NZLR

CN651

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

6/1

M. 1434/94

BETWEEN GROUP RENTALS NEW ZEALAND LIMITED

Plaintiff

AND PRAMB WONG ENTERPRISES LIMITED

Defendant

1975

MEDIUM PRIORITY

M. 1460/94

BETWEEN PARAMOOR ELEVEN LIMITED

Plaintiff

AND PRAMB WONG ENTERPRISES LIMITED

Respondent

Hearing: 13 November 1994

Counsel: J.E. Long for respondent in both matters in support
Miss M.M.B. Van Ryn for Group Rentals Limited
A.K. Singh for Paramoor Eleven Limited

Judgment: 13 November 1994

(ORAL) JUDGMENT OF BARKER J

Solicitors: Prendergast Horrocks, Onehunga, for respondents
Simpson Grierson Butler White, Auckland, for Group Rentals New Zealand Limited
Bell Gully Buddle Weir, Auckland, for Paramoor Eleven Limited

The Companies legislation which came into force on 1 July 1994 amended the previous provisions in the Companies Act 1955 ('the Act') concerning proof of a company's inability to pay its debts. Under the former statutory system a creditor alleging a debt owed by a company made a statutory demand which, if unsatisfied, was prima facie proof of inability to pay debts for the purposes of one of the statutory criteria. If the debt was challenged, then there was frequently an application to stay winding-up proceedings on the grounds that the company was not indebted in terms of the statutory demand.

This appears to be the first time the new regime has come before the Court. It is therefore prudent to set out Ss.261-265 of the Act -

> "261. **Meaning of 'inability to pay debts' -**
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> Unless the contrary is proved, and subject to section 262 of this Act, a company is presumed to be unable to pay its debts if -
>
> (a) The company has failed to comply with a statutory demand; or
> (b) Execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part; or
> (c) A person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge; or
> (d) A compromise between a company and its creditors has been put to a vote in accordance with Part VB of this Act but has not been approved."
>
> "262 **Evidence and other matters -**
>
> (1) On an application to the Court for an order that a company be put into liquidation, evidence of failure to comply with a statutory demand is not admissible as evidence that a

company is unable to pay its debts unless the application is made within 6 weeks after the last date for compliance with the demand.

(2) Section 261 of this Act does not prevent proof by other means that a company is unable to pay its debts.

(3) In determining whether a company is unable to pay its debts, its contingent or prospective liabilities may be taken into account.

(4) An application to the Court for an order that a company be put into liquidation on the ground that it is unable to pay its debts may be made by a contingent or prospective creditor only with the leave of the Court; and the Court may give such leave, with or without conditions, only if it is satisfied that a prima facie case has been made out that the company is unable to pay its debts."

"263 **Statutory Demand -**

(1) A statutory demand is a demand by a creditor in respect of a debt owing by a company made in accordance with this section.

(2) A statutory demand must -

(a) Be in respect of a debt that is due and is not less than the prescribed amount; and
(b) Be in writing; and
(c) Be served on the company; and
(d) Require the company to pay the debt, or enter into a compromise under Part VB of this Act, or otherwise compound with the creditor, or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within 21 days of the date of service, or such longer period as the Court may order."

"264 **Court may set aside statutory demand -**

(1) The Court may, on the application of the company, set aside a statutory demand.

(2) The application must be -

(a) Made within 14 days of the date of service of the demand; and
(b) Served on the creditor within 14 days of the date of service of the demand.

(3) No extension of time may be given for making or serving an application to have a statutory

demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the statutory demand.

(4) The Court may grant an application to set aside a statutory demand if it is satisfied that -

(a) There is a substantial dispute whether or not the debt is owing or is due; or
(b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
(c) The demand ought to be set aside on other grounds.

(5) A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.

(6) In subsection (5) of this section, 'defect' includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.

(7) An order under this section may be made subject to conditions."

"265 **Additional powers of Court on application to set aside statutory demand -**

(1) If, on the hearing of an application under section 264 of this Act, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute, or is not subject to a counterclaim, set-off, or cross-demand, the Court may -

(a) Order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or
(b) Dismiss the application and forthwith make an order under section 211(4) of this Act putting the company into liquidation, -

on the ground that the company is unable to pay its debts.

