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NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M NO. 495/89

BETWEEN

HEWLETT-PACKARD (NZ) LIMITED

59

Plaintiff

AND

COMPUSALES SOFTWARE AND HARDWARE LIMITED

Defendant

Hearing: 1 February 1990

Counsel: P A Morten for Plaintiff to oppose
M J Hay for Defendant in support

Judgment: 1 February 1990

ORAL JUDGMENT OF MASTER J H WILLIAMS, QC

For several years the parties to this proceeding were in a contractual relationship with each other, Hewlett-Packard acting as vendor of computer hardware and software and Compusales acting as a dealer in those goods but the relationship between the parties has now come to an end and Hewlett-Packard has issued this proceeding seeking an order for the winding up of Compusales. That proceeding was issued on 1 December and Compusales now applies to this Court for an order under R 700K restraining publication of the required advertising of the winding-up proceeding and staying the winding-up proceedings themselves.

It is convenient to commence this judgment by setting out the principles which now govern applications such as this. In the first place, the Court is now required by R 700K(2) to deal with applications such as the one now before it as if it were an application for an interim injunction and that raises the familiar test as set out in American Cyanamid Co v Ethicon Ltd [1979] AC 396, 407-408 per Lord Diplock:

" The Court no doubt, must be satisfied that the claim is not frivolous or vexatious; in other words, there is a serious question to be tried, so unless the material available to the Court at the hearing of the application of interlocutory injunction fails to disclose that the plaintiff has any real prospects of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought."

The overall justice of the case is also required to be considered. (See for instance, Klissers Farmhouse Bakers Limited v Harvest Bakers Limited (No 2) [1985] 2 NZLR 129.)

In the recent decision in the Court of Appeal, Taxi Trucks Limited v Nicholson [1989] 2 NZLR 297, 299 the following passage appears:

" It has long been settled that the Court may under its inherent jurisdiction restrain or stay winding-up proceedings that are an abuse of the Court's process. The abuse consists of using the winding-up procedure, involving as it does the advertising of the petition with the likely consequence of serious commercial damage to the company, as a means of obtaining payment of a genuinely disputed debt. For in general, a winding-up order will not be made where there is genuine dispute. This is not an inflexible rule, as was stated in and illustrated by Bateman Television Ltd v Coleridge Finance Co Ltd [1969] NZLR 794 (CA), [1971] NZLR 929 (PC); and in this respect the law in New Zealand differs somewhat from that in England, which is more unbending. The principles to be applied appear succinctly in this passage of the judgment of this Court in Exchange Finance Co Ltd v Lemmington Holdings Ltd [1984] 2 NZLR 242 at p.245, which follows a reference to the judgments in the Bateman case:

" Obviously the jurisdiction to restrain winding-up proceedings has to be exercised with that settled New Zealand law in mind. We think that the governing consideration can only be whether presenting or proceeding with a petition savours of unfairness or undue pressure. Whether that stigma attaches to a petition must depend on the particular facts. In many cases where there appears to be a genuine and substantial dispute about the present existence of a debt it will be right to grant an injunction. But there will be cases sufficiently out of the ordinary to justify a Judge in holding his hand."

> Rule 700K(1) regulates the procedure for making the application. Subclause (2) directs the Court to deal with the application as if it were an application for an interim injunction, and enable the Court to impose terms on any order it makes. Subclause(3) states that nothing in the Rules limits the inherent jurisdiction of the Court. Counsel were agreed, and we think they were right, that there is nothing in R 700K to require modification of the principle enunciated in Exchange Finance Co Ltd v Lemmington Holdings Ltd. The applicant must show a genuine and substantial dispute as to the existence of the debt, and that it would be unfair - as it usually would be - to allow that dispute to be resolved by the Companies Court rather than by action commenced in the usual way. That assessment must be made on the material before the Court, and not on the hypothesis that some other material, which has not been adduced, might nonetheless be available."

It is to be noted that the matters to be considered and demonstrated by the applicant are conjunctive, that is to say the applicant must show both a substantial dispute as to the existence of the debt - that being the debt on which the proceeding is based - and that it would be unfair to allow the dispute to be resolved in this Court rather than in the usual way by action.

