

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

10/5

M.675/92

Under the Companies Act 1955

**NOT
RECOMMENDED**

99b

BETWEEN

ELIOT-COTTON ASSOCIATES
of level 7, SIL House, 44-52
Wellesley Street, Auckland
suing as a firm, Chartered
Accountants

Plaintiff

AND

CASE WESTON MORGAN CO.
LIMITED a duly incorporated
company having its registered
office at level 27, BNZ Tower,
125 Queen Street, Auckland
and carrying on business as
investment bankers

Defendant

Hearing: 15 May 1992

Counsel: P. N. Collins for Defendant/Applicant
M. A. Tapsall for Plaintiff/Respondent

Judgment: 8 June 1992

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Introduction

The plaintiff has instituted a proceeding to wind up the defendant. The defendant has applied for an order restraining the plaintiff from taking further steps in the proceeding, including advertising.

The plaintiffs are chartered accountants. The defendants are investment bankers. The plaintiffs seek to wind up the defendant for non payment of professional fees for work allegedly done by the plaintiff for the defendant between October 1990 and February 1991. The defendants deny that the work was done at their request. The amount involved is apparently \$12,247.88.

Principles applicable to determination of applications for stay of winding up proceedings

The applicable principles are as follows:

- (a) In considering the defendant's application for a stay the question is whether or not the use of the winding up proceeding by the Plaintiff savours of unfairness or undue pressure : *Exchange Finance Co.Limited v Lemmington Holdings Ltd* [1984] 2 NZLR 243 (C.A.) at 245/12-23; *Taxi Trucks Limited v Nicholson* [1989] 2 NZLR 297 (C.A.) at 299/16-49.
- (b) Where an application for a stay is based on the existence of a bona fide dispute over the debt relied on by the creditor and the parties have had an opportunity to file full affidavits the debtor company must establish a *prima facie* case of the existence of a genuine dispute, on substantial grounds, as to the present existence of a debt to the defendant sufficient to found a winding up petition: *Pink Pages Publications Limited v Team Communications Limited* [1986] 2 NZLR 704 at 711/32-35; *Nemisis Holdings Limited v North Harbour Industrial Holdings Limited* (1989) 1 PRNZ 379 at 385.
- (c) In determining whether the defendant has established a strong *prima facie* case, evidence which is inconsistent with undisputed contemporary documents may be rejected: *Eng Mee Yong v*

Letchumanan [1980] A.C. 331 (P.C.) at 341; [1979] 3 WLR 373 at 381.

- (d) The relevance of solvency to the exercise of the Court's discretion does not appear to be clearly stated in the decisions. Given that the effect of neglect to comply with a section 218 notice is that the debtor company is deemed to be insolvent, it appears to me that the proper approach is that the solvency of a debtor company cannot make unfair and oppressive an application to wind up the company which is not otherwise unfair and oppressive. I find support for this view in the judgment of Hardie Boys, J. in *Re Rosbro Holdings Limited* (1987) 3 NZCLC 96-163.

The Undisputed Facts

The circumstances giving rise to the proceeding are as follows:

- (a) In August 1990 the defendant took over McKeevers Transport Ltd ("McKeevers"). The defendant's team working on McKeevers affairs involved or included:

- (i) Mr G. B. Wilding, a director of the defendant who became a director of McKeevers and had what he described as "supervisory responsibility for the management of [McKeevers]";
- (ii) Mr G. Leadley, an employee of the defendant, who was seconded to McKeevers as company secretary and financial controller.

Mr Leadley worked with the general manager of McKeevers, Mr G. R. McCarten.

- (b) In the course of his duties Mr Leadley arranged for the installation of a new computer system. On the evidence of Mr Wilding and Mr McCarten

this was in December 1990. Difficulties were experienced with the new system.

(c) Mr Leadley engaged Mr P. E. Eliot-Cotton, one of the principals of the plaintiff firm.

The Disputed Facts

There is a conflict of evidence as to the purpose for which, the stage at which and the terms on which Mr Eliot-Cotton was engaged by Mr Leadley:

(a) Purpose:

Mr Wilding and Mr McCarten say that Mr Eliot-Cotton was involved in giving advice regarding the difficulties being experienced with the new computer system. Mr Leadley and Mr Eliot-Cotton say that Mr Eliot-Cotton was engaged to give general accounting advice and assistance.

