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LIQUIDATORS

Some Polite Observations on the
Commercial Affairs Division of the
Justice Department

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SOME POLITE OBSERVATIONS ON THE COMMERCIAL
AFFAIRS DIVISION OF THE JUSTICE DEPARTMENT

In an interim report presented by the Macarthur Committee to the then Minister of Justice in August 1971 an examination was made of the administration and policing of the Companies Act. The Committee recommended the establishment of an enlarged and strengthened Companies Office divorced from the Lands and Deeds Division, such office to have control of the functions then performed by official assignees and in addition to perform a positive role in the policing of the provisions of the Act.

These proposals were generally welcomed (by myself among others - see (1972) 7 Recent Law 190) and were accepted by the government of the day which approved the establishment within the Justice Department of a Commercial Affairs Division. The Companies Amendment Act 1973 formally charged the Registrar of Companies with responsibility for the administration of the Companies Act. In his report for the year ending 31 March 1974 (page 23) the Secretary of Justice was able to report substantial progress in establishing the new division. It is not too soon, I suggest, to take a look at the division and try and come to a conclusion as to whether or not the experiment proposed by the Macarthur Committee has succeeded.

I propose to consider the operation of the division under three heads; first in relation to registration and the filing of documents generally, secondly the functions of official assignees and thirdly the general supervisory and investigatory functions of the division.

As to registration and filing there must first be acknowledged one success. The effect of the provision of penalties for late filing contained in the 1973 report coupled with the more vigorous enforcement steps taken by the division has been entirely beneficial. Where by statute limitation of liability is conferred in return for certain obligations as to disclosure, no one can seriously quarrel at positive steps being taken to enforce those obligations. In his 1975 report (page 5) the Secretary for Justice describes the effect of the new provisions as "dramatic". This adjective is entirely justified.

But with this exception the service provided in relation to registration and filing is, I regret to say, no better, and in some respects rather worse than under the former regime. The topic is a tedious one, and I will confine myself to citing by way of example two instances only. There was a time when if the exigencies of the case required it one could obtain approval of a company name by reply paid telegram. This is no longer permitted; and while it may be that the now requirement of the completion of the two forms and the payment of a fee in some way adds to the sum of human happiness, it is a little difficult to see just how this can be so.

Secondly, salutary though the crackdown on late filing has undoubtedly been, it is also possible to discern the emergence of pettifogging attitudes. Consider the requirement under S.102 of registration of particulars of a mortgage granted by a company and registered under the Land Transfer Act. It is clear law that failure to register such particulars does not affect the validity of the mortgage. Under S.108 an order can be made by the Supreme Court extending the time for filing. Now no one can quarrel with the refusal of a district registrar to accept for registration out of time without a S.108 order the copy of an instrument, the validity of which is affected by the late filing. Nor in the case of particulars of Land Transfer mortgages can one quarrel with the imposition of a penalty for late filing. But for a district registrar to insist on a S.108 order before accepting for filing particulars of a Land Transfer mortgage is simply absurd. It wastes the time of the Supreme Court. It casts an unnecessary expense on the practitioner whose carelessness has brought about the situation. Silliest of all, it postpones the time when those searching the file of the company in question are made aware of the existence of the charge, and to that extent defeats the whole purpose of the exercise.

Enough of that. A far more serious failure of the division is in relation to the functions of the official assignees. It would be paltering with the truth to describe the administration of bankrupt estates and the winding up of companies of which the official assignee is appointed liquidator as other than disgracefully inadequate.

This worried the Macarthur Committee, which reported the statement of the Secretary for Justice "that lack of skilled staff and an almost

intolerable caseload have resulted in somewhat superficial examinations of the affairs of companies and bankrupts alike. There is little investigation in depth for possible frauds and offences." At that time there were full-time official assignees in Auckland, Hamilton, Wellington and Christchurch, with the position of official assignee in other centres being filled by court registrars. It may be that outside the centres named some improvement has resulted from the concentration of work in the district offices of the Division. But I defy anyone seriously to assert that in Auckland at least there has been any improvement on the superficial examination and the lack of in-depth investigation that existed under the old regime.