The Court of Appeal in Taxi Trucks went on to make several other helpful comments relating to applications such as this. In the first place, it made it clear that the Court's conclusion on applications such as this is to be reached solely on the evidence before the Court and that it is wrong for a Court at this juncture of a proceeding to express any concluded view on merits (at 301).

Secondly, the Court said (at 301-2):

> " A dispute as to the amount of a debt, is not appropriate for resolution on the hearing of a winding-up application... The issue on such a hearing is different: it is whether the company is insolvent. If it is and a winding-up order is made, the amount properly payable to a creditor is determined in the course of the liquidation."

That last dictum reiterates the point made by Greig J. in Anglian Sales Limited v South Pacific Manufacturing Company Limited [1984] 2 NZLR 249, 254 that:

> " There is a clear distinction between the exercise of the discretion on hearing the petition and the exercise of the inherent discretion to restrain or stay the presentation of or further proceedings on a petition. What the applicant invokes in this case is the latter; to stay proceedings as vexatious or an abuse of the Court's process. That is a general inherent jurisdiction which is exercisable in appropriate cases in any proceedings including a petition for winding-up brought under the Companies Act 1955. It is a jurisdiction which is to be exercised with great circumspection. The test is whether it is impossible for the party concerned, in this case the plaintiff, to succeed in its claim."

It is helpful also, because the argument in this case is based on the claimed existence of set-off, to consider the even more recent decision of the Court of Appeal in Morrison v Speedy Parcels Limited (unreported CA 151/89 judgment 5 December 1989). That was an appeal against the making of an order for stay of a winding-up. A Master ordered the stay but on review, Thorp J. refused the stay and the appeal was brought. In part of Thorp J's judgment (reproduced on p.8 of the Court of Appeal judgment) he said that:

> " A debt may be disputed on grounds of equitable set off because that goes to its existence but short of an attack on the debt which must go somewhat beyond arguable case, the Court will require proof either that the petition or action cannot succeed or of some special circumstance which would make the prosecution of the application abuse of the judicial process."

In quashing the Master's order staying the application the Court of Appeal (at p.18 of its judgment) based its decision in part, on a comment that the Master should have given more weight to the fact that the debts:

> " ...were in themselves not disputed and would prima facie entitle the Appellant to a winding-up order, a right enjoyed by a creditor in the sum of more than $100.00 who has made due and unsatisfied demand."

Three further authorities require to be mentioned.

The first is the decision of the Court of Appeal in Exchange Finance Company Limited v Lemmington Holdings Limited [1984] 2 NZLR 242, 245 where Cooke J. said:

> "...In New Zealand the general rule is that no winding-up order will be made on a petition founded on genuinely disputed debts but that rule is not inflexible as there are cases where the Companies Court in its discretion, can find it appropriate on a winding-up petition to determine a dispute as to the existence of a debt.

In this case, Compusales asserts that it has a claim against Hewlett-Packard which exceeds the amount of the debt owed to Hewlett-Packard. A similar situation was dealt with by Hardie Boys J. In re Julius Harper Limited, ex parte Winkler & Co. (Hong Kong) Limited [1983] NZLR 215, 223 where after what was, with respect, a comprehensive review of authority on the topic, Hardie Boys J. concluded:

> "As the debt on which the petition here is based is not disputed, the petitioner has the locus standi to bring its petition. The counter-claim asserted by the company, even though it be bona fide and based on substantial grounds, is in my opinion no automatic bar to a winding-up order. Thus, I do not think it is an abuse of the process for the petition to be presented or proceeded upon. I do not consider it a proper function of the Court in the exercise of its inherent jurisdiction to embark upon a consideration of matters relevant to the exercise of a discretion - and indeed to exercise a discretion - which is conferred by the Companies Act and properly belongs to the Court when hearing the winding-up petition itself."

That decision was expressly adopted by the Court of Appeal in Anglian Sales Ltd (Supra) at 252, where the decision of the learned President and McMullin J. delivered by the latter held:

> "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 amounted to an abuse of process merely by reason of an alleged counter-claim. Where therefore the debtor, while admitting the debt, advances a counter-claim in an attempt in 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."

I turn then from that consideration of the authorities to the facts of this matter and commence by considering whether or not there is a dispute about the debt on which this proceeding is based. As already noted, Hewlett Packard and Compusales had a trading relationship for several years. The dealership arrangement between them was, it seems, on an annual basis and the contract for the year 28 February 1988 was extended to 28 February 1989 by agreement between the parties.