(b) Date:

Mr McCarten dates the installation of the new computer system in December 1990. Both he and Mr Wilding, as already stated, relate Mr Eliot-Cotton's involvement to the difficulties experienced with the new system. He must, on their version, have commenced work in about December 1990.

(c) Terms:

Mr Wilding and Mr McCarten say that they understood Mr Eliot-Cotton provided assistance to Mr Leadley as a friend.

Mr Wilding states that the engagement of Mr Eliot-Cotton would have required his approval and that this was not sought by, nor given to, Mr Leadley.

Mr Wilding says that Mr Leadley did not have authority to engage Mr Eliot-Cotton on behalf of the defendant or any of its related companies. His evidence on this point is contained in paragraph 7 of his affidavit and reads as follows:

"... As to any alleged contract entered into between Mr leadley and Mr Eliot-Cotton, I emphasise that Mr Leadley was at all times an employee of the defendant only. In his affidavit Mr Leadley has said that he was an executive/director of the defendant. Although his job title was "executive/director" Mr Leadley has never been a director of Case Weston Morgan & Company Limited or any of its related companies. He was a salaried employee only and had no authority to contract with outside experts or consultants."

I will return to the question of Mr Leadley's description again later.

Mr Wilding states that Mr Leadley ceased to be involved in McKeevers in early 1991. At that stage, according to Mr Wilding, the question of Mr Eliot-Cotton acting as financial advisor/company accountant to McKeevers came up. In paragraph 6 of his affidavit in support of the application for a stay, Mr Wilding says:

"At that time Mr Eliot-Cotton expressed an interest in being formally engaged as financial advisor/company accountant to McKeevers and I asked him to provide me with a report on his proposals for the financial management of McKeevers. I told him that the decision whether or not to employ him would be based on his report and that I was seeking a similar submission from one other person. Again, no terms or conditions were discussed and I made it clear to Mr Eliot-Cotton that no decision had been made to appoint him or his firm as financial advisor to McKeevers. He nevertheless produced a report dated 22 January 1991, a copy of which is annexed marked "A". Shortly after receiving the report I informed Mr Eliot-Cotton that he would not be engaged on behalf of McKeevers. That was the last time I spoke to him."

I will return to the report later in this judgment.

In paragraph 11 of his affidavit in opposition Mr Eliot-Cotton states:

"Mr Wilding was aware of my presence at McKeevers and of the work that I was doing. I spoke to Mr Wilding about McKeevers on several occasions. I attended at a McKeevers Directors' Meeting at the directors' boardroom where the financial reports that I had prepared were tabled. On at least three occasions I spoke directly with Mr Wilding concerning McKeevers operations, taking his instructions and giving advice on same. I was provided with full information, as requested, of McKeevers financial position."

Mr Leadley's evidence is contained in a short affidavit, the relevant paragraphs of which are as follows:

"1. _____ I was employed until about the 27th day of March 1991 by Case Weston Morgan & Co. Limited ("Case") as an Executive Director.

3. _____ BY virtue of my employment with Case, I was authorised to instruct chartered accountants to undertake work for Case and for Case's clients.

4. _____ ONE of the clients of Case was McKeevers Transport Limited ("McKeevers"). I was appointed the company secretary and Financial Controller of McKeevers on or about 6 August 1990.

5. _____ IN my capacity as Executive/Director for Case I was authorised to contract with Eliot-Cotton Associates, Chartered Accountants for the provision of accounting services to McKeevers and Case.

6. _____ AT all times, Eliot-Cotton Associates were reporting to Case in respect of McKeevers accounts and their own accounts.

7. *THE work undertaken by Eliot-Cotton Associates on behalf of McKeevers and of Case was authorised by me and payable by Case on being invoiced."*

Mr Eliot-Cotton's evidence is that Mr Leadley was held out by the defendant as an "Executive Director" and that the assistance given by Mr Eliot-Cotton was given purely on a business basis. He refers to Mr Leadley's card.

The Documentary Evidence

There is important documentary evidence in this case:

(a) Mr Leadley's Card:

Mr Leadley's card, which according to Mr Eliot-Cotton was displayed in the defendant's offices throughout the period of Mr Leadley's employment by them, describes him as, "Geoffrey J. Leadley, Executive Director". There is no "/" between the words Executive and Director.

