

IN THE MATTER of the Companies
Act 1955

AND

IN THE MATTER of FASHIONELLA
LIMITED a duly incor-
porated company having
its registered office at
89 Buchan Street, Christ-
church and carrying on
business there as a
garment manufacturer

Hearing: In Chambers
11 September, 1984

Counsel: J.F. Burn for Company in support
A.A. Couch for Creditor to oppose

Judgment: 17 OCT 1984

JUDGMENT OF HARDIE BOYS J

This is a motion for an injunction restraining a creditor which has issued a winding-up petition against the applicant company from advertising the petition or further proceeding with it until an action which the company has instituted against the creditor in the High Court at Dunedin has been determined. Following argument on 11 September the matter was adjourned to enable the parties to negotiate but the negotiations being unsuccessful the motion came before me again on 9 October when it was dismissed with an award of costs of \$150 to the petitioning creditor. I indicated that I would give my reasons in writing later.

The petitioning creditor's debt is not disputed. It is in the sum of \$19,309.79 being the cost of cloth supplied during March 1984. In July 1984 recovery of the debt was placed in the hands of a collection agency but it appears that it was not until August 1984 after service of a notice under s 218 of the Companies Act and discussions between the principal of the agency and the principal of the company as to the means by which payment of the debt would be made that the company intimated that it was pursuing a counterclaim. Proceedings in respect to that were issued on 23 August 1984 and they relate to an alleged breach of contract for the supply of cloth early in 1983. The facts relating to that matter are not before me with any clarity but I am prepared to assume in the company's favour that its claim is a genuine and arguable one.

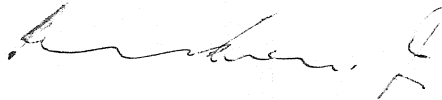
This Court's jurisdiction to intervene by way of injunction to restrain the exercise by a creditor of his statutory right to petition for a winding-up arises where it is shown that that exercise amounts to an abuse of the process of the Court. That will be the case where the purpose of the petition is not so much to obtain a winding-up order as to apply pressure on the company, or where other provisions in the Companies Act provide a more appropriate remedy for the petitioner's complaint, or where for some other reason the petition is one which is bound to fail. A disputed debt is the most typical example for there the very status of the petitioner is in question. But there is a difference between a disputed debt and an alleged counterclaim. I discussed this topic at some length in Re Julius Harper Limited [1983] NZLR

215 and the conclusion which I reached there has recently been affirmed by the Court of Appeal in Anglian Sales Ltd v South Pacific Manufacturing Co Ltd (C.A. 157/83, 3 October 1984).

In that case Woodhouse P and McMullin J in their joint judgment said:

" It follows that where the existence of the debt on which the petition is founded is unchallenged it cannot be said with the same confidence that the proceedings amount to an abuse of process merely by reason of an alleged counterclaim. Where therefore the debtor, while admitting the debt, advances a counter claim in attempted answer to a petition, the latter should normally proceed to determination, with the Court retaining a discretion as to whether it ultimately makes a winding-up order or not."

An example of the kind of case where the petition should not be allowed to proceed is where the debtor company is clearly not insolvent. But in the present case the evidence suggests strongly that it is unless it succeeds on its counterclaim. No grounds were advanced to me which show that the petition is an abuse of process, or that the normal course intimated by the Court of Appeal should not be followed in this case. It was for this reason that the motion was dismissed.



Solicitors:

Brunton Farry Cassidey & Gowing, DUNEDIN, for Company
Weston, Ward & Lascelles, CHRISTCHURCH, for Creditor.