IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 61/97

BETWEEN **DAVID WYNDHAM CROCKETT and ARTHUR JOHN FARRANT**

Applicants

AND **JONNY ON THE SPOT DRYCLEANERS LTD**

Respondent

Hearing: 10 September 1997

Counsel: HDP van Schreven for Applicants
S J Shamy for Respondent

ORAL JUDGMENT OF MASTER VENNING

The Applicants seek an order staying execution of the order for summary judgment made by this Court on 1 July in favour of the Respondent against them for payment of the sum of $137,244.87. A stay is sought pending the hearing and determination of an action commenced by Alamo Holdings Ltd (in receivership) against the Respondent.

The application is made under R565. That rule is in the following terms:

> "Any party against whom judgment has been given may apply to the Court for a stay of execution, or other relief against the judgment, upon the ground that a substantial miscarriage of justice

would be likely to result if the judgment were executed, and the Court may give relief on such terms as appear just."

The onus is, of course, on the Applicants. The Applicants must establish both the likelihood and substantial nature of any miscarriage of justice and show that such a miscarriage is probable rather than possible: *Amalgamated Finance Ltd v Fairlie* (HC Auckland, A 1232/83, 03/09/86, Wylie J).

As noted by Tompkins J in *Econotek Construction Ltd v Kale* (HC Auckland, CP 8/87, 07/01/88) R565 has widened the grounds upon which the Court may grant a stay of execution from those provided under the rules in the former code. Nevertheless, the onus remains to establish a substantial miscarriage of justice.

The basis for the application really is that if the Respondent is entitled to execute the judgment against the Applicants before the proceedings brought by the Receiver of Alamo Holdings Ltd are able to be determined then there will be a substantial miscarriage of justice to the Applicants.

Mr van Schreven put it in his submissions that this case was not dissimilar to that of the *Apple & Pear Marketing Board v Wallis* 4 PRNZ 713, a decision of Master Williams as he was. In that case there was a real likelihood the judgment debtor would be bankrupted which could have had the result that the counterclaim issued by the judgment debtor against the judgment creditor would not have been pursued. As noted by Tompkins J in *Econotek* the defendant must be free to pursue his claim against the plaintiff in the normal way.

In the present case the claim by the receivers of Alamo Holdings Ltd against the Respondent raises in large part a number of matters that were before this Court on the summary judgment application. In the course of deciding that summary judgment application the Court came to the view that the matters raised were matters that properly should be raised by Alamo Holdings Ltd and could only be raised by that entity rather than the now Applicants in their personal

capacity. That position is unaltered. The Applicants could only benefit from the proceedings brought by the receivers against the Respondent in their capacity as shareholders or perhaps creditors of Alamo Holdings Ltd themselves. Those proceedings could not, as a matter of law, affect the judgment given in these proceedings.

I accept, as Mr van Schreven submitted, that there may be practical considerations that would lead to a settlement during the course of those proceedings which may benefit the Applicants or that they may benefit as the result of a determination of those proceedings in the receiver's favour. The Applicants are, however, one step removed from the proceedings.

The starting point for the Court on an application such as this is that a judgment creditor in the Plaintiff's position is entitled to the fruits of its judgment and to execute its judgment.

In *Econotek Construction Ltd v Kale* Tompkins J said:

> "A miscarriage of justice can hardly be said to result where the defendant is required to pay to the plaintiff an amount that is owing to it, and the defendant will be free to pursue his claim against the plaintiff in the normal way."

In *Heaven Farms Ltd v Aylett* (HC Auckland, CP 480/87, 10/03/88) Henry J commented:

> "Although sympathetic to a natural reluctance on the part of a debtor to pay a debt when there is a prospect of the creditor being required himself to pay the debtor a greater sum in the near future, I cannot see how a miscarriage of justice, let alone a substantial miscarriage, could result. The plaintiff has an immediate entitlement to the judgment debt and to the right to use that money to its best advantage, and to allow that to happen rather than have to wait for payment with the debt attracting interest at only 11 percent per annum while defendants prosecute their claim is not unjust except to the plaintiff."

