

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2007-404-00094

UNDER the Companies Act 1993

BETWEEN THE COMMISSIONER OF INLAND
REVENUE
Plaintiff

AND PANMURE CONSULTANTS LIMITED
Defendant

Hearing: 11 October 2007

Counsel: C Wood for plaintiff
No appearance by defendant

Judgment: 11 October 2007 at 1055

**(ORAL) JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to liquidate company]**

Solicitors: Meredith Connell, PO Box 2213, Auckland for plaintiff

And to: Mr JG Russell, 1439 Clevedon-Kawakawa Bay Road, RD5, Papakura

Representation of the defendant company

[1] Mr JG Russell, a director of the defendant company, applied to the Court to represent the defendant in this proceeding. I will set out now the background to that request.

[2] The Commissioner applied to this Court for an order winding the defendant company up and appointing a liquidator. The proceeding was filed on 15 January 2007. It relies on a statutory demand served on the defendant on 23 November 2006.

[3] The notice of proceeding, statement of claim and affidavit verifying the statement of claim were served on the defendant company on 18 January 2007.

[4] Mr JG Russell wrote to the Court. His letter was received on 5 February 2007. He sought permission to personally appear for the defendant. His letter summarised, in the final paragraphs, the reasons for that request, which I now set out:

I therefore request that I personally be permitted to act for the company in these proceedings because exceptional circumstances apply.

The exception circumstances are as follows:

1. This is the third attempt by the Commissioner to wind up this company.
2. The company does not owe the Commissioner any money.
3. The company has exhausted its resources on defending the Commissioner's earlier attempts to wind up.
4. The company currently has proceedings before the Taxation Review Authority which on the established case law it could not continue to pursue if it was wound up.
5. The Commissioner is acting in disregard of Section 6 Tax Administration Act 1994 and the Bill of Rights.
6. The Commissioner is conducting a fraud on this taxpayer in refusing to give effect to Section 99(4) Income Tax Act 1976 which he assessed the same income to me in 1996 and 2003.

7. It is in the public interest that the allegation of misconduct by the Commissioner in this particular case be heard before the court and be dealt with accordingly.

A copy of this letter has been sent to Mr Cyril Wood of Meredith Connell who I understand is acting for the Commissioner in this matter.

[5] No evidence has been placed before me as to the actual financial position of the defendant company.

[6] On 14 February 2007 by minute I invited counsel for the plaintiff to respond. A memorandum was duly filed by Mr Wood on 19 February 2007. I invited Mr Russell to respond to it by a minute issued on 21 February 2007. He did so and filed a detailed memorandum.

[7] I considered the material filed and issued a further a minute on 16 March 2007 as follows:

[1] The Commissioner applies to wind up the defendant and appoint a liquidator. The application is based on non-compliance with a statutory demand.

[2] The application has a first call hearing date at 10.45 on 3 May 2007.

[3] In a letter addressed to the Registrar dated 31 January 2007 and received on 5 February 2007, Mr JG Russell advised that he is a director of the defendant company and that he seeks leave to appear on the company's behalf.

[4] I invited the Commissioner's counsel to respond to Mr Russell's request. A memorandum opposing the application of Mr Russell has been filed. I have given Mr Russell the opportunity of responding to it.

[5] An indication is given in Mr Russell's memorandum of the likely defences that will be run. What is lacking, however, is any indication as to where the evidence will come from and, in particular, whether Mr Russell would be the appropriate deponent. I therefore invite Mr Russell to provide a draft statement of defence and draft affidavits in opposition so that I can consider what practical difficulty, if any, might arise from my granting the leave that he seeks. Because of the hearing date, I invite Mr Russell to provide the drafts by 13 April 2007. The Registrar shall then refer the file to me for further consideration.

[8] Mr Russell filed a draft statement of defence and affidavit with a further facsimile. That produced a response by way of a memorandum from counsel for the plaintiff. As a result of this further material I issued a minute on 19 April 2007 in

which I declined the application by Mr Russell to represent the company. That minute recorded the following:

[1] I have now received Mr Russell's draft statement of defence and affidavit and a further facsimile dated 18 April 2007 seeking an adjournment of the winding-up proceedings.

[2] I have also received a memorandum from counsel for the plaintiff, which is filed principally in reply to the draft statement of defence and draft affidavit.

[3] Mr Russell seeks leave to appear on behalf of the defendant company when the application to appoint a liquidator is called on 3 May 2007.

[4] Mr Russell is a director of the defendant company. The material that he has filed makes it self-evident that he personally requires to give evidence by affidavit in opposition to the application to appoint a liquidator. It is also self-evident from the material that he has filed that he will seek to draw parallels with his own personal position and that of other entities with which he is associated in relation to matters involving the Commissioner of Inland Revenue. There is, in this, a potential for a conflict of interest.

