IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2008-463-000708

IN THE MATTER OF	of an application for a company to be put into liquidation pursuant to Section 241 (2)(c) Companies Act 1993
BETWEEN	L.E.A.D TRAINING TRUST LIMITED Plaintiff
AND	LEAH EVANS LIMITED Defendant

Hearing: 23 June 2009

Appearances: C Fletcher for the Plaintiff
S M Kai Fong for the Defendant

Judgment: 23 June 2009

ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

Solicitors/Counsel:
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[1] The plaintiff applies to liquidate the defendant. The plaintiff's statutory demand went unanswered. No application was made to set it aside. The defendant (LEL) opposes the liquidation application broadly upon the grounds that it can show there is a substantial dispute between the parties, and because it says it is solvent.

[2] This morning I heard counsel's submission upon the liquidation application. Initially Ms Kai Fong raised an issue not previously identified by the pleadings or by affidavits in opposition. The issue concerned the claim being brought in the name of the plaintiff. Ms Kai Fong produced Companies Office details to show that at the time of the parties' contract the plaintiff was known as Life College Training Institute Limited and only changed its name to the plaintiff on 21 August 2008 i.e. more than a year after the parties completed the license agreement.

[3] Further confusion is added by the fact that the license agreement describes the licensor as L.E.A.D Training Trust whilst on the signature page it is signed by M Wood as director for L.E.A.D Training Trust Limited.

[4] I ruled the objection was of no substance because there was no issue but that a debt was incurred in consideration of the defendant entering into a license agreement although there is some minor confusion regarding the identity of the licensor. It was signed on behalf of the plaintiff albeit that name was not adopted until subsequently changed as noted on the Register.

[5] At the conclusion of counsels' submissions I ruled:

> 1. There is no substantial dispute evident from the affidavit evidence. Claims of these by the defendant lacked detail. I accepted Mr Fletcher's submission that Ms Evans of the defendant had a change of mind post contract and her priorities were focussed elsewhere than utilising the value available to her by the plaintiff's license.

2. The company is insolvent for it is unable to pay its debts from income earned from its trading. It was kept afloat only because of Ms Evans' loans to it.

3. I directed that LEL **be liquidated** and noted the time of the order at **12:23pm**. The Official Assignee was appointed liquidator and costs were awarded to the plaintiff on a category 2(b) basis together with disbursements as fixed by the Registrar.

[6] At that time I informed Ms Kai Fong that I would provide more detail in support of the conclusions mentioned above. These follow.

Background

[7] The plaintiff operates a coaching and mentoring business under the trade name Coachouse (the business). By the agreement dated 28 July 2007 LEL entered into a license agreement with the plaintiff to operate a coaching and mentoring business under the trade name Coachouse in Rotorua.

[8] LEL was licensed to commence operation of the business from 1 August 2007 for a term of three years. It agreed to pay a license fee of $25,000 plus GST annually for three years. It paid the license fee for the first year but not thereafter. The plaintiff claims the unpaid license fee together with penalty interest at 20 percent, together with indemnity costs.

[9] LEL did not pay the license payment due on 1 August 2008. Instead its solicitors by letter dated 18 April 2008 said it wished to cancel the agreement. The plaintiff said the agreement did not allow for unilateral termination. On 22 August 2008 it served a statutory demand for the amount of $28,125 being the annual license fee plus GST.

[10] By way of defence LEL claims the plaintiff represented that in consideration of entering into the license LEL would earn an income of approximately $150,000

per annum. Further, that the plaintiff promised that contract work would be available and that this work was part of the projected finance income. Instead in the first year LEL received income of $500 only directly attributable to the Coachouse brand and license arrangements and, the promise to contract work was not available and therefore did not flow through to the projected financial income of $150,000 per annum.

[11] LEL says it was a term of the license that the parties would develop and maintain a strong working relationship in the operation of the business and that LEL would be able to use the intellectual property which was the subject of the license. The license agreement provided that the plaintiff would provide eight one hour supervision and mentoring sessions per year, two days per year of professional Coachouse development training in Hamilton, and provide a tour kit CD together with yearly updates and one day's training per year, and as well to deliver one copy of the manual and provide other training materials deemed appropriate. LEL says those assurances were not met.

[12] Further, LEL asserts that in contravention of clause 37 of the parties' agreement the plaintiff did not submit to a dispute resolution in a genuine effort to resolve the dispute before resorting to litigation. It said the dispute resolution clause required the parties to provide written notice of a dispute nominating representatives for negotiations and in the event the parties were not able to reach a resolution by negotiation the matter was to be referred to mediation. Instead, the plaintiff gave no written notice of the dispute nor nominated a representative for reference of the matter to mediation.

