IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2009 442 000397

UNDER	The Companies Act 1993
BETWEEN	LEONARD PAULUS BUYSROGGE Plaintiff
AND	KAHURANGI ESTATE LIMITED Defendant

Hearing: 21 October 2009 (by telephone conference)

Appearances: G J Praat for Applicant/Defendant
S Gepp for Respondent/Plaintiff

Judgment: 17 November 2009 at 2pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Application for Orders Staying Liquidation Proceeding and Restricting Advertising

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Introduction

[1] The plaintiff seeks an order putting the defendant into liquidation. The defendant is presumed to be unable to pay its debts because it did not comply with a statutory demand dated 20 August 2009.

[2] The defendant applied to set aside that statutory demand. On 21 September 2009 this Court declined the setting aside application. The Court ordered the applicant to pay the debt of $61,747.63 by 23 September 2009 and ordered, pursuant to s291(1) Companies Act 1993, that in default of payment the creditor might make an application to put the company into liquidation.

[3] It is common ground that the defendant did not pay the required sum by 23 September 2009. The plaintiff issued this proceeding on 28 September 2009.

Staying proceedings and restraining publication – the principles

[4] High Court Rule 31.11 makes provision for orders restraining publication of advertising and staying further proceedings. In this case the defendant/applicant invokes r 31.11(1)(a) and (b), both as to restraint of publication and as to stay of proceedings.

[5] I adopt the following as principles applicable to the consideration of this application:

(a) The governing consideration is whether presenting or proceeding with the winding up application savours of unfairness or undue pressure: *Exchange Finance Co Ltd v Lemington Holdings Ltd* [1984] 2 NZLR 242 at 245 (CA).

(b) The stay jurisdiction is to be exercised with great circumspection – a test is whether it is impossible for the plaintiff to succeed in its liquidation claim: *Anglian Sales Limited v South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249 (CA) per Greig J at 254.

(c) In general where there appears to be a genuine and substantial dispute it will be appropriate to grant staying and restraining orders: *Exchange Finance* at 24. The dispute generally should be resolved through action commenced in the ordinary way and not in the Companies Court.

(d) The jurisdiction under the rule is derived from and does not substantially alter the substantive law as to restraint or stay based on an abuse of the Court's process: r 31.11(3) and see *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297 at 299 (CA). An abuse would arise where advertising of a liquidation application would have the likely

consequence of serious commercial damage to the defendant as a means of obtaining payment of a genuinely disputed debt: *Taxi Trust Ltd v Nicholson* at 299.

(e) The Court must treat an application under r 31.11 as if it were an application for an interim injunction: r 31.11(2). The onus of proof is on the applicant. The usual residual considerations, such as the adequacy of damages to each side, the balance of convenience and the overall justice, are relevant. The Court will consider all relevant facts, including the adverse effect of advertising and of proceeding to a hearing or delay; the interests of the parties and the public interest; and any evidence of the applicant's solvency. It is normally necessary to demonstrate something more than balance of convenience in favour of the applicant: the applicant is expected to establish "a strong prima facie case on substantial grounds" (*Nemisis* at 385) or "clear and persuasive grounds" (*Bryanston Finance Ltd v de Vries (No 2)* (1976) Ch 63 at 78 per Buckley LJ.

(f) The assessment of the dispute is made on the material before the Court at the time of the hearing and the application and not on the hypothesis of some other material possibly arguable but not produced: *Taxi Trucks Limited* at 299.

(g) Where a stay is not granted, the defendant may still raise a defence based upon the stay grounds when the application to put the company into liquidation is heard.

(h) The Court if granting an application may do so on whatever terms the Court thinks just: r 31.11(2).

(i) Even where there is a genuine dispute as to the existence of an alleged debt, there will be exceptional cases in which the winding up proceeding will be allowed to continue so that the Judge in the Companies Court may determine the issue on the hearing of the

liquidation proceeding itself: *Fletcher Development & Construction Ltd v New Plymouth Hotels Holdings Ltd* [1986] 2 NZLR 302 (CA) per Cooke P at 303.

The defendant's case

[6] In its notice of opposition the defendant asserted that the debt claimed by the plaintiff is disputed and that the defendant has a counterclaim which exceeds the plaintiff's claim.

Dispute as to debt?

[7] The plaintiff's statement of claim refers to a debt of $61,747.63.

[8] In the related proceeding of *Kahurangi Estate Ltd v Buysrogge* HC NSN CIV 2009 442 369, 21 September 2009, I found that there was a debt due by the defendant to the plaintiff which was not the subject of a substantial dispute and not the subject of a counterclaim (except to the extent I referred to in the judgment, which resulted in the Court's ordering that the defendant pay the (net) debt of $61,747.63). I therefore refused the application to set aside the statutory demand.