(2) For the purposes of the hearing of an application to put the company into liquidation pursuant to an order made under subsection

> (1)(a) of this section, the company is presumed to be unable to pay its debts if it failed to pay the debt within the specified period."

The Judicature Act 1908 was also amended to enable Masters to exercise the jurisdiction under S.264. This is a related jurisdiction enjoyed by Masters along with winding-up jurisdiction, summary judgment and bankruptcy jurisdiction.

In the present case the defendant, Pramb Wong Enterprises Limited issued statutory demands against both Group Rentals (New Zealand) Limited ('Group Rentals') and Paramoor Eleven Ltd ('Paramoor') (formerly known as Vision Hire Limited). The defendant was the landlord of premises in Wiri formerly leased at various times to both of the plaintiffs. Both had assigned their interest in the lease with the consent of the landlord, i.e. the defendant; both still retained rental liability under the lease.

It seems that subsequent tenants have defaulted in rental payments; the defendant landlord therefore has looked to both of its former tenants for payment of the alleged arrears of rent. That was the basis on which the S.263 demand was issued in each case. Within the time limits provided by S.264(2), each plaintiff applied to the Court to set aside the statutory demand. Both have filed extensive affidavits disputing liability on various grounds. An affidavit on behalf of Group Rentals stated

unequivocally that it was solvent. Paramoor's affidavit admitted that it had been trading at a loss but that it was one of a number of companies in a large group and that it had substantial assets.

The application under S.264 came before Master Gambrill on 30 November 1994. She indicated that there was regretably insufficient hearing time available for defended matters; that these applications, although urgent, could not be heard on the merits until 28 February 1995.

Mr Long, counsel for the defendant in both cases, then sought from the Master an order that the amount of the statutory demand should be paid into Court. The Master declined this application; she considered that she should not make such an order without being satisfied that the plaintiffs were financially unable to meet any obligations that would arise. She stated that although Paramoor had traded at a loss, both companies had sufficient assets; she would have been surprised if Paramoor would be allowed by its parent to be placed into liquidation. She permitted further affidavits to be filed and was satisfied that she had jurisdiction under S.264(3) to extend (as she did) the time for compliance with the statutory demand until further order of the Court following the defended hearing on 28 February 1995.

Counsel for the plaintiff then sought to review the Master's decision relying on R.61C. The grounds were that the decision was wrong, that the statutory rights of the defendant were being interfered with unduly, that an order for payment into Court should have been made and that there was no jurisdiction to extend the time for compliance with the statutory demands.

Before me today, both Miss Van Ryn for Group Rentals and Mr Singh for Paramoor submitted that this Court had no jurisdiction to entertain a review of the Master's decision under R.61C. I consider this submission correct; neither S.26P of the Judicature Act nor R.61C give jurisdiction to review a decision of the Master on a S.264 application. This must be the case following the Court of Appeal decision in **Talyancich v Index Developments Ltd** [1992] 3 NZLR 28 which was followed by me in **Bank of New Zealand v Webster Properties Ltd** [1994] 2 NZLR 485.

However, I was sympathetic to an approach similar to that taken by me in the **Webster** case; because there was no prejudice to the plaintiffs in a late application under R.264, I was sympathetic to Mr Long's applying under R.264 to review the Master's decision. In **Webster's** case, whilst holding that there was no power to review under R.61C a Master's decision on an application for stay of a winding-up proceeding, R.264 still gave

jurisdiction to review and I gave leave to amend the application for review.

I think that similar indulgence should be extended to the defendant on both cases here. There was, however, one procedural difficulty alerted to by counsel for the plaintiff, namely that these present proceedings were not "an interlocutory proceeding" to which R.264 applies. They were in fact an "originating application" under R.458D of the High Court Rules, particularly in R.458D(1)(a) whch specifically applies to S.264 applications.

