

Our Ref: 433

## DECISION OF THE SECURITIES COMMISSION IN RESPECT OF AN APPEAL UNDER SECTION 69 SECURITIES ACT 1978 BY POWER NEW ZEALAND LIMITED

### THE HEARING

1. On 28 September 1994 a quorum of the Commission heard an appeal by Power New Zealand Limited ("Power") under section 69 Securities Act 1978 against a decision of the Registrar of Companies ("the Registrar") concerning a prospectus relating to an offer of shares in Power which had been delivered to the Registrar for registration ("the prospectus"). The quorum comprised:

Miss J.M. Potter (Chairperson)  
Mr R.E. Baker  
Mr J.M. Robson  
Mr M.R.H. Webb

2. Section 69(1) of the Securities Act provides that any person who is aggrieved by -
  - (a) The refusal of the Registrar to register any prospectus, deed, memorandum of amendments to a registered prospectus, or instrument amending a deed; or
  - (b) Any other refusal, act, or decision of the Registrar under any provision of the Act (other than section 67 or 67A) or any regulations made under the Act -

may within 21 days after being notified of such refusal, act, or decision, or within such further time as the Commission may allow, appeal against the refusal, act or decision to the Commission.

3. Section 69(2) of the Securities Act provides that, on hearing the appeal, the Commission may confirm the refusal, act, or decision of the Registrar or may give such directions or make such other determination on the matter as it thinks fit; and, subject to section 26 of the Act, the determination of the Commission on the Appeal shall be final and binding on the parties thereto.
4. Section 69(3) provides that on appeal under section 69 the Commission may make an order for the payment by any party to the appeal of costs incurred in respect of the appeal by any other party to the appeal, and in any case the costs so awarded shall be recoverable as a debt due by the party against whom they have been awarded to the party in whose favour they have been awarded.



5. Power was appealing to the Commission under section 69 against a decision of the Registrar to refuse registration of the prospectus. The Registrar had informed Power that in his opinion the prospectus omitted a material particular, namely, that one of Power's directors, Mr Barry Brill, was a former director of Supercool Refrigeration and Engineering (1991) Limited (In Receivership) and (In Liquidation) ("Supercool").
6. Power was represented by Messrs T. Weston and C. Rowling, Solicitors, Buddle Findlay and the Registrar by Mr H. Rennie, Barrister and Mr J. McPherson, Investigating Accountant.
7. The Members of the Commission declared certain interests in relation to Power. Power and the Registrar did not consider these to be an impediment to any of the Members participating in the quorum.
8. The Commission made an order under section 19(5)(a) of the Securities Act that the proceedings be heard in private.
9. Power submitted that, in view of the circumstances of the case, the appeal should be conducted as if it were a hearing *de novo*. The Registrar concurred. The Commission decided that in view of the very wide mandate conferred on it under section 69(2) it was at liberty to proceed on this basis and for this purpose to receive new evidence.
10. The parties presented evidence and made written and oral submissions to the Commission.

## THE ISSUES

11. Section 42(3)(b) of the Securities Act provides that the Registrar shall refuse to register a prospectus if he is of the opinion that the prospectus contains a statement that is false or misleading on a material particular or omits any material particular.
12. The issues for consideration by the Commission were:
  - (a) had the Registrar validly exercised his power to refuse to register the prospectus; and
  - (b) was the Registrar correct in forming the opinion that the fact of Mr Brill's former directorship of Supercool was a "material particular".
13. It was agreed by both parties and the quorum that the words "material particular", as used in the Securities Act, mean a particular which is material to the offer of securities.



**THE COMMISSION'S FINDINGS**

14. The Commission considers that the Registrar was required, before he refused to register the prospectus under section 42(3)(b), to form the opinion that the fact of Mr Brill's former directorship of Supercool was a particular which was material to the offer of securities to the public.
15. The Commission considers that the Registrar did form an opinion in accordance with section 42(3)(b). He had reviewed and considered information as to the specific involvement of Mr Brill in Supercool before proceeding to form the "opinion" within the meaning of section 42(3)(b).
16. In addition to the information which was available to the Registrar, the Commission received further information in respect of Mr Brill's association with Supercool and associated companies.
17. On the basis of the information which was available to the Registrar and the further information which has been provided to the Commission, the Commission has also formed its own opinion on the matter, namely, that the fact of Mr Brill's former directorship of Supercool is a material particular.
18. In forming its opinion, the Commission took into account the following particular matters:
  - (a) Supercool was placed in receivership and in liquidation;
  - (b) The receivership and liquidation of Supercool is a recent event;
  - (c) Supercool was unable to pay its debts;
  - (d) Mr Brill was involved with Supercool as the chairman of directors prior to the receivership and as a substantial shareholder, directly or indirectly, in two companies which were respectively a major creditor and a substantial shareholder of Supercool.
  - (e) The prospectus refers to Mr Brill's involvement in certain other companies in the course of his business career.
19. In the course of the proceedings the Commission observed that the Registrar has adopted a standard practice of deferring registration of a prospectus and seeking further information from the issuer wherever a director, to the knowledge of the Registrar, is a person who has in recent years been a director of a company which had been put into receivership or liquidation because of its inability to pay its debts. The Commission believes this to be a prudent step, not in any way inconsistent with the provisions of the Securities Act, provided the Registrar, before forming an opinion under section 42(3)(b), makes specific enquiry as to the particular circumstances and considers any comments in a proper manner.

20. The Commission, in accordance with the power conferred on it by section 69(2) of the Securities Act, confirms the decision of the Registrar.

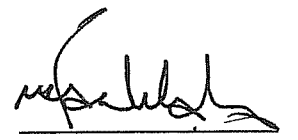
**COSTS**

21. The Commission makes no order as to costs in respect of these proceedings.

**Dated this 3rd day of October 1994.**

**The Common seal of the Securities Commission was hereunto affixed in the presence of:**



  
Member