IN THE HIGH COURT OF NEW ZEALAND 15/5
HAMILTON REGISTRY

M No. 29/92

657

UNDER the Companies Act 1955

BETWEEN FIELDSTAR MARKETING LIMITED

Plaintiff

A N D UNI-LINK COMMUNICATION SYSTEMS LIMITED

Defendant

Hearing: 15 April 1992

Counsel: Miss J.M. Screech for plaintiff
R.E. Lawn for defendant

Judgment: 15 April 1992

JUDGMENT OF DOOGUE J

The defendant applies first for an order that the plaintiff be prohibited from advertising the particulars of the application to wind up the defendant company until further order of this Court and secondly that the plaintiff's winding up proceedings be struck out.

The background to the applications is that the plaintiff has applied to the Court for an order that the defendant be wound up under the Companies Act 1955 for failure to pay a debt alleged to be owing by the defendant to the plaintiff totalling $1,929.81. The application for winding up is based on a notice of demand under s. 218 of the Act, served on 12 December 1991, to which there was no response by the defendant.

The application for winding up was commenced on 14 February 1992. On 17 February 1992 the present application was filed. On 21 February 1992 the present application came before this Court, when the plaintiff undertook not to advertise before 28 February 1992 and an order was made as to the filing of affidavits. At the present time there are before the Court affidavits from the defendant in support of its application and from the plaintiff in opposition to the application. There are no answering affidavits in reply by the defendant to the plaintiff's affidavits.

As to the first part of the application the parties are agreed that the relevant rule is R 700K of the High Court Rules, which enables the Court to restrain publication of the advertising required in respect of an application for the winding up of a company as if it were an applicatIon for an interim injunction. The parties are also agreed that the principles applicable to the application are those determined in such cases as Bateman Television Ltd (in liquidation) & Anor v Coleridge Finance Company Ltd [1971] NZLR 929, Anglian Sales Ltd v South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 at 251, Provincial Steel Merchants Ltd v Fletcher Industries Ltd (1984) 2 NZCLC 99,081 at 99,082. The basic rule is that advertising will be restrained if the Court is satisfied that there is a bona fide dispute based on substantial grounds that a sum of money is owing. Reference was also made to the supplementary rule that there are cases where the Court in its discretion can

find it appropriate on a winding up petition to determine a dispute as to the existence of a debt: Bateman (supra), Exchange Finance Co Ltd v Lemmington Holdings Ltd [1984] 2 NZLR 242. There was agreement that the governing principle was one of fairness. An order restraining publication will generally be made where the Court is satisfied that to allow the matter to proceed would constitute an abuse of the process of the Court. The main consideration is whether proceeding with the matter will result in undue pressure or unfairness: Exchange Finance Co Ltd (supra).

For the defendant it is submitted that there is a bona fide dispute as to the indebtedness of the defendant to the plaintiff based on substantial grounds that a sum of money is owing. For the plaintiff it is submitted that that is not the case and that further there is no unfairness or undue pressure in the winding up proceedings, which should accordingly be allowed to proceed.

Both the plaintiff and defendant companies are involved in the supply of telephone communication and related equipment. During 1990 and 1991 there was mutual trading between them. Invoices were sent for goods supplied. From time to time journal entries were completed in the accounts of both companies to clear amounts owing to and by each. In September 1991 the companies ceased to trade with each other. At that time the plaintiff alleged that certain sums were due and owing to it by the defendant company, as was borne out by

the defendant's own statements faxed to the plaintiff on 5 September 1991. It served a s. 218 notice upon the defendant company. It realised the amount stated in the first s. 218 notice was incorrect. It then issued a subsequent notice, which was misdated; so it then issued the third and final notice upon which it now relies. That notice was in the sum already stated of $1,929.81. That was the difference between the amount which the plaintiff recognises it owed to the defendant of $10,085.95 and the amount which it believed the defendant owed to the plaintiff of $12,015.78. Subsequently, upon receiving the defendant's affidavit in these proceedings, it has re-calculated the amounts owing upon the basis of the defendant's own documentation and finds that the amount in fact owing to it is greater than the amount stated but takes no issue for present purposes with the amount previously relied upon by it.

The defendant in support of its application relies upon various matters raised in an affidavit by an accountant for the defendant.

The first matter raised by the accountant is that there is an error in the arithmetic in a statement from the plaintiff. The nature of the error is not detailed. The plaintiff's affidavit in reply details the invoices and credit notes which go to make up the figure in the particular statement and attaches an adding machine summation of the figures which shows no error in the addition in the statement of $12,015.78.

