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NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.421/83

114

BETWEEN PROVINCIAL STEEL MERCHANTS LIMITED

Plaintiff

AND FLETCHER INDUSTRIES LIMITED

Defendant

Hearing 9 February 1984

Counsel J. M. Dawson for Plaintiff
A. J. MacCuish for Defendant

Judgment 23/2/84

JUDGMENT OF ONGLEY J

This is an application for the issue of an interlocutory injunction restraining the filing of a petition by the defendant for the winding-up of the applicant company upon the ground that it is unable to pay its debts. The matter first came before me on 16 November 1983 when a winding-up petition had been filed and was about to be advertised in accordance with the Companies (Winding-up) Rules 1956. The present applicant somewhat hurriedly filed an application for the issue of an injunction restraining the advertising of the petition. I made an interim order to that effect on Counsel's undertaking to complete the filing of a more formal application on the following day. It is that application which is now before the Court. In the meantime the time appointed for the hearing of the winding-up petition has passed and no further step has been taken.

The defendant now applies for an order rescinding the order of 16 November 1983 and has expressed its intention of proceeding to obtain an order for the winding-up of the plaintiff company if and when it becomes at liberty to do so.

The defendant alleges that the plaintiff owes it a total sum of $33,493.57 for the supply of steel. The plaintiff carries on business as a steel merchant supplying manufactured steel to an associated company, Provincial Steel Limited, as well as to other customers. Prior to the incorporation of the plaintiff in September 1981 its associate, Provincial Steel Limited, had dealt directly with the defendant which conducts a steel merchandising business on a large scale. After incorporation the plaintiff obtained steel for supply to Provincial Steel Limited from the same source.

There were two types of steel supply covered by the arrangements between the plaintiff and the defendant. One dealt with what was known as stock steel. That means simply steel supplied from the defendant's existing stocks. It is in the nature of a retail transaction in which the price is substantially higher than the price for what is called indent steel. As the term implies, indent steel is steel supplied in specific quantities and types on forward orders received from a customer. Because it can be manufactured to order with a certain sale in prospect it can be supplied more cheaply than stock steel. Stock steel in this

case was paid for in cash on delivery. Indent steel was paid for on receipt of an invoice sent from the defendant's Auckland office which ordinarily reached the plaintiff before the steel itself arrived.

So far as I have recounted these facts they appear up to this point to be common ground. It is also not disputed that consignments of steel received at the defendant's store in Wellington for supply to the plaintiff were sometimes split into smaller quantities. The reason for that being done is not agreed upon. The plaintiff says that the defendant broke down the consignments in order to obtain steel for supply to its other customers; the defendant says that it kept the steel in its store at the plaintiff's request and delivered it in installments because the plaintiff had inadequate storage facilities of its own. I am unable to resolve that conflict on the evidence before me and I doubt whether in the long run the answer will prove to be critical in the determination of the dispute.

During the year 1982 the plaintiff's payments for indent steel allegedly supplied to it by the defendant fell into arrears. The matter was brought to the attention of Mr P. A. S. Irwin, a director of the plaintiff company, by the defendant's branch manager, Mr Frame, and it appears

that a promise of early payment was made. The defendant alleges that no question of short supply was raised at this time and that Mr Irwin accepted that the payments were in arrears and promised to bring them up to date. The promised payments were not made until December and in the meantime the defendant says that it closed the plaintiff's account for the purchase of stock steel. The plaintiff says that is not so and that it commenced purchasing for cash for reasons of its own. Mr Irwin says that he orally complained about the short supply of indent steel frequently during this period without obtaining any satisfactory response.

The plaintiff contends that its records of deliveries show that all steel paid for has not been delivered and, although it admits that some specific invoices have not been paid, it contends that there is no proof that the steel so invoiced has been delivered. Difficulty in proving delivery is encountered, so the plaintiff says, by reason of the fact that the deliveries of quantities of steel less than a total consignment have not been related to specific invoices. The defendant answers that its cartage records disclose the true position but the plaintiff disputes that.

The plaintiff adopts the stance that if the defendant were to claim by action the amount allegedly owed to it, it would have to assume the burden of proof of delivery of the goods and the defence would be more than

a mere traverse by way of denial of the allegations in the Statement of Claim because it could be shown positively that there is a disparity between the quantities invoiced and the quantities received.