[13] Mr I E Wood is a director of the plaintiff. He deposes to the facts provided in support of the plaintiff's claim for liquidation of the defendant. In opposition an affidavit has been sworn by Mr B Erskine-Shaw and Ms L M Evans. Mr Erskine-Shaw is a chartered accountant of Rotorua and has acted for LEL since its incorporation on 8 May 2007. On 29 January 2009 he did a further inspection of LEL's financial records. He says he can confirm LEL is still solvent on the basis that its assets exceed its liabilities and LEL is able to meet "all other outgoings and accounts such as wages, power and telephone accounts when they fall due". Apart

from the disputed debt with the plaintiff he is not aware of any other unpaid accounts.

[14] Ms Evans deposes that prior to entering into the license agreement a strategic plan was prepared for her by Mr and Mrs Wood the principals of the plaintiff. One of the outcomes expressed in it was that LEL would be able to earn an income of $150,000 per annum. Also that there would be additional income streams through other coaching opportunities indicated.

[15] About half way through the first year of operation she met with Mr and Mrs Wood. She said she indicated then that given various defaults and breaches under the license arrangement LEL would seek to terminate the franchise arrangement at the end of the first year's operation on 31 July 2008. On 17 March 2008 she sent an email confirming this. Subsequent correspondence between lawyers indicated, from LEL's point of view, that there was a breach of contract; that the unrealistic indicative financial outcome had been represented as an inducement for LEL to enter into the arrangement. Further, that steps to be taken by the plaintiff to assist development of the Coachouse brand did not eventuate.

[16] Subsequent correspondence between solicitors reviewed views about those representations.

[17] Ms Evans says the plaintiff's were aware of the parties' dispute before serving a statutory demand. Also she says LEL was solvent, that it is still trading and continues to offer business-coaching services in detailed terms that she described.

[18] In reply Mr Wood deposed that he and Mrs Wood did not prepare a strategic plan prior to LEL entering into the license agreement. Rather it was drawn up in a workshop facilitated by he and Mrs Wood with Ms Evans taking an active role in its preparation. He said Ms Evans was responsible for almost all of the research and information as to the viability of the Coachouse business in Rotorua. Ms Evans was aware that LEL was the plaintiff's first licensee in the Rotorua region and that a lot

of hard work would be required by her to develop the business. She was, he says, solely responsible for the following information appearing in the strategic plan:

- Vision and purpose
- Values
- SWOT analysis
- Financial goal
- Potential clients

[19] He said he and Mrs Wood merely facilitated the preparation process and the recording of Ms Evan's thoughts and ideas into the plan template which they provided.

[20] He denies an express representation that an income of approximately $150,000 per annum would be earned. It was he said Ms Evans who set the financial goals – all based on the figures provided by her. What the plaintiff provided was not a franchise but rather a license to use the plaintiff's coaching systems, coaching manuals, literature, IP including computer files and templates.

[21] Mr Wood's inquiries suggest instead of wanting to continue with the Coachouse business, Ms Evans was intent on pursuing other business opportunities when they met on 22 February 2008 (on that occasion Ms Evans referred to when she said LEL would seek to terminate the franchise arrangement). Mr Wood says the defendant was offered:

a) The right to extend the boundary under the license to enable coaching outside its original physical boundary.

b) Work in Hamilton with Coachouse for one day each week.

c) An existing Ministry of Social Development contract for coaching people in Tirau, Putaruru, Waikato, Waihi and Paeroa.

[22] LEL's refusal of the plaintiff's offer of acceptance was evidenced by Ms Evans' email of same date claiming the Coachouse design did not work for either party. In Mr Wood's view Ms Evans simply chose to work in other areas of business outside of LEL's business as the plaintiff's licensee. He considers her interests lay rather with other entities with which she was connected.

[23] On 7 April 2008 the plaintiff was invited by the Ministry of Social Development to tender for a business-coaching program for 40 people across the Bay of Plenty region. Mr Wood emailed Ms Evans with the details and asked her if she would like to submit a tender. Mr Wood said it was Ms Evans' decision alone not to utilise this opportunity, one, which he estimated, would have realised an income return of $96,000 plus GST. In that outcome and following the issue of the statutory demand Mr Wood denies there is a dispute regarding payment of the debt due to the plaintiff. He said LEL has not complied with the terms of the license. Moreover it is now advertising in the Yellow Pages as Leah Evans Limited trading T/A Topgear Coaching.

