. That task could take some time. I direct

⁴⁰ See para [75] above.

⁴¹ See Companies Act 1993, ss 271, 271A and 272.

the liquidators to file and serve a report on progress in determining whether the claimed debts are admitted to proof, on or before 27 January 2012.

[83] The Registrar is directed to set down all applications (and any pooling proceeding filed in the meantime) for a case management conference before me at 9am one day during the week of 6 February 2012. One hour will be allocated and the hearing will be held in Court for chambers. At that stage, I will review the applications and proceedings before the Court and determine what further timetabling orders are required to ready them for hearing. For that conference, counsel shall serve contemporaneous memoranda identifying the orders that they seek. Those memoranda must be filed and served no less than two working days prior to the allocated conference date.

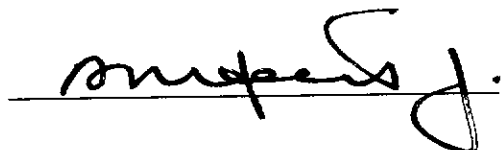
Result

[84] On the applications with which I am dealing at present:

- (a) Leave is granted for Manifest to apply to reverse the liquidator's decision to reject its proof of debt. The liquidators' decision to reject Manifest's proof of debt is reversed. The liquidators are directed to admit Manifest's claim in the sum of \$AUD3 million.
- (b) The liquidators' application to rule Mr Reeves' affidavit inadmissible is granted. As a result, the liquidators' application to file a further affidavit is otiose. That application is dismissed.
- (c) Orders are made, in terms of paras [82] and [83] above.
- (d) Save for those parts that appear in this judgment, the content of Mr Reeves' affidavits (including references to them in submissions) are prohibited from publication, pending further order of the Court. The affidavits may not be searched, copied or inspected without leave of a Judge or Associate Judge of this Court, on an application made on notice to all parties.

(e) Of my own motion, I amend the intitulment to the applications to reflect those with which I have dealt in this judgment.

[85] I reserve all questions of costs.

A handwritten signature in black ink, appearing to read 'P R Heath J', written over a horizontal line.

P R Heath J

Delivered at 4.00pm on 20 December 2011