In a further amended Statement of Claim the plaintiff makes allegations of miscellaneous errors in the invoicing of stock steel resulting in a total overcharge of over $20,000.00. No such allegations were made in the earlier pleadings and it seems to be established that the plaintiff raised no dispute about the invoicing of stock steel until November 1983 when the petition for winding-up was about to be issued. There is considerable force in Counsel's comment that the plaintiff's complaint about non-delivery of stock steel appears to have been made for the first time at a very late stage in the dealings between the two companies.

After an interchange of correspondence between solicitors had failed to resolve the dispute the defendant served a notice under S. 218 of the Companies Act 1955 upon the plaintiff dated 10 August 1983. That notice was superceded by two similar notices served on the plaintiff on 13 October 1983. One of those was based upon a claim for $22,553.76 in respect of invoices for stock steel admittedly unpaid; the other upon a claim for $10,939.85 representing a claim for the balance of the unpaid account for the supply

of both stock and indent steel. The subsequent winding-up petition relied upon non-compliance with each notice as a ground for winding-up and the defendant intends to continue to rely upon those notices as the bases of its further proceedings.

In seeking to restrain the defendant from proceeding further with its petition the plaintiff relies upon the well-established principle that where there is a bona fide dispute as to whether a debt exists which is not based on trivial or insubstantial grounds it should be resolved in ordinary litigation and not by invoking the machinery of company law; Re Lympe Investments Limited [1972] 2 All E.R. 385; see also Mann v Goldstein [1968] 2 All E.R. 769, Bateman Television Ltd v Coleridge Finance Co. Ltd [1969] NZLR 794. The defendant in reply submits that the evidence now before the Court on affidavit shows that the plaintiff's repudiation of its claim is not made bona fide but is based upon spurious grounds raised for the purposes of delay so as to avoid the stringency of the winding-up provisions of the Companies Act. I have to acknowledge that the apparent dilatoriness of the plaintiff company in bringing its present contentions about the accounts clearly into issue and what appear to be inconsistencies in its approach to the dispute both before and since the filing of the petition for winding-up leave me less than fully convinced of the merits of its case. At the same time, spurred no doubt by

the urgency of the situation, there is evidence in the documentation of these proceedings which indicates that it has expended considerable effort in making available the information within its possession. Some relevant issues which are raised on the affidavits cannot be resolved in the absence of viva voce evidence. A particularly significant point of conflict, to my mind, relates to the question whether Mr Irwin, as he deposes, persistently brought the claim of short supply to the attention of the defendant. That question cannot be satisfactorily examined on the present state of the evidence. If it were to be decided in favour of the plaintiff a possible adverse inference which might otherwise arise would to some extent at least be refuted.

I am not prepared to say that it is clearly shown that the plaintiff's allegations are not made bona fide. I think there are sufficient matters of substance raised for it to be proper for the dispute to be determined by action. Whether it can be fully considered on the plaintiff's present pleadings is not clear. It may be necessary for the defendant to file a counterclaim. Counsel for the defendant submits that the dispute can be decided upon a point of law on the basis that the property in the goods passed to the plaintiff at no later time than the arrival of the steel at the defendant's Wellington store and with it the risk in the goods. That position in law

is said to be borne out by the express terms of the contract for supply of indent steel which themselves are put forward as alternative grounds supporting the defendant's case. It is submitted that similar conditions govern the contract for the supply of stock steel. It would be premature, in my view, to decide this matter upon those grounds. They may be well founded as legal propositions but I believe that there are issues of fact to be determined upon which their applicability to this case may depend.

If the plaintiff is right in its assertions then it will not owe the defendant anything. Either the defendant's claim will be defeated because it fails to prove delivery of the goods or the plaintiff's present claim may be pleaded as a set-off to any claim brought by the defendant.

The plaintiff has not otherwise been shown to be insolvent and accordingly it is my view that a petition for winding-up should not be presented against it by the defendant unless and until it has established by action that the plaintiff is indebted to it.

The order of 16 November 1983 is discharged. There will be an order that an injunction will issue restraining the defendant from proceeding further with the presentation or advertising of the winding-up petition under the Companies Act 1955 against the plaintiff dated 15 November 1983 or any

petition upon the same grounds pending the further order of the Court. Costs are reserved.

Solicitors:

Luckie Hain Kennard & Sclater, Wellington, for Plaintiff
Buddle Findlay, Wellington, for Defendant