

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
CIVIL DIVISION**

**Misc 7/2017 .**

<b>BETWEEN</b>	<b>APEX AGENGIES LIMITED</b> trading as TOA PETROLEUM a duly incorporated company having its registered office at Rarotonga  <u>1<sup>st</sup> Petitioner</u>
<b>AND</b>	<b>PORTER GROUP HOLDINGS LIMITED</b> trading as TOA GAS a duly incorporated company having its registered office at Rarotonga  <u>2<sup>nd</sup> Petitioner</u>
<b>AND</b>	<b>PACIFIC SCHOONERS LIMITED</b> a duly incorporated company having its registered office at Rarotonga, Cook Islands  <u>Respondent</u>

**Date of hearing:** 4 February 2017 (New Zealand time 11.35am – 1.20pm)

**Counsel:** Mr B Marshall for 1<sup>st</sup> and 2<sup>nd</sup> Petitioners  
Mr W Rasmussen for the Penrhyn community  
Mr D McNair for the captain and one crew member  
Ms M Henry for the Bank of the Cook Islands  
Mr P Dawson by phone from New Zealand on behalf of the Respondent

**Judgment:** 4 February 2017

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**JUDGMENTS OF HUGH WILLIAMS, CJ**

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[1] This is an application brought by the two Petitioners to wind up the Respondent. It was the subject of an expedited hearing - to which further reference will later be made - and has been determined by conference call on the date set out in the intituling.

[2] As a matter of procedure a Mr Dawson, of Nelson, New Zealand, is not an admitted practitioner in the Cook Islands but was heard nonetheless. Should this

matter proceed Mr Dawson may need to arrange admission in the Cook Islands or to brief Rarotonga counsel.

[3] This is a petition brought to wind up the Respondent, Pacific Schooners Ltd., on the basis of an unsatisfied notice from the Petitioners to the Respondent dated 24 November 2016 brought under the Companies Act 1955 (New Zealand) as applied in the Cook Islands by the Companies Act 1970-71.

[4] The notice was a standard form notice issued under s 218 of the Companies Act 1955 asserting that Apex Agencies Limited, trading as TOA Petroleum, was owed \$53,415.42 and Porter Group Holdings Limited, trading as TOA Gas, was owed \$2,056.60 by the Respondent.

[5] After some difficulties in establishing the locality of the Respondent company's registered office the s 218 Notice was served on the registered office. It was not met by Pacific Schooners and was followed in the usual way by a petition to wind up the company issued on 23 January 2017. Accompanying the petition was an application for the matter to be dealt with an expedited hearing over the telephone rather than the petition being called during the sessions of the Court commencing in Rarotonga on 6 March 2017. The result therefore is that, if the expedited hearing proceeds today, that that will accelerate the matter by a little over a month.

[6] The application for the expedited hearing was based on the fact that the cyclone season is now in force in the Cook Islands. The ship "Tiare Taporo", which is essentially Pacific Schooner's sole asset, has been moored for some time in Avatiu Harbour on Rarotonga and there is concern that should a cyclone hit Rarotonga the vessel may be unable to put to sea properly crewed in order to safeguard it and the port facilities against damage or loss.

[7] It must be said that the evidence concerning the vessel's ability to put to sea in the event of a cyclone is hearsay and somewhat speculative and it is also subject to a certain contest. To elaborate on that comment the affidavit of Mr Herman in support of the application for the expedited hearing speaks of conversations which he and another director are said to have had with the former captain of the vessel

and a crew member and a Ports official as to the existence and practicality of the evacuation plan for the vessel in the event of a cyclone. Those assertions are contested by Mr Broadhead, a director of Pacific Schooners, by way of email, not affidavit, with his assertions being supported by emails to him from a Mr Nooroa Tou, the Ports Manager.

[8] Although it is not possible to be precise it does seem at least a reasonable assumption that in the event that a cyclone were to hit Rarotonga in the next little while, - probably about a month while the cyclone season remains on the main island - then it may, if the cyclone gives at least 24 hours' notice, be possible for a skipper to be brought from New Zealand, for some former crew members for the vessel to be recruited and the vessel removed from the harbour in time to avoid damage either to the harbour or to "Tiare Taporo". However the evidence is in a fairly unsatisfactory state in the sense that the assertions in favour are hearsay, the contrary assertions are merely in tabled emails and the correct position from the Port's point of view seems opaque.

[9] Mr Dawson is engaged by Pacific Schooners to refinance the current indebtedness of the company and he submits that the exercise is reasonably far advanced and that there is a reasonable possibility of it being satisfactorily concluded if the expedited hearing does not proceed today and the matter is adjourned to the March sessions of the Court. Against that however, he accepts that the result of the s 218 procedure is that his client is now deemed to be unable to pay the debts incurred by it in the ordinary course of business and is thus deemed to be insolvent. No action has been taken by Pacific Schooners at this stage to contest the petitioner's debts. Indeed Mr Dawson accepts that, apart from the possibility that the vessel may still have about \$30,000 worth of bunkers on board which might be recoverable, Pacific Schooners cannot contest the debts owed.

[10] Of the supporting creditors, Mr Rasmussen acting for the Penrhyn community says that he is in the process of preparing claims on their behalf for freight and proceeds of fish. He has been hampered in his efforts to put the claim together by the difficulties in communications with the Northern Group but expects that the claim might be in the order of \$75,000 to \$100,000.