A contract for the year to 28 February 1990 was prepared and forwarded by Hewlett Packard to Compusales and was signed by Compusales and returned. It has been signed by Hewlett Packard but not returned to Compusales. Hewlett Packard says that it took that stance because it was seeking information from Compusales concerning Compusales's business objectives and strategic direction. The terms of the earlier contract are before the Court.

One of those terms makes it clear that either party has the right to terminate the contract with or without cause on giving 30 days notice. Another of the terms of the arrangement between the parties as alleged by Compusales is that the dealership arrangement was an exclusive arrangement for the sale by Compusales of Hewlett Packard equipment. That allegation is denied by Hewlett Packard in this proceeding and it seems, tentatively, that Hewlett Packard's stance may be supported by the terms of the agreement before the Court but since that is an issue which will require determination in Compusales's own proceedings to which reference will shortly be made, it would not be proper to do more at this stage than note that very tentative view in this judgement.

It is clear that on 1 September 1989, Hewlett Packard gave one month's notice, not 30 days, but nothing hangs on that, to Compusales and advised Compusales that the agreement between

them would be terminated with effect from 1 October 1989. Compusales did not respond to that letter until the period of notice had expired.

On 2 October 1989, it wrote to Hewlett Packard asking for the reasons for termination and setting out in paragraph 2, a number of complaints which it said it had concerning Hewlett Parkard's performance under the contract between them. That passage reads:-

> " We remind you that the nature of our contract with your company was that we, together with other computer retailers, would purchase and sell your equipment on the same terms. There was a clear understanding that your DeskJet and LaserJet Printers were to be the exclusive models of their types sold by our company. That is an arrangement we have adhered to. It was further an essential element of that contract that your company was not to compete with Compusales or other resellers for the same market. In breach of this you have sold direct. Further in accordance with our marketing of your Vectra range of products over a number of years and after reaching agreement with members of your staff we have declined to market directly competitive products. Further we have reason to believe that you have favoured a reseller over our company and others to exploit a commercial connection. Further you have refused to sell us parts for your equipment which would allow us to provide an adequate level of service to our customers. Further you have supplied us goods which were not fit for the purpose for which they were intended and in some cases you have refused to accept the return of this equipment, and in all cases you hae declined to compensate Compusales for their efforts".

The letter goes on to claim that Hewlett Packard's unilateral cancellation of the contract was unjustified and concluded:

> " In the meantime, any sums claimed by you, as owing by this company, are set off against those claims which we believe will equal or exceed any sum which may be due. Therefore no debt to your company is acknowledged."

There then ensued a series of letters between the parties and between the parties' solicitors. Those letters include a response by Hewlett Packard to Compusales complaint and a demand for payment of the overdue portion of Compusales

accounts with Hewlett Packard. Both those matters are in letters dated 5 October.

In the correspondence between the solicitors, there were a number of requests from Hewlett Packard's solicitors for details of complaints made by Compusales but particularised claims appear never to have been furnished.

The matter therefore, comes down to this. As at 30 September 1989, according to a statement before the Court, Compusales owed Hewlett Packard $66,815.06. All but about $300.00 of that sum related to sales by Hewlett Packard to Compusales in July, August and September 1989. I did not understand it to be contended by Compusales, that any, or at least any large part, of the debits incurred during those three months, were disputed. Certainly there seems nothing to suggest that any material before the Court, even if wholly construed in Compusales' favour, could possibly reduce the amount owed by Compusales to Hewlett Packard to anything near the threshold figure of $100.00 appearing in the Companies Act 1955 S 218A and never increased in the 35 years since that statute was enacted. So that on the face of it, virtually the whole of the debt on which this proceeding is based, is undisputed. What then is the evidence adduced by Compusales and on which it relies for the order which it now seeks?

Compusales has issued its own proceedings out of this Court against Hewlett Packard. Those proceedings have been served but no further action taken in relation to them. It seems that Hewlett Packard intends to apply either for further particulars of this statement of claim or for an order to strike out the same on the basis that no cause of action is disclosed. Again, given that those matters will require consideration when those applications come before the Court, it would be improper to express any comment on the draftsmanship of the Compusales proceeding but the document is instructive in that it collects the various disputes on which Compusales says it is entitled to rely in this matter.