[24] Regarding Ms Evans claim that LEL is still trading Mr Wood notes that whilst on the one hand LEL repudiates the license, on the other it has not returned any of the plaintiff's coaching manuals, literature, IP including computer files and templates, or materials relating to the license. Instead he says the services which Ms Evans' claims LEL now provides are those same services LEL contracted to provide under its license to the plaintiff. Also Ms Evans is the sole director and shareholder of Topgear Coaching Limited (TCL). New signage outside of LEL's premises in Rotorua indicate a substitution of Ms Evans new business in similar style for that promoted previously on behalf of the plaintiff.

Considerations

[25] I have adopted a robust approach in dealing with the defendant's claims of a bona fide dispute with the plaintiff. He/she who claims such must show there is a

genuine and substantial dispute as to the existence of the debt and that it would be unfair for the dispute to be resolved in this Court rather than by action commenced in the usual way.

[26] Ms Evans deposed the license agreement was entered into because of a representation of an ability to earn up to $150,000 per annum. She made the following statements in her first affidavit in support of the claim of a genuine dispute:

> "Part way through the first year of operation LEL became increasingly concerned about the licensing agreement for coaching opportunities and the income potential and other breaches under the agreement." (para 7)
>
> "In February 2008 I met with Margaret and Ian Wood and indicated at the time that given the various defaults and breaches under the license arrangement that LEL would seek to terminate the franchise arrangement…" (para 8)
>
> "There was a breach of contract in that the work that was to be provided or expected was not realised. In addition the indicative financial outcomes that had been represented and were in an inducement for LEL (to) enter into the arrangement, were clearly unrealistic. Also the steps to be taken by the plaintiff to assist development the Coachouse brand had not eventuated. It was therefore the view that the business and its viability was entirely misrepresented." (para 11)

[27] Ms Evans refers to the strategic plan prepared with her prior to the license agreement being entered into. It described a strategy of target income of $150,000 per annum was to be achieved and included categories of clients that ought to be approached. Reference was also made to a list of potential clients although most of these described categories of businesses or professions.

[28] It is apparent from reading Ms Evans' affidavits that she expected substantial income flow to be generated from the beginning but clearly she misconceives the nature of her agreement with the plaintiff if she expected a significant body of clients can be made to her.

[29] Ms Evans seems to misunderstand the promise provided by the license agreement. As Mr Fletcher submitted, LEL did not acquire a franchise, rather an opportunity to utilise the plaintiff's business process as part of her own business ambitions. Ms Evans overlooks the fact that the license agreement provided a

coaching system. It did not require the plaintiff to provide the business from which income could be sourced. The license provided the use of software and documents and a system detailed in hardcopy form. She complains it hasn't worked for her but she provides no particulars at all of her efforts undertaken to use the system or to source clientele.

[30] When she complained that it "did not work for her" reasonable efforts were, I consider, made to provide her with business opportunities – although there was no obligation upon the plaintiff to assist her in this way. The fact is, and as earlier mentioned, Ms Evans energies and priorities were directed elsewhere. Undoubtedly because of this insufficient time and effort was spent sourcing clients for whom services could be provided utilising the plaintiff's licensed product.

[31] The Court's test when considering solvency is to assess the ability of a company to meet its debts as they fall due. In support of LEL's claims of solvency Ms Evans has provided a copy of the company's annual report for the year ended 31 March 2009. They show that LEL has accumulated losses of $83,072.62 over the last two years. Its income totaling $28,032.79 includes the profit on the sale of its only fixed assets. The statement of financial position shows shareholder's equity of $86,299.01 being loans by Ms Evans to the company. Although appearing in the accounts as an asset it is in reality a liability for it refers to a sum of money owed by the company to Ms Evans. In reality LEL has no fixed assets and its current assets total $6,805.11 only.

[32] Although the accounts show current liabilities of $2,578.72 only, in fact with a debt owing to Ms Evans the company is in a deficit position of around $82,000 even allowing for its current assets of about $6,800.

[33] LEL does not trade at a profit as its accumulated losses clearly show. Rather the company exists because of Ms Evans' loans to it. No assurance has been provided of continuing support of this kind. The company is clearly insolvent.

[34] Although the license agreement proscribed for recourse to mediation in the event of a dispute it is now too late to raise that in defence of the claim because LEL has by its pleadings, submitted to the jurisdiction of this Court.

Associate Judge Christiansen