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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2002-404-2813
M 1634/02

UNDER	the Companies Act 1993
BETWEEN	EQUIPMENT FINANCE LIMITED Plaintiff
AND	SNACK ATTACK LIMITED (FORMERLY T/A PLANET BURGER LTD) Defendant

Hearing: 19 June 2003

Appearances: A Young for plaintiff
D Hickson for defendant

Judgment: 19 June 2003

(ORAL) JUDGMENT OF MASTER FAIRE

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[1] The plaintiff applies for an order placing the defendant into liquidation and appointing a liquidator.

[2] The plaintiff pleads that a notice given under s289 of the Companies Act 1993 requiring payment in the sum of $5,938.40 was served on the defendant on 15 November 2002. The plaintiff alleges that the defendant has failed to comply with the demand.

[3] The defendant does not dispute that a debt of $4,340.10 is owing. It is common ground that approximately $100 has been paid under an automatic payment authority to which I will make reference. The defendant alleges that it has entered into a settlement agreement in respect of that sum.

[4] The plaintiff acknowledges that a part of the amount claimed in the notice issued under s289 of the Companies Act 1993, namely $1,598.30, has in fact been paid. The plaintiff also acknowledges acknowledges that approximately $100 has been paid under the automatic payment authority.

[5] The defendant denies receipt of the statutory demand.

[6] This proceeding has been advertised in accordance with the High Court Rules in both the *New Zealand Gazette* and the *New Zealand Herald.*

[7] Section 241 of the Companies Act 1993 gives the Court a discretion to appoint a liquidator if it is satisfied that the company is unable to pay its debts. Section 287 of the Companies Act 1993 provides that:

> unless the contrary is proved and subject to s288 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
> ...

[8] The approach that the Court should take in considering an opposed application to appoint liquidator has been examined in a number of authorities. In *Bateman Television Limited (in liq) & Anor v Coleridge Finance Company Ltd* [1971] NZLR 929 (PC) the Privy Council referred to the general rule that no order will be made on a petition founded on a debt which was genuinely disputed. To apply to wind up a company in such a circumstance is an abuse of the Court's process. The Court has an inherent jurisdiction to prevent such an abuse of process. The position has been considered in a number of cases both in relation to opposed applications to wind up and in respect of applications for orders restraining advertising and staying proceedings. *Exchange Finance Co Ltd v Lemington Holdings Ltd* [1984] 2 NZLR 242; *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297; *Edge Computers Ltd v Colonial Enterprises Ltd* 9 PRNZ 621.

[9] From the authorities I extract the following specific principles which are applicable to such applications:

a) A winding up order will not be made where there is a genuine and substantial dispute as to the existence of a debt such that it would be an abuse of the process of the Court to order a winding up;

b) In such circumstances, the dispute, if genuine and substantially disputed, should be resolved through action commenced in the ordinary way and not in the Companies Court;

c) The assessment of whether there is a genuine and substantial dispute is made on the material before the Court at the time and not on the hypothesis that some other material, which has not been produced might, nonetheless be available;

d) The governing consideration is whether proceeding with an application savours of unfairness or undue pressure.

[10] Two issues require determination. The first is whether the notice under s289 of the Companies Act 1993 was in fact served in accordance with the Companies Act. Second is whether there has been an accord and satisfaction in respect of the outstanding debt of $4,340.10.

[11] I deal with the first matter, the service of the statutory demand. Two affidavits of service have been filed by Robert Hartley Parkes. They confirm that a notice was served on the defendant company at 5/37 Wilkinson Road, Ellerslie, Auckland on 15 November 2002. The defendant admits in its statement of defence that 5/37 Wilkinson Road, Ellerslie, Auckland is its registered office. Mr Parkes further swears that he left the statutory demand with Mr P Horrocks at the registered office of the defendant. Mr Horrocks, a director of the defendant company, has sworn an affidavit in which he says that the defendant has no record of ever having received the statutory demand. I accept Mr Parkes's evidence. He was not cross-examined. There is nothing to suggest that his evidence is unreliable. Accordingly, I conclude that the statutory demand was served as pleaded in the statement of claim.

[12] The second matter raised by way of defence alleges a settlement.

[13] It is not necessary to record all the correspondence between the parties. The critical piece of information, however, is a letter sent by the plaintiff to the defendant's director which is entitled *Final Advice Notice*. That letter records:

> We are prepared to enter into a payment arrangement with you to clear the above outstanding debt.
>
> Please complete the automatic payment form attached and forward it to your bank.
>
> You are requested to contact this office by **Friday 16th November 2001** to advise when repayment of the account will commence.
>
> If you fail to contact us by the date above, this office will commence alternative recovery action; this may including proceeding with legal action or referring this debt to an outside agency for collection without further notice. You will be liable for any additional costs incurred.
>
> The default lodged against you with Baynet CRA Limited will continue to affect your ability to obtain further finance until the account has been paid in full.

[14] The automatic payment authority was completed by the defendant and, in particular, it provided for payment of the debt by a payment of $5 per month. The authority records that the final payment was to be made on 14 February 2074. The defendant sent the payment authority to its bank and the Bank has proceeded to action the authority. The plaintiff complains that at no time did it specifically agree to the amount, namely $5 per month, and the term over which the debt was to be paid.

[15] What is immediately apparent from the terms of the automatic payment is that the amount outstanding is the only amount provided to be paid. There appears on the face of it be no consideration for the settlement arrangement made.

[16] There is no statement to the effect that the plaintiff would accept the payments in full and final settlement of the obligations currently owed.

[17] The defendant's case appears to allege an accord and satisfaction. In *British Russian Gazette Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, 643-644 the Court said:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

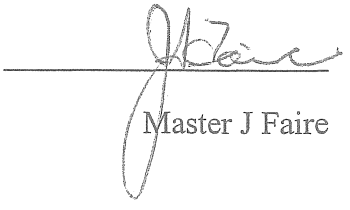
Conclusions

[18] I can find no evidence of any consideration for the proposed settlement. It follows from that that the original contract has not been discharged. The sums claimed, if credit is given for the payments made under the automatic payment authority, are accordingly due and owing.

[19] Mr Hickson invited me to adjourn the case, if I reached this conclusion, to 10am tomorrow morning to allow his client to present a Bank cheque, including costs, which clearly the plaintiff is entitled to, and disbursements.

[20] The amount outstanding, taking account of the automatic payments is approximately $4,240.10. As I have said, the plaintiff is entitled to costs. Both counsel agree that costs should be assessed on a 1A basis and on the basis of a ½ day fixture. I will leave it to counsel to calculate the precise costs figure.

[21] In the circumstances, I adjourn this proceeding to 10am tomorrow, 20 June 2003. I indicate that if a bank cheque has been presented which includes the sum that I find to be due, plus costs and disbursements is paid to the plaintiff, then the proceeding will be dismissed. If payment is not made, I will appoint a liquidator.



Master J Faire

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