[9] The debt arises directly from calculations based upon a grape purchase contract between the plaintiff and the defendant. In the statutory demand proceeding the defendant did not challenge the calculation of the debt. Rather the defendant asserted that, by reason of subsequent arrangements entered into between the parties, the payment obligation had been varied with the result that while the debt was owing it was not yet due for payment. In upholding the statutory demand, I ruled against that argument for the reasons set out in my judgment. I also ruled against a counterclaim argument based on alleged over-cropping by the plaintiff given an absence of quantification of such a claim. Accordingly, there was no substantial dispute as to the debt being due and owing.

[10] In this proceeding, the defendant does not assert a dispute based on its earlier reasoning. Rather Mr Praat has in his submissions described the dispute in this way:

> The ultimate question is what amount if any is the defendant indebted to the plaintiff for the supply of grapes under the grape purchase agreement.
>
> The dispute is not fanciful or contrived. The specifications for the cropping levels are recorded in clause 4 of the agreement...

[11] Notwithstanding the implicit suggestion that there is a further ground for disputing the debt itself, the point can be disposed of briefly. There can be no dispute as to the contractual sum owed for the grapes. The grapes were delivered and have been used by the defendant. The contract debt exists. Although Mr Praat in his submissions suggested there remains a question as to the amount of that debt (for supply of grapes) the answer is clear, namely that the debt is (net) $61,747.63. When Mr Praat's submissions are considered in their entirety, the essence is that the defendant is raising a matter in the nature of a cross-claim. I will now come to the way in which that claim is put.

Counterclaim?

[12] The emphasis in Mr Praat's submissions, for the defendant, was that the defendant has a contractual claim against the plaintiff for breach of contract specifications. The argument runs thus:

(a) There were cropping levels specified in the grape purchase agreement.

(b) Compliance with those specifications could not be ascertained until the defendant had measurement of volume harvested, crop ratios and vineyard information, which information became available in late May 2009 (after the delivery of the grapes).

(c) The cropping levels were outside specification with the result that they impacted on the defendant's ability to utilise the grapes in the wine making process resulting in a diminution of value of the wine.

(d) The defendant has suffered damages of $89,130.50.

[13] Gregory John Day, the principal of the defendant, filed an affidavit in support of the application. Mr Day provides calculations as to the excess volume. He deposes that excess grapes were not able to be used in the defendant's name brand wine but are to be used in an alternative, lower priced, brand. He then provides figures which he says represent the loss of wholesale value from the two varieties of grape purchased and processed. The resulting total ($89,130.50) represents the claim the defendant makes for damages. That claim has recently been filed in the District Court.

[14] For completeness, I add that Mr Day also in his affidavit addressed issues relating to the brix level of grapes sold by the plaintiff to the defendant. Issues relating to the brix level are not identified in the grounds of application – or indeed in the District Court claim. They are not relevant to the issues before me and, indeed, Mr Praat did not suggest so in his submissions.

[15] Moving to broader issues of fairness – the defendant's application asserted that allowing the continuation of the winding up proceeding would be unfair to the defendant in all the circumstances – Mr Praat identified the unfairness in the following way. He submitted that the defendant may actually owe nothing more to the plaintiff for the supply of grapes than that which has already been paid. He notes that on the defendant's figures the plaintiff may be liable to the defendant for the difference between $89,130.50 and $61,747.63. He further notes that a particular feature of this case is that the defendant had been acting under the misapprehension that an agreement had been reached as to an extended time for payment and that had cut across any need for the defendant to have earlier issued proceedings in relation to its counterclaim. Finally, Mr Praat points to the evidence of Mr Day that the plaintiff has listed a property for sale and Mr Day is concerned that if the defendant makes payment to the plaintiff there will no security for the counterclaim. Documentary evidence has been provided of the marketing of the property including the comment that "the vendor's bags are packed".

[16] Notwithstanding Mr Praat's succinct submissions, I am satisfied that the appropriate course in this case is to allow the liquidation proceeding to continue.

[17] Five considerations in particular weight with me.

