DIRECTORS' DUTIES TO CREDITORS
Current Law & Proposals for Reform

QUESTIONS AND ANSWERS

Question - Roger Drummond (Bell Gully Buddle Weir, Wellington):

I think it is fair comment to say that we in New Zealand expect some developments in this area of the law in the very near future arising from some fairly spectacular corporate collapses in New Zealand since October 20th. I suspect, however, that one of the reasons why we have not had actions brought to date is that small creditors, in particular, have lacked the resources to bring such actions against directors - where they were clearly in breach of their obligations to creditors where they have incurred liabilities when their companies were insolvent.

I would like to put a question to Bob Baxt as to whether there are any current law reform proposals to get government agencies to assist small creditors in class actions against directors where they are clearly in breach of their obligations to creditors, or if there are no such proposals, what he thinks the likelihood would be of developments in this area in the future.

Response - Robert Baxt:

As far as I am aware the only proposal that has come forward is the one that was leaked to the Financial Review yesterday suggesting that the Australian Law Reform Commission has prepared a paper on class actions. I have not seen that paper and I am not sure whether it will in fact lead to the situation that you deal with in your question. I just would echo Mr Adler's comments about the fact that the legislation is not being administered.

We have s.229, which requires directors to act honestly etc. and we have had about three or four cases on it that have been reported. I get the impression that the NCSC or the Corporate Affairs Commission or whoever, have not been enforcing that particular legislation. It may well be that it is not the sections that are at fault, but the rules that apply in criminal courts that may need to be examined. I do not think that by increasing the number of situations in which directors may be brought to the courts is going to help this group.

The time has come where we must seriously consider whether contingency fees should be introduced into the system to enable

actions to be taken. The Chief Justice of the Supreme Court of Western Australia made that suggestion at last year's Australian Legal Convention. I believe it is a matter that is under study by the Victorian Law Institute. Although I know that there are going to be many who would say this would be terrible, that the floodgates will open etc., I would suggest that the time has come for that particular issue to be studied very carefully before being dismissed out of hand. I certainly would not go about increasing the size of our statutes by three times, four times, six times in the case of our Companies Code, to try to deal with the problems that you have suggested arise as a result of these company crashes.

Comment - Paul Darvell (Rudd Watts & Stone, Auckland):

Once again on our Law Commission's proposal for company law reform. The first point I would make, reinforcing what Professor Baxt said about the Law Commission of New Zealand research, indeed is that to get effective litigation you have effectively got either to have contingency fees or some governmental or quasi-governmental organisation which takes litigation. The smaller shareholder by and large just cannot fund this sort of litigation and it would not work other than with contingency fees or a very active SEC.

Comment - John Walter:

Well all of our speakers at the Banking Law Association Conference of course have devoted valuable time to the subject matter of their addresses but I think in the context of the speakers at this session we have been particularly privileged by the time which has been put in by them and in particular the attention which Mr Adler has given to the particular problems facing directors from a businessman's perspective. I should like you to join with me in thanking each of the speakers.