[11] Mr McNair says that the skipper is owed about \$17,500 and the one crew member for whom Mr McNair currently acts is owed about \$1,500. Mr Dawson's response is that the skipper's claim might be met by a counterclaim for damage caused to the vessel under his captaincy but is unable to give an amount and of course that claim has not yet materialised.

[12] Mr Rasmussen, despite having a claim on behalf of the Penrhyn islanders against Pacific Schooners, opposes the winding up on the basis that the Northern Group needs access to shipping, particularly that of the "Tiare Taporo".

[13] Ms Henry appears for the Bank of the Cook Islands who supports the petition. Her instructions is that the bank is owed about \$200,000 and that the security was in default as at the end of January 2017 for non-payment (other than the interest on the facility which is paid from a separate facility).. Mr Dawson says that the security for the facility is a personal overdraft guaranteed by the directors of the Respondent company.

[14] The central question, bearing on whether the hearing of the petition should be able to proceed today is whether the matter is such that the petition should proceed on 3 February as opposed to be heard in a month's time during the fortnight's session beginning 6 March 2017.

[15] It is accepted that Mr Broadhead has, so far, been hampered in his efforts to organise the Respondent's defence of this proceeding, partly by Mr Broadhead's own ill health and his current presence in New Zealand, and partly because his approaches to a number of local counsel have been declined on the basis of conflicts of interest and the like. That is, of course, unfortunate and Mr Dawson seeks time to instruct local counsel to bring the matters earlier reviewed before the Court.

[16] Against that, however, is the fact that the Petitioners' debts are not opposed and that the Respondent faces the statutory presumption of its inability to pay its debts. To that there is really no effective response and it appears clear that any

ability Pacific Schooners might obtain in the next month or so to meet its debts is conditional on it incurring further debt and paying off its current debts.

[17] A factor to be borne in mind as far as the hearing date for the petition is concerned is the asserted loss of the vessel's service to the Northern Group. However, against that, there have been few recent voyages during the 15 to 18 months or so that the "Tiare Taporo" has been in Cook Islands waters and there have been no voyages in recent times. Further, if the petition successfully proceeds today it would be a matter for the liquidator to decide whether it is economic for the voyages to continue in light of the vessel's capability, its crewing and of course whether the voyages can be profitable.

[18] Another factor to be taken into account is that, in the Cook Islands, the High Court sits for only about five fortnights a year, but it is, of course, incumbent on the Court to provide a service to the commercial community of the Cook Islands. And, in this case, when the issues are rendered down we have a Respondent company that is deemed unable to pay its debts and to be insolvent with creditors with substantial claims made against it and supporting the petition and against that there is no more than the prospect of payment from additional facilities being made in the next 2 or 3 weeks. An additional factor indicating that the petition should proceed today is that debtors, owing substantial unopposed debts, should not be able to continue to trade just because of the Court's intermittent sittings. The view therefore is that there is nothing particularly remarkable about the hearing of the petition proceeding today as opposed to being heard in 2 or 3 weeks' time and the factors reviewed fall surely in favour of declining the application for adjournment and directing that the hearing of the petition proceed today.

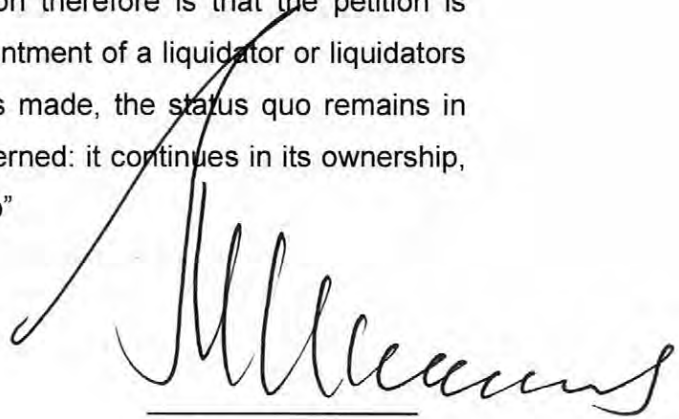
[19] As a second judgment (delivered at 12.58pm NZ time or 1.58pm Cook Islands time). The position has now been reached where, following the delivery of the judgment declining the application to adjourn the hearing, Mr Herman gave evidence on behalf of both Petitioners. He swore to the correctness of the affidavit verifying the petition and gave evidence that neither petitioner has received any payment today from the Respondent in respect of either debt. There was no cross-

examination from other counsel and (at 12.43pm NZ time) Mr Marshall closed the Petitioners' case.

[20] There was then further discussion because the ruling was that a case had been made out for an order to be made winding up the Respondent company but Mr Marshall advised that he had been unable to locate a person or persons to be appointed as liquidator. That meant that the matter could not be left in limbo because of the responsibilities the liquidator would undertake. If an order for winding-up were to be made there would be nobody with responsibility to care for the vessel in the event of a cyclone occurring. That could not be allowed to happen.

[21] Mr Marshall has made enquiries of persons who might be appointed but to date without success and he will continue those enquiries. Once a suitable person or persons has been located he will circulate a memorandum giving that person's name to other counsel and seeking input. At that point a procedure will have to be devised to ensure that the making of any order for the winding up of the Respondent company is made in open Court.

[22] To make matters clear, the formal position therefore is that the petition is adjourned sine die for the identification and appointment of a liquidator or liquidators for the Respondent. So, until an appointment is made, the status quo remains in force as far as the Respondent company is concerned: it continues in its ownership, management and possession of the "Tiare Taporo"

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