NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M 378/97

BETWEEN P G and M CHAMBERS as trustees of the South Piha Trust

Plaintiffs

AND SANTIAGO HOLDINGS LTD

Defendant

AND M 379/97

BETWEEN P G and M CHAMBERS as trustees of the South Piha Trust

Plaintiffs

AND KERERU INVESTMENTS LTD

Defendant

Hearing: 23 October 1997

Counsel: C LaHatte for Applicants
J R Parker for Defendants

Judgment: 12 NOV 1997

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
James Christopher LaHatte, Auckland
Morrison Kent, Wellington

The plaintiffs apply for an order winding up Kereru Investments Ltd because that company failed to comply with a statutory demand served pursuant to s.289 of the Companies Act 1993 and which required payment of the sum of $648,183.00. That notice was served on 20 August 1997.

The plaintiffs also apply to wind up Santiago Holdings Ltd because that company failed to comply with a statutory demand served pursuant to s.289 of the Companies Act 1993 requiring payment of M$1,497,945.00. That notice was served on the defendant company on 20 August 1997.

Santiago Holdings Ltd has been removed from the New Zealand Register. However pursuant to s.327 of the Act it appears that removal from the register does not prevent the company being put into liquidation. Both Santiago Holdings Ltd and Kereru Investments Ltd have applied to restrain advertising and to stay the winding up proceedings against them. That is opposed by the plaintiffs. The applications are made in reliance on R.700(k) of the High Court Rules. The legal principles are set out in ***Nemesis Holdings Ltd v. North Harbour Industrial Holdings Ltd*** (1989) 1 PRNZ 379 and ***Taxi Trucks Ltd v. Nicholson*** (1989) 2 NZLR 297. As stated in the headnote to ***Taxi Trucks Ltd***:

> "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. In general, a winding-up order will not be made where there is a genuine dispute; but this is not an inflexible rule. The governing consideration can only be whether presenting or proceeding with an application savours of unfairness or undue pressure. Whether that stigma attaches to an application must depend on the particular facts. There is nothing in R.700K of the High Court Rules (which regulates the procedure

for making such an application) which requires modification of these principles."

The applications to wind up arise from an agreement for the sale and purchase of shares in De Bretts Hotel Ltd. That company ran a hotel in central Auckland pursuant to a lease. The shares in the company were owned by the South Piha Trust, which is a family trust of the Chambers family. Its affairs are directed by Mr K Chambers. De Bretts got into difficulty and it was not able to pay its rent. The landlord re-entered the premises on or about 20 February 1997 and the hotel was closed. However on 11 March 1997 Mr K Chambers applied for relief from forfeiture of the lease and interim possession of the hotel. He succeeded in that application. It appears relief was obtained because a Mr McCracken (a major shareholder in Kereru and Santiago) had become interested in purchasing shares in De Bretts. Initially the shares were to be purchased jointly by Mr Chambers and Mr McCracken. However on 26 March 1997 Santiago Holdings Ltd entered into an agreement with the plaintiffs to purchase the shares in De Bretts. That agreement for sale and purchase was subject to obtaining the landlord's consent, the landlord being Triple Act Ltd. The agreement was guaranteed by Kereru and that company entered into a subsidiary agreement with the plaintiffs whereby part of the purchase price for the shares was to be provided by Kereru agreeing to sell six units which it was building in Wellington to South Piha Trust. It seems however that it was proposed that no money would change hands but Kereru would sell the units and apply the purchase moneys towards the sum outstanding in respect of the agreement for sale and purchase of the shares in De Bretts. The main shareholder and director of both

Santiago Holdings Ltd and Kereru Investments Ltd was Mr McCracken. Mr McCracken became actively involved in attempting to keep the hotel afloat. Moneys were advanced so that De Bretts could meet its current liabilities and pay outstanding rent. Mr McCracken also took an active interest in the day to day running of the hotel. However it appears before the agreement for sale and purchase of the shares in the hotel was formally settled the High Court cancelled the interim relief against forfeiture it had granted because of breach of the terms of the Court's order. The landlord again re-entered on 15 April 1997 and De Bretts was afterwards put into liquidation on 19 April 1997. The plaintiffs' maintain that prior to the re-entry they had done everything necessary to meet their obligations under the agreement for the sale of the shares including obtaining the landlord's consent to the transfer of the shares to Santiago Holdings Ltd. The plaintiffs argue that the reason the agreement for sale and purchase was not completed was solely because of the defaults of Santiago Holdings Ltd. In respect of the landlord's consent the plaintiffs say that Mr McCracken elected to take 'a punt' on obtaining the landlord's consent and he entered into possession and took control of the hotel on that understanding. However Mr McCracken strongly disputes that he ever agreed to settle the agreements without first obtaining the landlord's consent. Given the very substantial outlay involved the Court finds it difficult to believe that he would have agreed to take such a risk. Certainly the affidavit filed by his solicitor, Mr Rama does not support the plaintiffs' claim that Mr McCracken settled on the basis that he would accept the obligation to obtain the landlord's consent. Exhibit G to Mr Rama's affidavit contains a proposal to advance $40,000 to the