[5] In *re GJ Mannix* [1984] 1 NZLR 309 the Court of Appeal examined the issue of rights of audience before the Superior Courts. In short, the Court found that no one has a right to represent a case in any Court unless that person is the litigant in person him or herself or is a qualified lawyer. A company has no right of audience in the Superior Courts. It must appear by a person who is admitted as a barrister or solicitor of the High Court under the Law Practitioners Act 1982. The Court does, however, have a residual discretion. Whilst the Court did not lay down any hard-and-fast rules, it indicated that the residual discretion should be reserved for use primarily in emergency situations where counsel is not available or in straightforward matters where the assistance of counsel is not needed by the Court, or where it might be unduly technical or burdensome to insist on counsel.

[6] The matters that Mr Russell has raised in his memorandum and which are raised in the draft affidavit clearly do not fit within the general areas where the residual discretion might be exercised. I have already referred to the fact that, because of Mr Russell's involvement with the Commissioner both in his personal affairs and also in relation to a number of other entities, there is a clear risk of conflict between the position of this defendant and even Mr Russell personally or those other entities.

[7] This leads me to the view that there is no proper basis for the exercise of the discretion by way of creating an exception in this case. Therefore the defendant company must be represented by a person on the Roll of Barristers and Solicitors and cannot be represented by Mr Russell in person.

[8] Mr Russell has indicated, in his latest facsimile to the Court, that he is about to undergo surgery. I propose that the proceeding be called on 3 May 2007 in accordance with the notice of proceeding at which time the Court will consider, having regard to any other parties who appear at that

time, the adjournment request. I indicate to the Commissioner, however, that unless there are further matters placed before me beyond that which are in the papers that I have currently read an adjournment does seem appropriate. A final decision, however, will be made on 3 May 2007.

[9] When the proceeding was called on 3 May 2007 I allocated a fixture for 10am on 11 October 2007 and I gave directions for the filing and service of submissions.

[10] When the matter was called before me on 11 October 2007 no appearance on behalf of the defendant by counsel or by any person on the Roll of Barristers and Solicitors was entered on the defendant's behalf.

[11] I was however provided with a facsimile sent to the Case Officer who had management of this file which is in the following terms:

9/10/2007

This is to confirm my telephone advice that the company cannot afford the costs of representation at the hearing on 11 October due to the circumstances referred to in my earlier application to the Court on this issue.

I hereby file by fax an affidavit in these proceedings and ask that the Court test the allegations of the plaintiff by reference to the evidence before making a determination.

Regards
John Russell

[12] An affidavit in faxed form, dated 9 October 2007 was provided.

[13] The affidavit does not comply with r40 of the High Court Rules and appears to be yet another attempt by Mr Russell to circumvent the ruling I issued on 19 April 2007.

[14] Master Venning (as he then was) in *Time Ticket International Ltd v Broughton* 9 PRNZ 305 dealt with the filing of documents on behalf of a company by persons other than those enrolled as a barrister and solicitor of this Court and holding a practising certificate entitling the person to so practice. He concluded, that in the case of a company the documents must be filed on its behalf by a person who is on the Roll of Barristers and solicitors and who is entitled to practice as a solicitor.

That suggests to me that I should not read the affidavit. Nevertheless, I have considered it but it adds nothing further to the material previously given to me.

[15] Having set that background out, however, I am concerned about one specific matter. It is the company's allegation that there is an extant proceeding before the Taxation Review Authority. I am advised that:

On 18 November 2005 the defendant filed a notice of claim with the Taxation Review Authority dealing with further assessments which have been made in respect of the same years that are involved in these winding up proceedings. ... The Authority has already heard two days of argument and submissions in February 2006 and is awaiting final submissions in reply from me before making a determination on a interlocutory matter. These final submissions have been deferred the outcome of the winding up proceedings as there is no point in doing the considerable work necessary for final submissions if the defendant cannot continue in any way because it is wound up. ... It is claimed by the defendant that it needs the current proceedings before the Taxation Review Authority to continue to a conclusion. On past case law in identical cases with the same issues the allowance made by the Authority is that a reduction will effectively remove all taxation liability.

[16] The plaintiff's case essentially is that all such rights have been exhausted and ruled upon in prior cases. In addition, if there is any proper basis for the application that could be pursued by any liquidator which the Court appoints. On that basis, I accept Mr Wood's submission that there is no current basis which would justify my adjourning this proceeding or, for that matter, staying it pending the hearing before the Taxation Review Authority.

[17] 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 ...

[18] The approach that the Court should take in considering an opposed application to appoint a 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.

[19] 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.

[20] I have already mentioned that a statutory demand was served on the defendant company. It is therefore presumed to be unable to pay its debts. The statutory grounds for the appointment of a liquidator have therefore been made out.

[21] I am satisfied therefore that an order should be made. Proof of the debt is confirmed by an affidavit filed by LR Barnes and by counsel's certificate that no payment has been made since the time of that affidavit. I have been provided with a

consent by Barry Philip Jordan and Henry David Levin to their being appointed as liquidators.

Orders

[22] The defendant company is put into liquidation. BP Jordan and HD Levin are appointed liquidators.

Costs

[23] The defendant shall pay costs based on Category 2 Band B together with disbursements as fixed by the Registrar.

This order is made at 10:55am

JA Faire
Associate Judge