Those comments were, of course, made in the context of a counterclaim by the judgment debt against the judgment creditor. In the present case the situation is one further step removed.

There is no detailed financial information before the Court of the Applicants' financial position. There is a statement in the affidavit in support by Mr Crockett to the effect that neither Mr Farrant nor he have the resources to pay the judgment sum. It may be that execution of this judgment would lead to the bankruptcy of either or both of them. I am unable to come to a clear view on that matter.

However, even if that were the outcome if a stay were not granted, it does not necessarily follow that the proceedings by the receivers of Alamo Holdings Ltd against the Plaintiff would not be able to be prosecuted or brought to conclusion. I was advised during the course of submission by Mr van Schreven, and I accept, that the proceedings by the receivers are funded by a third party (not the debenture holder), on behalf of these Applicants.

The receivers are, of course, appointed by Westpac. The receivers have certain responsibilities to the creditors appointing them, but also to creditors generally under the Receiverships Act 1993. It is not clear what the shortfall to Westpac is. I am advised it is a relatively small amount. Even if that is so and the receivership was terminated there is no evidence before the Court to suggest that the third party funding would not be continued and the proceedings by Alamo Holdings Ltd pursued to conclusion.

There are a number of other matters which in my view are material. They are that clearly there are other creditors that may be involved and interested in the Alamo Holding Ltd proceedings. It is apparent from the evidence before the Court on the summary judgment application that Alamo Holdings Ltd is a lessee of at least three properties about Christchurch, each for varying periods of time. Those lessors may well be interested in the proceedings. The position of other creditors is unclear.

Further, I note that the Respondent itself has additional claims which it may wish to pursue against Alamo Holdings Ltd as counterclaims in the

proceedings by the receivers. Those counterclaims arise out of the franchise agreement.

The receivers' proceedings, will, for the reasons discussed in the judgment given in the summary judgment context, not be straight forward and it appears will be the subject of a counterclaim. Even with responsible counsel involved, as there is, it is inevitable that those proceedings will take some time before they are resolved and brought to conclusion. In my view it would be wrong to require the Plaintiff to stand out of execution of the judgment pending the outcome of those proceedings in those circumstances.

Fundamentally, however, in my view the major difficulty for the Applicants in pursuing this stay is that the application is made on the basis a substantial miscarriage will result if the receivers of Alamo Holdings Ltd are not able to pursue their separate proceedings brought by them against the Plaintiff. There is simply insufficient evidence before the Court that that will in fact be the case, bearing in mind the third party funding of these proceedings. Further, those proceedings are by Alamo Holdings Ltd rather than being a true counterclaim by these Applicants, albeit that these Applicants have a financial interest in Alamo Holdings Ltd.

For those reasons the application for stay is dismissed

Costs

This is a stand alone application. The Respondent is entitled to costs having successfully opposed the application.

There will be an award of costs on this application of $600 together with disbursements as fixed by the Registrar.

MASTER VENNING

Solicitors:
Clark Boyce, Christchurch for Applicants
McGillivray Callaghan & Co, Christchurch for Respondent

NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M 130/96

BETWEEN JAMES CROSSLAND

Plaintiff

AND AWATOTO WOOL AND FELLMONGERY COMPANY LIMITED

Defendant

Hearing: 12 June 1997

Counsel: S L Devoy for Plaintiff
M C Pullar for Defendant

Judgment: 23 JUN 1997

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
Wynn Williams & Co, Christchurch, for Plaintiff
Kelly McNeil, Hastings, for Defendant

This is an application to set aside a judgment striking out a winding up application. The plaintiff filed the application to wind up the defendant company on 19 March 1997. The grounds for winding up were stated to be that in the circumstances it was just and equitable that the defendant company be put into liquidation by the Court under the Companies Act 1955.

In paragraph 5 of the statement of claim the plaintiff pleaded:

> "5 The company has persistently failed to comply with the Companies Act 1955 the particulars of which are:
>
> 5.1 The company has failed to appoint an auditor or auditors at its annual general meeting.
>
> 5.2 The company has not passed a unanimous resolution that no auditor be appointed at its annual general meeting.
>
> 5.3 The company has failed to provide financial statements together with a copy of the auditor's report to shareholders prior to the annual general meeting."