Secondly, the accountant disputes a journal entry variously entered on 26 and 28 June 1991, which is shown in the defendant's statements faxed to the plaintiff on 5 September 1991 in the sum of $8,163.06. The plaintiff company had in fact worked upon a greater figure of $9,764.85. That error worked to the benefit of the defendant. The defendant, however, puts before the Court statements from which it says the sum is $13,640.50. The plaintiff says that it has never seen those statements before and puts evidence before the Court which indicates that they are in conflict with the defendant's own records at the time that the earlier statements were prepared by the defendant and faxed to the plaintiff. The defendant has not sought to dispute the plaintiff's replies in respect of this item and the plaintiff's evidence must be preferred. On the defendant's own documentation which it forwarded to the plaintiff the correct figure is $8,163.06 rather than the higher figure which the plaintiff adopted to its own disadvantage.

The third matter raised relies upon the debtor and creditor statements attached to the accountant's affidavit which I have already adverted to. Those statements are in conflict with the statements faxed to the plaintiff on 5 September 1991 and are also in conflict with the additional evidence put before the Court on behalf of the plaintiff as to the defendant's own records at that time. The principal difference relates to the journal ledger entry that I have already traversed. A further difference relates to the omission

of a particular invoice, 1247, from the plaintiff to the defendant for the sum of $1,643.93. No explanation has been given by the defendant as to why that invoice should have been omitted, nor has any affidavit in reply to the plaintiff's explanation in respect of that invoice been filed. I accordingly prefer the plaintiff's evidence in respect of both the creditor and debtor statements of the defendant generally and in respect of invoice 1247 as well as the journal entry already traversed.

A further alleged dispute relates to an invoice, 10855, from the defendant company to the plaintiff company, which relates to the supply of goods by the defendant to the plaintiff which were then sold by the plaintiff to a third party. At an early time the suggestion was made that the defendant should invoice the third party direct and give the plaintiff a credit. The plaintiff's evidence is that that did not occur and that the amount of the invoice appears in all the calculations made by the defendant and the plaintiff as to the amounts owing by the defendant to the plaintiff, and the plaintiff accepts that it is liable to the defendant for the amount of that invoice. Once again there is no affidavit in reply by the defendant on this item. There is no reason for me to reject the evidence of the plaintiff, which I again prefer.

The last item of this kind in alleged dispute relates to an invoice 10877, where again the plaintiff has accepted that the amount of that invoice of $4,255.90 is owing by it to the defendant and has allowed for it in

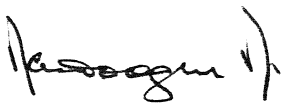
its calculations of the amount owing to the defendant, that amount also appearing in the statements of the defendant's fax of 5 September 1991 relied upon by the plaintiff. Once again there is no affidavit in reply in respect of this matter. The plaintiff's explanation is credible and I accept it.

The consequence is that upon the material before the Court the defendant does not make out that there is any bona fide dispute based on substantial grounds when each of the items upon which it relies has been answered by the plaintiff in reliance upon the defendant's own documentation or by other answer clearly substantiated by the documentary evidence before the Court. Even if I were to take the view urged upon me by the defendant that the affidavits show a difference between the parties which cannot be determined in these proceedings as they involve questions of credibility, I would still be of the view that fairness demands that the winding up application be allowed to proceed in the present case where the undisputed material before the Court indicates that there is evidence of indebtedness by the defendant to the plaintiff in an amount in excess of that raised in the s. 218 notice.

Mr Lawn for the defendant submitted that the issue of three separate s. 218 notices was oppressive in the context of the dispute with no prior correspondence. The notices were issued by the plaintiff and the explanation for there being three notices has already been traversed. Upon the documentation before the Court there is nothing

unfair or savouring of undue pressure in what has occurred in the present case, given the defendant's own documentation before the Court and the total lack of any explanation by the defendant as to why it is now putting before the Court other documentation inconsistent with the documentation forwarded by it to the plaintiff.

The result will be that the application for orders prohibiting the advertising of the particulars of the application to wind up the defendant company and to strike out the plaintiff's proceedings will be dismissed. The plaintiff is entitled to its costs upon this application, which, having regard to this being the fourth appearance, together with other matters relating to it, I fix in the sum of $1,200.00 together with any reasonable disbursements to be fixed by the Registrar in accord with Item 34 of the Second Schedule to the High Court Rules.



Solicitors for plaintiff:
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Solicitors for defendant:
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