plaintiffs in order to meet the landlord's requirements for the giving of consent. The document is dated 9 April 1997 and is signed by the parties. It includes a clause which states:

> "This agreement is also subject to the purchaser satisfying all of the lessor's requirements for consent of which he has knowledge by 12 noon today and its agreement to effect settlement of the transaction upon lessor's consent being obtained or so soon thereafter as is practical."

That document seems to give the lie to Mr Chambers claim that settlement was effectively completed between the parties when share transfers were executed on 7 April 1997.

Apart from the issue of the obtaining of the landlord's consent there are subsidiary disputes between the parties. One concerns the sum of $40,000 which I have mentioned and which was advanced by Santiago Holdings Ltd to the trust to effect payment of outstanding rent. In the event the money was not paid over to the landlord because of the landlord's re-entry. There is now a dispute as to the ownership of that sum which is held in a solicitor's trust account. There is also a dispute as to the ownership of chattels which were to form a substantial part of the purchase price for the shares. The solicitor for the landlord wrote to Mr McCracken's solicitor in September 1997 advising that the plaintiffs had mislead Mr McCracken as to the ownership of the chattels most of which the landlord claims belongs to it. While Mr Chambers in his affidavit of 24 September 1997 disputes the landlord's claim as to the ownership of the chattels and says he can produce evidence to prove ownership, he has not in fact put

any evidence before the Court to show ownership. All in all I hold that nothing can be clearer than that there are unresolved disputes as to:

a Whether Santiago agreed to settle without first obtaining the landlord's consent.

b Whether there was a purported settlement and if so the date of same.

c Whether the agreements were validly cancelled by the defendant.

d The ownership of the $40,000.

e The ownership of the chattels.

All those issues are matters of hot dispute. As I have held in the caveat proceedings judgment there does not appear to be the slightest chance now that the plaintiffs could obtain specific performance of the agreements relating to the share purchase. If they have any remedy for breach then it would sound in damages. Furthermore the plaintiffs have up to now taken no action to enforce or sue on the agreements. Even though Santiago and Kereru did not apply to set aside the statutory demands I think the plaintiffs' status as a creditor is very dubious. Further I think, given the correspondence that took place during the period that the statutory demands were issued one can understand, in the circumstances, why no formal action to set the demands aside was taken, although it would have been prudent to have done so. The fact that such action was not taken does not of course prevent the defendants from defending the winding up petitions.

Kereru Investments Ltd is a development company. Its solvency is contested. Solvency or no appears to largely depend upon the value of its developments, and landholdings, and in particular the value of its development in Glenmore Street, Wellington. Valuations have been put before me by both parties. To determine the present applications I do not have to finally resolve the solvency issue. However the evidence of Mr Harden, the solicitor for Kereru does indicate solvency and that evidence is sufficient to satisfy me that the applications to restrain advertising and stay should be granted. I am advised that the present builder is prepared to continue with the Glenmore Street project and the present secured creditors of the Glenmore Street project have not yet withdrawn their support. I am told by the defendants that given my judgment on the caveats Kereru should be able to obtain the necessary Council consents it requires in order to deposit the plan and to proceed with its development.

As far as Santiago Holdings Ltd is concerned, as I understand it, it has been struck off the register but Mr LaHatte agreed that both companies should stand or fall together.

As required by ***Taxi Trucks*** I find there is more than a genuine dispute here and that it would be an abuse of the Court's process to allow the winding up applications to proceed further until such dispute is resolved. Accordingly in respect of both Kereru and Santiago there will be orders restraining advertising and orders staying the winding up applications. Costs are reserved.

Master J.C.A. Thomson