This perhaps sounds like an attack on the Auckland officers of the division. It is not meant as such. Undoubtedly the economic miracle has imposed its stresses, and successive annual reports by the Secretary for Justice make clear the difficulties the division has had in attracting sufficient suitably qualified staff to do this work.

To my mind the establishment of an adequately functioning official assignees office is far more important than, for example, soothing the outraged cries of investors whose fingers have been burnt in one or other of the more spectacular company crashes of recent years. The official assignees must be given the staff to enable a proper probing of the affairs of bankrupts and of liquidated companies. The certainty that on bankruptcy or liquidation such a thorough investigation will in every case be carried out would do far more to improve commercial morality in New Zealand than any of the other measures proposed or enacted in recent years. It must be remembered that New Zealand is a country in which small businesses abound. In the circles in which small traders move, the sort of thing that is noted is that following the bankruptcy of Mr Bun the baker, or the liquidation of Bun's Bakeries Limited, Mr Bun seems to suffer no alteration in his life-style, Mrs Bun seems mysteriously to have acquired title to all the available assets, and no one does anything about it. It is futile to have, as we do in the Insolvency Act and the Companies Act, elaborate rules to enable justice to be done in these circumstances if in most cases official assignees cannot or will not set the machinery moving.

I have suggested that some of the trouble may result from the inadequate manning of the division. This is simply an impression from the outside looking in, and the malaise may have other causes. But there seems good reason to suggest that such resources as do exist have not always been wisely deployed. Following the collapse of the Circuit Group the Registrar of Companies caused the officers of the various companies of the group to be prosecuted for a large number of technical offences relating to the omission to file documents in the Companies Office. This sort of straining at gnats is just childish; one would have thought that in all the bankrupt estates and liquidations being administered by official assignees in New Zealand there were matters crying out for attention far more loudly.

The detection of offences is the less important aspect of the matter. What is essential is that proper steps should be taken to recover all monies that should be available for distribution among creditors. Simple justice requires nothing less. Unless the official assignee has the facilities and the will to probe beneath the surface of the situation presented to him by the bankrupt or by the directors of the liquidated company, to turn over a few stones and see what wriggles beneath, then justice is simply not being done to creditors. And the plain fact is that precious little probing is at present done by official assignees.

Summing up then, one is left I fear with this conclusion. The establishment of the Commercial Affairs Division with the one exception of the strikingly increased compliance by companies in relation to their disclosure obligations has not led to any improvement in the service provided to the public in relation to registration and filing, and in some respects the service has worsened. The improvement in the performance of their functions by official assignees, which the Macarthur Committee regarded as so important, has not taken place. In relation to both the filing and official assignee functions there are clear signs of obsession with petty technicalities getting in the way of the performance of obligations of far greater substance. In relation to general matters there has been a deal of sound and fury but little solid achievement. No one can be criticised for trying the experiment of a commercial affairs division. It seemed like a good idea. But there is no use proceeding on a trial and error basis if you are not prepared to recognise

errors when they occur. I submit with confidence that it is now perfectly plain that the establishment of a commercial affairs division was a disastrous mistake.

What is to be done? There is a clear case for dismemberment. The registration and filing function should be restored to the Lands and Deeds Division where it logically belongs. The official assignee function, which is to my mind the most important of the activities of the present division, requires special treatment. It has always seemed to me that the logical solution to the problem is to combine the functions of the official assignee with those of that well-known corporation sole, the Public Trustee. There is a clear analogy between the administration of deceased estates and the winding up of the affairs of bankrupts and liquidated companies. The Public Trustee has an extensive system of offices throughout New Zealand. He does not seem to have the same difficulties in attracting qualified staff as does the present Commercial Affairs Division. He is always advertising for more work. I am aware that the Public Trustee is content with his present empire and has resisted suggestions of this sort in the past. But he must do as he is told.

For the rest, the preparation of new legislation will be more efficiently performed by the Law Reform Division of the department. The Commission now proposed in the transmogrified Securities Advertising Bill will no doubt play the required supervisory role.

Of the functions of the present Commercial Affairs Division this leaves only the function of making speeches about white collar crime. But perhaps if we all try really hard we can manage to get along without those.

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