In its defence also at paragraph 5 the company pleaded as follows:

> "5 It denies the allegations in paragraph 5 of the statement of claim and says further that:
>
> (a) In order to alleviate any concerns the plaintiff may have, the defendant has advised the plaintiff it is prepared to instruct an accountant to carry out a further audit and requested from the plaintiff a suggestion as to who should perform the audit. The plaintiff has failed or refused to respond to this proposal.
>
> (b) It is not required to provide financial statements or auditors reports to shareholders prior to annual general meetings."

When the matter was called before me on 14 November 1996 timetabling orders were agreed because the plaintiff wished to file an amended statement of claim. I made an order that by the 29 November 1996 the plaintiff file and serve his amended statement of claim. I also made consequential timetabling orders for action to be taken by the defendant with a view to the case then being put before a Judge for hearing. It appears the plaintiff wished to file an amended statement of claim as a result of the defendant's solicitors querying the basis upon which the petition was founded. An amended statement of claim has never been filed but a copy of it was handed to me at the hearing of 12 June.

On 6 December 1996 the defendant's solicitor wrote to the plaintiff's solicitors expressing concern that an amended statement of claim had not been filed. The matter was put in the call over list for 27 February 1997 for allocation of a fixture. The Registrar wrote to both firms of solicitors advising that the matter would be called on Thursday 27 February 1997 for allocation of a fixture. In that letter he informed the plaintiff's solicitors that they had failed to file an amended statement of claim as directed by me on 14 November 1996. That letter was addressed attention C R Johnstone a partner of the plaintiff"s solicitors. When the matter was called on 27 February 1997 there was no appearance for the plaintiff and Mr Pullar for defendant asked that the proceeding be struck out for non compliance with the timetable. I agreed to that request and the proceeding was struck out with costs of $750 to defendant. On 3 April 1997 the plaintiff's solicitors filed his application to set aside the order striking out the proceeding. It is opposed. The defendant's grounds being:

1 That the substantive proceeding was without merit or prospect of success.

2 There would be no miscarriage of justice to the plaintiff if the application was declined.

3 The defendant would be prejudiced if the application was granted.

A lengthy affidavit was filed by Ronald Shakespeare for the defendant company. He says that the company has ceased trading. Its only outstanding business relates to an appeal, by some of its former employees, of an Employment Tribunal decision relating to the company's decision to make those employees redundant when it ceased trading. He deposes that he has received advice that the appeal would likely be heard in the Employment Court in Wellington in May or early June. When that case is disposed of it is intended to distribute the assets of the company among shareholders and to apply to the Registrar of Companies to strike the company off the register.

An affidavit has been made by Mr Whiteside, a solicitor, in support of the application to set aside the order striking out the proceeding. The affidavit shows that an employee of the solicitor's firm acted in the matter but had been dismissed on 27 March 1997. After his dismissal the file was reviewed and it was then discovered that the present application to wind up had been struck out. Mr Whiteside deposes that until then neither the supervising partner nor any other partners were aware of the fact that there had been no appearance and that the proceeding had been struck out. Mr Whiteside on behalf of his firm

accepted full responsibility and offered his apologies to the Court. He deposed that the costs will be paid which were ordered.

The plaintiff's solicitor sought the consent of the defendant's solicitors to set aside the order striking out the application but that was not acceded to.

Both counsel agreed that the discretion under r.486 has been considered by the Court of Appeal in ***Mathieson v. Jones*** 11 December 1992, CA198/92 where McKay J delivering the judgment of the Court held at page 6:

> "The test against which an application to set aside a judgment should be considered is whether it is just in all the circumstances to set aside the judgment, ... in the context of procedural rules whose overall purpose is to secure the just disposal of litigation."

