

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

CIV-2009-441-804

UNDER the Companies Act 1993

BETWEEN CONTACT ENERGY LIMITED
Plaintiff

AND DURNEY LAND COMPANY LIMITED
Defendant

Hearing: 10 December 2009

Appearances: S. Barker - Counsel for Plaintiff
G. McKay - Counsel for Defendant
K.J. Trusler - Counsel for Creditor in Support Kerr & Glenn Limited

Judgment: 11 December 2009 at 2.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 11 December 2009 at 2.15 pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] The plaintiff, Contact Energy Limited (“Contact”) has applied for an order to place the defendant company, Durney Land Company Limited (“Durney”) into liquidation. The application is supported by Kerr & Glenn Limited a creditor in support but it is opposed by Durney.

[2] At the outset of the hearing of this matter leave was granted to Durney for the late filing of its statement of defence, this being filed only on 3 December 2009.

Background

[3] The debt in question outstanding from Durney to Contact totals some \$391,568.84. It relates to electricity supply made to Contact over a lengthy period and the debt has been outstanding for about the last 18 months. It is accepted that no payments have been made against the debt over this 18 month period.

[4] The amount claimed by Kerr & Glenn Limited (trading as Lynn Electrical) as supporting creditor is \$42,163.76.

[5] A statutory demand for the Contact debt in question was served upon Durney but remained unanswered. No application was brought by Durney to set aside the demand.

[6] When the substantive proceedings were filed on 18 November 2009 Durney did however bring an application before this Court to restrain advertising and stay the proceeding. That application was heard as a matter of urgency by His Honour Justice Miller on 2 December 2009. After hearing from counsel for the plaintiff and the defendant, Justice Miller refused the application. Significantly, in doing so, at para. 2 of a Minute he issued on 2 December 2009 outlining his decision, Justice Miller stated:

“The company (Durney) is admittedly insolvent on a cash flow basis. Contact has been unpaid for some 18 months, and continues to supply electricity to the company to the value of some \$20,000.00 per month. Although there may be a dispute about the precise amount payable, it is not in dispute that Contact is a creditor of the

company and is unpaid. In those circumstances the Court must be slow to take it on itself to decide that creditors should be denied the ability to take an insolvent company out of the hands of the directors who got it into that position. Because the company is clearly paying some creditors to stay off other proceedings, there is a risk of preferences that may have to be unwound in the interests of creditors as a whole.”

Counsel’s Arguments and My Decision

[7] Turning now to the substantive application before me brought under s. 241(4)(a) Companies Act 1993 on the basis that Durney is “unable to pay its debts”, clearly in terms of s. 287 Companies Act 1993, unless the contrary is proved, Durney is presumed to be unable to pay its debts now as it has failed to comply with the statutory demand issued by Contact. Despite the claim at para. 4 of Durney’s statement of defence that it “is able to pay its debts in the ordinary course of its business” the evidence before the Court shows that this is not the case and Durney is admittedly insolvent on a cash flow basis in terms of s. 4(1) Companies Act 1993. Contact has remained unpaid with what is a substantial debt for some 18 months and it appears this debt is likely to be growing at the rate of about \$20,000.00 per month for continued supply of electricity to Durney. In addition, the debt outstanding to the creditor in support Kerr & Glenn Limited is said to have been owing for some time. Liquidation of a company under s. 241(4)(a) is particularly justified when the cash flow test of solvency is not met – see *Tweeds Garages Ltd* [1962] CH406 and *Commissioner of Inland Revenue v F B Duvall Ltd* (2009) 24 NZTC 23, 135.

[8] The next claim in the defendant’s statement of defence contends that the unpaid power bills to Contact related in part to premises owned by other entities and not the defendant company. The bills in question are an amalgamation of accounts which it is said was unilaterally undertaken by the plaintiff in respect of those separate legal entities.

[9] On this aspect, before me it became apparent that a request to Contact to amalgamate the various accounts was likely in fact to have emanated from Durney. Even if this was not the case, it is accepted by all parties that an undisputed amount owing to Contact by Durney itself amounts to a substantial sum well into 6 figures. I dismiss this quantum ground of defence advanced for Durney.

[10] The last effective ground of defence advanced in Durney's statement of defence is that on a solvency test of assets over liabilities Durney has a considerable surplus which will enable it to meet "substantial liabilities within a reasonable time".

[11] On this aspect there was no detailed independent evidence before the Court of the present financial position of Durney. No financial accounts were provided to the Court nor was any evidence provided from the company's accountant or any independent third party as to the company's present financial position, despite several affidavits having been filed in support of Durney's opposition to the present application.

[12] Instead, Mr. Raymond Philip Durney ("Mr. Durney") stated at para. 4 of one of his affidavits sworn on 27 November 2009:

"4. To put the company's assets and liabilities in perspective there are total property holdings with valuations of approximately \$17.5 million, liabilities including mortgages of \$12 million and showing a significant excess of assets over liabilities of approximately \$5.5 million."

[13] In addition, Mr. Durney has provided evidence to the Court that one of Durney's properties known as "Heretaunga House" has been unconditionally sold at a price of \$5 million with settlement due on 18 December 2009. After repayment of mortgages and other costs, it has been indicated to the Court that "some amount" would be available as a part repayment towards the Contact debt.

[14] In addition Mr. Durney deposes that the company intends to continue a sell down process of its other property assets in a measured way and from each of these transactions an allocation will be made in his words "to substantially pay Contact Energy and the other creditors who are seeking to join in their application."