(b) The invoices submitted by the plaintiffs

Six invoices were submitted by the plaintiff, according to Mr Eliot-Cotton. The details of these invoices are as follows:

<u>Date</u>	<u>Company</u>	<u>Period</u>	<u>Details</u>
30.11.90	Action Holding Ltd	10.90	Professional services - \$562.50
30.11.90	McKeevers	10-11.90	Professional services - \$3,937.50
31.5.91	McKeevers	11.90-31.12.91	Professional services including assistance to reconcile ledgers and complete financial statements. Reconstructing records, reconciling journals and subsidiary ledgers, recreating company's ledger and processing transactions as matter of urgency - \$2,412.00
31.5.91	McKeevers	12.90 (from 19.12.90)	Reconciling debtors ledger to general ledger from incomplete records, attendances at meetings, reporting - \$604.13
31.5.91	McKeevers	1.91	Attendances at meetings including meetings with "your computer consultants to discuss your company's ledger requirements", attendance at directors' meeting.

preparation and completion of fringe benefit tax return, discussions with company's directors concerning company's management systems, report systems, cost cutting etc. - \$2,540.25

31.5.91 McKeevers 2.91

Updating professional statements, reconciling subsidiary ledgers from incomplete and missing records, continuing to investigate computer systems, reporting to you - \$2,191.05

The accounts were addressed to Mr G. Leadley, Case Weston Morgan & Co. Limited in the case of the two dated 30.11.90 and to Case Weston Morgan & Co. in the case of the first invoice dated 31.5.91. The other invoices were addressed to McKeevers Transport, C/o Case, Weston, Morgan & Co.

The invoices show the provision of a wide range of accounting services, not just advice on a computer system.

(c) Correspondence between Mr Eliot-Cotton and Mr Leadley in November and December 1990:

Mr Eliot-Cotton has exhibited to his affidavit three letters, dated 19 November 1990, 2 December 1990 and 5 December 1990. These also refer to a wide variety of accounting issues and are not limited to questions of computer systems. For example the letter of 19 November 1990, in addition to dealing with Computer Systems and Back Up, deals with Operating Systems, Processing, Filing, Reconciliations, General Journal, Debtors, Wages, Asset Register, Purchase of the Business, Share Capital.

(d) Mr Eliot-Cotton's Report dated 22 January 1991:

Mr Wilding, as I have already said, has exhibited to his affidavit a report received by him from Mr Eliot-Cotton dated 22 January 1991. Mr Wilding says this was Mr Eliot-Cotton's submission in support of his application for the job of "Financial Advisor/Company Accountant". The

report is not in the form of a submission and indicates that a great deal of discussion and investigation had already been carried out by Mr Eliot-Cotton.

(e) Mr McCarten's letter to Mr Eliot-Cotton of 12 June 1991

On receiving Mr Eliot-Cotton's accounts of 31 May 1991 Mr McCarten wrote the following letter to Mr Eliot-Cotton:

"Dear Mr Eliot-Cotton

RE; Your Accounts of 31 May 1991

Thank you for tendering accounts for work done late last year and early this year although I query the delay. However McKeevers Transport Limited's contract for management advice and assistance was with Case Weston Morgan and Company Limited not Eliot-Cotton Associates.

Therefore I suggest you readdress your invoices for any work you may have done on behalf of Case Weston Morgan to that company.

Yours faithfully

G McCarten"

It appears from this letter that at that stage at least Mr McCarten did not think that the work had been done purely on the basis of friendship.

My Findings

I am satisfied, on the basis of the contemporary documents, that the defendant cannot establish a *prima facie* case of the existence of a *bona fide* dispute on substantial grounds. The documents are, in my view, inconsistent with the defendant's story. The use of the winding up procedure by the plaintiff is therefore not an abuse of the process of the

Court. Consistently with the principles stated by me earlier in this judgment, I find that the fact that the defendant is solvent does not of itself make the use of the winding up procedure by the plaintiff an abuse of the process of the Court.

Orders

The defendant's application for a stay of the winding up proceeding brought by the plaintiff is refused.

The defendant is ordered to pay the plaintiff costs of \$1,250 plus disbursements to be fixed.


Master T. Kennedy Grant

Solicitors: Glaister Ennor, Auckland for Defendant/Applicant
 Jamieson Castles Walker, Auckland for Plaintiff/Respondent