The first two causes of action relate to the supply of computerware to Mitsubishi Motors New Zealand Limited. That matter was also referred to in letters written by Compusales to Hewlett Packard on 19 May and 28 August 1989 and complaints were made there about Hewlett Packard's performance and products but the damage sought in relation to those causes of action in the statement of claim are $8,000.00, which appears to be the cost of the material supplied by Hewlett Packard, a total of $15,000.00, for what is described as the costs of steps and labour taken in the matter, and $100,000.00 general damages for alleged loss of goodwill.

Setting the question of general damages aside for the moment - because of course they must be imponderable at this stage of the proceedings - the dispute in relation to the Mitsubishi Motors matter therefore totals $23,000.00.

The third cause of action again relates to the supply of some computerware which is claimed did not accord with its representations made. The damages sought in that case are $5,100.00 for the amount paid by Compusales to Hewlett Packard, $5,000.00 for labour and $10,000.00 general damages for loss of goodwill. Again setting the question of general damages to one side, the total claim is $10,100.00.

Pursuant to the fifth cause of action, which appears to be based on the same factual allegations, the claim totals $33,100.00. The only other particularised claim in Compusales proceeding appears in the 11th and 12th causes of action where $27,000.00 is claimed for loss of maintenance business in respect of a particular purchaser and loss of profit. In all the other causes of action, there are unspecified claims for damage or claims for general damages for loss of goodwill or general damages for other matters in sums of $200,000.00. It is also noteworthy that of the causes of action, the only ones it appears are raised by Compusales' letter of 2 October, are for the products supplied to Mitsubishi Motors and the

computerware appearing in the third cause of action where the amounts claimed are as previously set out. On that review, one can only conclude that not only is most if not all of the debts on which the proceedings are based not disputed but that it may be unlikely that, even if Compusales were wholly successful in its proceedings against Hewlett Packard other than in respect of general damages, the amount for which Compusales would ultimately obtain judgment in its proceeding would exceed the amount which it owes Hewlett Packard.

Further, it must be doubted that Compusales claim against Hewlett Packard can, as a matter of law, amount to an equitable set-off against Hewlett Packard's claim against it. As recently found by the Court of Appeal in Grant v NZMC Limited [1989] 1 NZLR 8 at 12-13:

> " The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract."

Certainly it does not seem that Compusales claim calls Hewlett Packard's claim into question nor does it impeach Hewlett Packard's demand.

In addition, it is difficult to see that the two are in effect interdependent since, of course, there is nothing to prevent Compusales continuing with its claim against Hewlett Packard quite independently of payment of the debt on which this proceeding is based.

The Court therefore holds, that Compusales has not demonstrated a genuine and substantial dispute as to the existence of the debt which founds this proceeding.

Turning then to the question of fairness or unfairness or whether this proceeding savours of undue pressure, the Court concludes that there is nothing unfair and no evidence demonstrating undue pressure on the matters currently before it. There are a number of reasons for that conclusion.

In the first case, as just noted, there is nothing to prevent Compusales independent claim from continuing and, if it is successful in its claim, nothing to suggest that Hewlett Packard would be unable to meet any judgment given against it.

Secondly, there is the question of the manner in which the dispute concerning Hewlett Packard's discharge of its obligations under the contract was raised. It seems reasonably clear that the business relationship between these parties has not been an easy one and that there were differences between them for some period which antedated the notice of 1 September but there is no evidence before the Court of any detail as to those disputes, certainly no evidence as to any detail concerning the monetary aspect of the parties relationship other than the two letters referred to relating to the Mitsubishi Motors matters written in May and August 1989. So that the only evidence of any broad detail as to any other disputes starts with Compusales' letter of 2 October after the notice of termination had expired. That letter itself was relatively undetailed and over the following weeks a number of requests for specific details were not met so that, although Compusales has now issued its own proceeding - and a number of the matters in the statement of claim are mentioned for the first time in that document - as far as the other evidence before the Court is concerned, the genuineness of the complaints may perhaps be doubted. But again, in accordance with the authorities cited, it would be improper to go beyond that.