[18] First, the process which the plaintiff has followed with its statutory demand and in this proceeding does not savour of unfairness or undue pressure. Its statutory demand was issued pursuant to a contractual debt. It then successfully defended the application to set aside the statutory demand. In doing so it met both limbs of argument advanced at the time by the defendant. The plaintiff satisfied the Court that the defendant did not have an arguable case as to contractual variation of the date of payment. In other words, there was no substantial dispute as to the existence of a debt due and owing to the plaintiff. Secondly, the plaintiff met essentially the same over-cropping allegation as has again been raised in this application. Although the over-cropping issue was not raised by the defendant in its originating application to set aside the statutory demand. Mr Praat sought to advance the counterclaim argument and as I recorded in my judgment I would have been minded to formally entertain it by an allowed amendment. However, the counterclaim argument failed on the evidence because the defendant did not attempt to quantify what the counterclaim might have amounted to. I applied the decision of this Court in *Data South Holdings Ltd v Melco Sales (N.Z.) Ltd* HC CHCH M41/96 (Master Venning): see my judgment 21 September 2009 at [27]. On the application before me, the nature of the defendant's asserted counterclaim has not altered. What has changed is that Mr Day has now moved to quantify a counterclaim and to issue a District Court proceeding pursuant to that quantification. At the hearing Ms Gepp made cogent submissions as to substantial errors in Mr Day's quantum calculations, especially in relation to Mr Day's failure to account for the additional grapes supplied and the consequential increase in wine produced. Ms Gepp's submissions pointed to an over-statement of the counterclaim which, when addressed properly, is likely to result in at best a counterclaim for less than the debt owed to the plaintiff.

[19] Against this background the plaintiff's application for orders putting the defendant into liquidation do not savour of unfairness or undue pressure. Indeed, against the background of a full hearing on the defendant's application to set aside

the statutory demand, allowing the defendant to use the same counterclaim argument (now quantified) as a basis of staying this proceeding would savour of unfairness to the plaintiff. The defendant previously had its full opportunity to advance evidence and to be heard on issues, including the counterclaim issue. It failed in its application. It was ordered to make payment of the contractual debt by 23 September 2009, failing which the plaintiff under the 21 September 2009 judgment was to be allowed to apply for the defendant's liquidation. The defendant either was unable to, or chose not to, make the ordered payment.

[20] Secondly, there is no evidence from the defendant as to its solvency. The defendant's failure to pay the contractual debt as required by the 21 September 2009 judgment may be an indication of actual inability to pay the debt, beyond the statutory presumption which arises through non-payment of the statutory demand. There is both an interest on the part of the plaintiff ex debito justitiae to proceed with the liquidation and there is a public interest in allowing the liquidation proceeding to continue to a hearing so that the issue in this jurisdiction – solvency – may be determined substantively.

[21] Thirdly, the defendant's current application is in a sense an attempt to overcome the statutory presumption of insolvency which arose when the defendant's earlier application (to set aside the statutory demand) failed and the defendant again failed to make payment. In the context of a jurisdiction based upon abuse of the process of the Court, it would be an abuse to now permit the defendant in an interlocutory context to defeat the presumption of insolvency and to not allow this proceeding to continue to a substantive hearing.

[22] Fourthly, the defendant expresses concern as to the financial prejudice it might suffer through now meeting the statutory demand and then later finding that the plaintiff cannot pay any award which the defendant receives in relation to its "counterclaim". Mr Day expresses the matter as "the defendant will not have security for its counterclaim". But it is not the function of this Court in this jurisdiction to arrange security for a counterclaim in that way. The plaintiff has promptly taken the appropriate procedural steps. The defendant has not promptly quantified or pursued its claim. The fact that possibly competing civil claims are not

being dealt with in tandem is a consequence of the way in which the defendant has responded to demands for payment of the contractual debt. On the circumstances of this case it is not appropriate for the Court to adopt interlocutory methods in a liquidation proceeding in order to seek to adjust the civil positions of the parties.

[23] Fifthly, the plaintiff has to some extent provided evidence to allay the concerns of the defendant as to any inability of the plaintiff to settle any sum that is subsequently found to be owing. The plaintiff in response to Mr Day's affidavit has indicated that while it is true that his property is on the market, it has a government valuation of $710,000.00 and a mortgage of $240,000.00. While there is no statement of overall financial position the evidence provided by the plaintiff does in some measure meet the basis of the only specific concern raised by the defendant as to the plaintiff's financial position which related to the fact that the plaintiff was marketing his property for sale.

Orders

[24] I dismiss the defendant's application.

[25] I allocate *2.15pm 9 December 2009* for the hearing of the plaintiff's application for an order putting the defendant into liquidation.

[26] I direct counsel to confer and to file by *20 November 2009* preferably a joint memorandum setting out proposed directions and timetabling for the preparation of the case for trial. The memorandum is to cover all matters requiring direction and timetabling, including matters in relation to any evidence that will be required at trial. I note in particular that the defendant denies that it is unable to pay its debts which I take to be a positive assertion that it is not insolvent within the meaning of "insolvency" under the Companies Act 1993. I expect counsel to indicate in their memorandum what evidence is anticipated, if any.

Costs

[27] I anticipate that counsel will agree that the plaintiff, as the successful party on this application, is entitled to costs on a 2B basis, together with disbursements. This is as was done in relation to the application to set aside the statutory demand (CIV 2009 442 369). In the event that costs and disbursements are not resolved by agreement between the parties I reserve leave for submissions to be filed sequentially no more than five working days apart (4 pages maximum).

Solicitors
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