

JUDGMENT : Barrett J : Equity Div. New South Wales Supreme Court . 27th February 2006

- 1 Mr Worrell is the liquidator of G J Formwork Pty Ltd which is a party to certain litigation with Holdmark Developers Pty Ltd arising from a building contract under which G J Formwork provided services to Holdmark. The litigation involves, among other matters, an adjudication in favour of G J Formwork under the **Building and Construction Industry Security of Payment Act 1999**.
- 2 The liquidator makes application under s.477(2A) of the **Corporations Act** for the court's approval of a proposed compromise intended to be entered into with Holdmark.
- 3 A deed of settlement and release has been prepared and embodies the proposed compromise. In essence, the parties will forego their respective claims against one another on the basis of a payment of a defined sum by Holdmark to G J Formwork.
- 4 There is a threshold question whether s.477(2A) applies, in that it is concerned only with the compromise of a debt. I had occasion to observe in *Re HIH Insurance Ltd [2004] NSWSC 5* (at [12]) that where there is room for argument about whether a particular claim is, technically speaking, a debt, the court should err on the side of treating the claim as a debt rather than decline to grant approval under the section, assuming of course the case for the grant of such approval is made out.
- 5 This is because the power of a liquidator to compromise under s 477(1)(d) derives from a provision which begins with the words "Subject to this section", so that, in a case to which s.477(2A) is applicable, the power to compromise does not arise and is not available to the liquidator unless the approval of the court has been forthcoming. That of itself is sufficient to warrant the approach I have outlined in cases of doubtful classification of the particular claim. It may well be in the present case that the claim is for damages rather than debt, but that technical distinction, while of course of fundamental importance in many contexts, should not be allowed to be something upon which the present matter turns. In any event the liquidator makes an alternative application under s.479(3) for a direction to the effect that he would be justified in committing G J Formwork to the compromise.
- 6 In cases within s.477(2A), the function of a court is as described in the judgment of Giles J in *Re Spedley Securities Pty Ltd (1992) 9 ACSR 83 at 85*: "*In any application pursuant to s 377(1) the court pays regard to the commercial judgment of the liquidator (Re Chase Corporation (Australia) Equities Ltd (1990) 8 ACLC 1118). That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in Re Mineral Securities Australia Ltd [1973] 2 NSWLR 207 at 231-2, the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct. The same restraint must apply when the question is whether the liquidator should be authorised to enter into a particular transaction the benefits and burdens of which require assessment on a commercial basis. Of course, the compromise of claims will involve assessment on a legal basis, and a liquidator will be expected (as was made plain in Re Chase Corporation (Australia) Equities Ltd) to obtain advice and, as a prudent person would in the conduct of his own affairs, advice from practitioners appropriate to the nature and value of the claims. But in all but the simplest case, and demonstrably in the present case, commercial considerations play a significant part in whether a compromise will be for the benefit of creditors.*"
- 7 It is clear that the court has regard to the commercial judgment of the liquidator and, while it does not rubber stamp whatever is put before it by the liquidator, its attention is really confined to questions such as lack of good faith, error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct.
- 8 In the present case, the compromise has been negotiated with the assistance of both solicitors and counsel. Their advice has been taken on the question whether the compromise should be accepted. In addition, the liquidator is now on notice of practical funding limitations which would mean that the litigation could not in any event be pursued. These matters point strongly towards approval of the compromise. In addition, there is no feature arising from the evidence which would cause the court to withhold its sanction whether by way of approval under s.477(2A) or by way of a s.479(3) direction. In the circumstances, the appropriate outcome is that both forms of relief should be granted.
- 9 I order pursuant to s.477(2A) of the **Corporations Act** that the following be approved, namely, a compromise of the claim by G J Formwork Pty Ltd against Holdmark Developers Pty Ltd constituted by a deed of settlement and release in the form which is at tab 7 of exhibit IW1 to the affidavit of Ivor Worrell sworn 23 February 2006.
- 10 In addition, I make a direction pursuant to s.479(3) of the **Corporations Act** that Ivor Worrell as liquidator of G J Formwork Pty Ltd is justified in entering into the said compromise.
- 11 I order that the costs and expenses of the interlocutory process filed on 23 February 2006 form part of the costs and expenses of the winding up of G J Formwork Pty Ltd.

Mr S.M. Gollidge – Liquidator instructed by Access Business Lawyers - Liquidator