The question then is, is it just in all the circumstances of this case to set aside the order dismissing the proceeding? The first issue is I think whether the plaintiff's failure to appear was excusable. Clearly it was not. In this day and age the sins of the solicitor are invariably visited on the client unless there are exceptional circumstances. There are none here and I must say that it is noted that although the responsibility for failing to file an amended statement of claim in accordance with the timetabling order, appears to have been the responsibility of a staff member who was handling the matter on behalf of the firm, and who was subsequently dismissed, that the Registrar's letter I have already referred to was clearly addressed to a partner of the firm. It would thus appear that it would not be right to place the whole of the responsibility for the failures to properly act on behalf of the plaintiff, on that employee. However the more important matter

in the exercise of the discretion is whether the plaintiff's winding up has any prospect of success. It appears that if leave to set aside the order was granted that the amended statement of claim would be filed and the plaintiff would rely on s.209ZG of the Companies Act 1955. As to that the defendant I think rightly submits that given the complaints relied on, that an application to wind up is premature. The two complaints as shown in the proposed amended statement of claim are failure to appoint an auditor and a failure to provide shareholders with financial statements and auditors reports prior to a general meeting. In respect of the first matter the company accepts that there was a technical breach of s.163 of the Companies Act 1955. Mr Shakespeare's affidavit says that the breach was inadvertent as the company erroneously thought it was complying with its obligations under the Act. The Court accepts that to be the position.

As Mr Shakespeare's affidavit shows, in order to alleviate the plaintiff's concerns, the company commissioned a special audit of the 1995 accounts and that report confirmed that there had been nothing untoward in the conduct of the company's affairs during that year. When the plaintiff was still not happy the company offered to instruct an auditor of the plaintiff's choice to carry out an audit of the company's accounts for the years 1994, 1995 and 1996 but the plaintiff expressly declined the offer. I think as Mr Pullar submits that if the company was at fault in failing to appoint an auditor, or to properly dispense with one, and that could be considered prejudicial conduct, that such conduct ceased when the offer of an independent auditor was made to the plaintiff and declined.

As to the claim that the company conducted its affairs in a prejudicial manner because it failed to provide financial statements and an auditor's report to the shareholders, prior to its annual general meeting, Mr Pullar says that the basis for that claim appears to be that the company breached a mandatory requirement in s.162 of the Act which requires companies to send the relevant financial documentation to shareholders 14 days before a general meeting. However as Mr Pullar submits that allegation is misconceived as s.354(4) of the Act in conjunction with the 9th Schedule provides that s.162 does not apply to private companies and the defendant is a private company. That being the case there is no obligation on it to provide shareholders with copies of financial accounts prior to its general meetings.

Mr Pullar further I hold rightly submits that even if that were not so the plaintiff would still have to persuade the Court that it was just and equitable to grant the remedy the plaintiff sought. He submits that the placing of a company in liquidation is an extreme step and should not be granted lightly; that s.209ZG is remedial rather punitive and where prejudicial conduct is shown the Court should attempt to provide a remedy that will involve minimum intervention in the company's affairs. That he says is indicated by s.209ZG(2) I think it significant that the plaintiff filed no reply to Mr Shakespeare's affidavit.

It appears there are a number of shareholders and the majority, if not all apart from the present plaintiff, appear to be satisfied with the conduct of the company's affairs by its directors.

I conclude that it would appear that the only basis for the plaintiff's claim that it would be just and equitable to place the company in liquidation was the failure to properly resolve not to appoint an auditor. To wind up the company on that ground alone would clearly not be warranted and if the present application is granted considerable expense will be incurred in defending the winding up application the cost of which will fall upon the shareholders. I do not think it would be just in the circumstances disclosed here to set aside my order dismissing the proceeding. The plaintiff of course will still be able to use the appropriate provisions of the Companies Act to enquire into the actions of the directors if he chooses to do so. It appears he could apply to the Registrar pursuant to s.354(3)(c) to see if he could persuade him to appoint an auditor. Further there is nothing to stop him issuing a fresh application to wind up. However if he does so and fails to obtain an order for winding up and the appointment of a liquidator he must expect that it will be inevitable that a substantial costs order would be made against him. Be that as it may, in respect of the present application I do not find that it is just in the circumstances that my order should be set aside. The application to set aside is therefore dismissed. Costs to the defendant company of $1,000 and disbursements as fixed by the Registrar.

Master J.C.A. Thomson