However, I consider that the oral application of Mr Long to the Master to require a payment into Court as a condition of the adjournment was an interlocutory application and comes within the definition of interlocutory application within the R.3 definition which reads -

> **"Interlocutory application -**
>
> (a) Means any application to the Court in any proceeding or intended proceeding for an order or a direction relating to a matter of procedure or for some relief ancillary to that claimed in a pleading; and
>
> (b) Includes -
>
> (i) An application for a new trial; and
> (ii) An application to review an order made, or a direction given, on any interlocutory application."

The word "pleading" in the definition includes a statement of claim, a statement of defence, a reply, and a counterclaim. I see no reason for not including in the definition of the word "pleading", an originating application. To hold otherwise would make the Rules difficult to apply; a broad meaning should be given to the word "pleading". The "interlocutory application" procedure under R.458D was introduced to render it unnecessary to file a statement of claim for every application to the Court of a routine nature.

I am guided by R.4 of the High Court Rules which requires the just, speedy and inexpensive determination of matters before the Court. It would be rather unnecessary for reviews of this kind of interlocutory decision by a Master to go to the Court of Appeal. Clearly the Legislature has intended that substantive decisions under S.264 should go to the Court of Appeal; but it would be quite inappropriate if interlocutory decisions should all have to go there.

There is a further difficulty caused by the fact that the Master purported to extend the time for payment of the debt in terms of S.264(3). The legislation is silent on whether the bringing of an application under S.264(1) to set aside a statutory payment puts the statutory demand "on hold". No doubt the parties thought it desirable to have the Master extend the time; practically speaking, one wonders what the defendant could have done even if

the Master had not extended the time by way of procuring the winding-up of the company.

I prefer to regard the exercise by the Master of the extension of time under S.264(3) as an interlocutory step made, not as a decision on the merits, but one made as a condition of the adjournment; therefore, a matter susceptible to review under R.264 if appropriate.

I therefore give leave to the defendant to amend its applications to include an application under R.264. I approach the matter of the R.264 review in the same way as I did in **Webster's** case; there is no new matter before me which was not before the Master. I note that the Master's decision was a considered one on the brief argument that she heard and on her reading of the affidavits.

In view of the statements by both the plaintiffs that they are solvent, I cannot find the Master exercised her discretion in a wrong manner. In fact, I should have thought that the exercise of her discretion was quite appropriate. As Mr Singh pointed out in his submissions, the defendant is seeking an advantage; it is asking the Court to ensure that the plaintiffs are judgment-worthy and that to require payment into Court is equivalent to an application for summary judgment. On the affidavits that were before the Master, I cannot see that she exercised her discretion wrongly.

Miss Van Ryn made a supplementary argument that there was no jurisdiction to order a payment into Court because of the power of the Court under S.265(a) on a substantive hearing of a S.264 application to order a company to pay a debt within a specified period and, on default, to put the company into liquidation on application. However, that is not the same power as was sought to be exercised here.

The payment into Court could be appropriate for certain circumstances. It is only that, a payment into Court. It is not a payment to the alleged creditor as envisaged by S.265(a).

I do not wish it to be considered as binding that, in an appropriate case, a Master should not make an order of the kind sought by the defendant in this case; namely, pending the substantive hearing under S.264, that money be paid into Court. I should think that such an order would be very rare because there would have to be an element of pre-judgment. It may well be that where a statutory demand is for an excessive amount but there is some amount conceded by the alleged debtor, that a smaller amount could be required to be paid into Court.

However, on the facts of this case I have no doubt that the Master's decision was quite correct; she was quite right to have refused the application to pay moneys into Court. Also I think she was correct to make the

decision under S.264(3) to extend the time for hearing, even though it may have been a counsel of perfection to have done so. But in the absence of any statement in the legislation that the application itself puts a freeze on the time for compliance, I think she was right to make the order.

Before parting with this matter, I emphasise the desirability of having applications under S.264 heard as soon as possible. I realise the difficulties under which the Masters in Auckland have been labouring and hope that this sort of situation may not arise again and that some priority should be given to this kind of application.

The question of costs is reserved.

The application to review the Master's decision is dismissed.