The third matter is the question of motive. It was submitted by Compusales that these proceedings are an abuse of the process of the Court or are a retaliatory action for Compusales

dispute or for its reference of certain aspects of the relationship between the parties to the Commerce Commission and its threat to make disclosure to a comparable American body. There seems nothing in that. Certainly the correspondence between the parties and the solicitors generate a deal of heat but there is nothing to suggest that Hewlett Packard is not owed all or virtually all the sum demanded and whatever may have been the reason for the partaking of the actions they have, it nevertheless remains the case that the debt is owing.

The next matter raises Compusales ability to pay and its general solvency. Mr Farmer, one of Compusales directors, says bluntly:-

> " The defendant company is not unable to pay its debts. It can and does pay all its debts. There are no other grounds for ordering that the Defendant Company be wound up. The Plaintiff's claim is not a debt of the Defendant company."

But the only financial data which he adduces in support of that statement is that Compusales current annual turnover is $2.4 million and that it has a paid-up capital of $335,000.00. Even those statements are unsupported by any financial records. It may well be a deliberate omission on Mr Farmer's part that he does not refer to profitability. Against that, the evidence from Hewlett Packard is that it has had difficulty in collecting payment for its accounts to Compusales over quite a lengthy period. Certainly, its Credit Controller says that from perhaps October 1987 onwards Compusales has failed to meet all its accounts on due date and she gives evidence of a number of conversations which she had in June, August and September 1989 with a woman who Mr Farmer says is the company secretary of Compusales relating to the unpaid accounts.

In particular, Ms Lentjes says that the company secretary said on 11 September that they will "not be able to pay anything for

the next week" and on 25 September 1989 she was told that we would "definitely not be paid for they (the Defendant) had no funds." The Credit Controller said it was not until 29 September 1989 when again she telephoned the Company Secretary, that she was told for the first time that there were alleged disputes in relation to Hewlett Packard's equipment.

Mr Farmer in reply, said that he did not authorise the Company Secretary to make those statements and that he does not believe that the statements were made. But no evidence is adduced by Compusales from the Company Secretary denying what Ms Lentjes said. Mr Farmer's assertion therefore that Compusales is able to pay and does pay all its debts needs to be seen in the light of that evidence. Compusales is so sparing of detail as to its financial position that one can only conclude that it may in fact, as well as deemed in law, be unable to pay its debts.

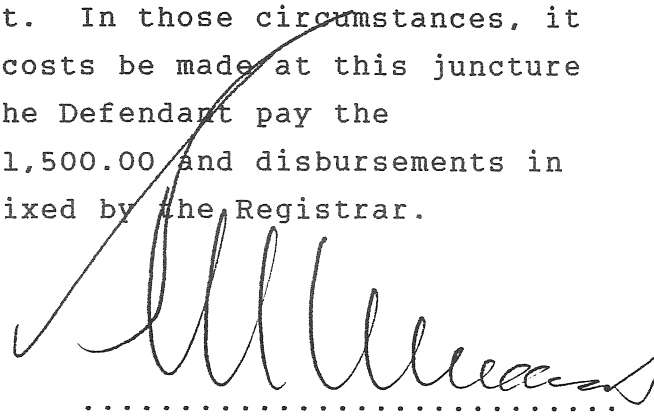
Gathering all those matters together, the Court concludes that Compusales has failed to demonstrate that it would be unfair to allow this proceeding to continue.

For all those reasons therefore, the application for an order restraining advertising and for staying of the winding-up proceedings is dismissed.

I record that the Counsel for Hewlett Packard has offered, on behalf of his client, not to embark immediately upon advertising the winding-up proceedings in order to give the parties an opportunity to discuss the matter or for Compusales to meet the debt as it alleges it can. That is a proper concession to make and a proper stance for Hewlett Packard to take. The Court cannot make an order to that effect but encourages the parties in any endeavours they may make to settle the matter.

Hewlett Packard applies for costs. It is appropriate that an order for costs be made at this stage, particularly if there is at least a chance that the matter will go no further.

This application has required an appearance on 20 December, at least two brief appearances early this week and the argument on this matter, which has occupied approximately 2 1/2 hours including the delivery of judgment. In those circumstances, it is appropriate that an order for costs be made at this juncture and there will be an order that the Defendant pay the Plaintiff's costs in the sum of $1,500.00 and disbursements in relation to this application as fixed by the Registrar.



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Master J H Williams, QC

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