[15] Under these circumstances Mr. Durney deposes at para. 4 of his 10 December 2009 affidavit:

"4. In all the circumstances I do not consider it would be fair to impose liquidation on the company which would have a material effect on the balance of its selling process."

[16] It became apparent therefore from the submissions advanced by Mr. McKay for Durney that the real nub of the company's defence to the present application was simply, as Mr. Durney had requested, that the company should be given more time to sell down its remaining property portfolio and to allow it to control the systematic repayment of all its liabilities. On this it needs to be noted that Mr. Durney in his evidence did suggest that he was willing to provide "appropriate undertakings" to the Court "... to keep the Court informed on a regular basis of sales and settlements until this selling scheme has been completed".

[17] On this basis Mr. McKay for Durney contended that it would not be just and equitable for Durney to be placed into liquidation.

[18] In considering all these aspects I need to say at the outset that it is entirely unsatisfactory that the Court does not have before it verified independent evidence of the current financial position of Durney. Mr. Durney has attached to his affidavit evidence certain unverified schedules setting out what are said to be the values of various properties held by Durney. No independent evidence of any kind is provided to the Court to verify this however. Nor are details provided of any other assets the company may own. In addition, there is no evidence before the Court to outline the full extent of Durney's liabilities. As I have noted above, Mr. Durney in one of his affidavits states that the company has "liabilities including mortgages of \$12 million". There is no evidence, however, of the value of unsecured creditors although before me Mr. Barker for Contact did suggest (and there was no objection raised to this) that it had been said by Mr. Durney earlier in the application before His Honour Justice Miller that Durney owed \$1 million to the Inland Revenue Department and \$1.25 million to unsecured creditors.

[19] And there seems little dispute with the suggestion that the company has clearly paid off some creditors at the expense of others to stay off other proceedings. Indeed, as I understand the position, earlier applications to place Durney into liquidation were filed and publicly advertised by Wynands Masonry Limited and by Programmed Maintenance Services (NZ) Limited. These liquidation applications did not proceed. It can only be assumed that the debts in question to these creditors were paid selectively.

[20] In considering all the circumstances here, in my view, there can be no question that Durney is insolvent on a cash flow basis in terms of the solvency test outlined at s. 4(1) Companies Act 1993. In spite of the claim in Durney's statement of defence to the contrary, this position has been effectively admitted by Durney on a number of occasions. This includes in a memorandum from Mr. McKay, counsel for Durney, filed in this Court dated 27 November 2009 where he states that he has instructions if necessary "to frame up and file and serve an application for the Court to approve a scheme of arrangement". Under Part 14 of the Companies Act 1993 at s. 228(1) a requirement for such a compromise proposal or scheme of arrangement is that the "Company (in question) is or will be unable to pay its debts".

[21] Next, it is clear that Durney although a property development and ownership company continues to trade at present. The evidence before the Court is that additional liabilities are being incurred including at the very least liabilities approaching some \$20,000.00 per month for electricity to Contact. The evidence before the Court confirms that tenants of the company's properties are paying rent but it is unclear where this rental income may be directed other than the obvious requirement to meet mortgage payments.

[22] Taking a broad view of all these matters, it is clear to me that Durney has failed to heed the warning provided by His Honour Justice Miller in his decision on the application for stay and to restrain advertising made on 2 December 2009. Those comments are outlined at para. [6] above and in particular I repeat:

"... the Court must be slow to take it on itself to decide that creditors should be denied the ability to take an insolvent company out of the hands of the directors who got it into that position. Because the company is clearly paying some creditors to stay off other proceedings, there is a risk of preferences that may have to be unwound in the interests of creditors as a whole."

[23] Before me at the hearing of this matter, no real proposals were put to satisfy the substantial outstanding debts owing to Contact, the creditor in support or other creditors. The suggestion of a programmed sell down of Durney's properties controlled by the directors provides no certainty that any party other than secured creditors would be repaid.

[24] The existing unsecured creditors will clearly suffer continued financial prejudice if Durney is allowed to run up more credit which it may be unable to pay. There seems to be no question that Durney is continuing to trade whilst it is legally insolvent in terms of the cash flow test. It is for the benefit of all parties that this situation should cease now and a liquidation order be made. Liquidation now will ensure that all existing creditors are treated evenly and it will prevent further potential risk to new creditors extending credit and to the directors of the company from any potential liability for trading whilst insolvent. This will also allow any existing sales of the company's properties to be settled and completed by the independent liquidators and for proper decisions to be made to treat all unsecured creditors on an equal basis.

[25] For all these reasons Contact's application succeeds. An appropriate certificate confirming indebtedness has been filed by Contact and a signed Consent to Act form provided by the proposed liquidators.

Orders

[26] An order is now made placing the defendant company, Durney Land Company Limited, into liquidation.

[27] John Howard Ross Fisk and Craig Alexander Sanson are appointed liquidators.

[28] Costs are awarded to the plaintiff Contact and to the creditor in support Kerr & Glenn Limited on a Category 2 basis together with disbursements as fixed by the Registrar.

[29] An order is made approving the liquidator's rates of remuneration in accordance with the affidavit of Craig Alexander Sanson dated 17 November 2009 filed herein, subject to s. 284 Companies Act 1993.

[30] This order is timed at 2.15 pm today, 11 December 2009.

‘Associate Judge D.I. Gendall’