IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-004167

	BETWEEN	MERLOT INVESTMENTS LTD (IN LIQUIDATION AND IN RECEIVERSHIP) Plaintiff
	AND	MERLOT (WANAKA) LTD (IN RECEIVERSHIP) Defendant

Hearing: 15 December 2009

Appearances: D Wong for Plaintiff
B Vautier for Defendant

Judgment: 16 December 2009 at 12:30 pm

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on 16 December 2009 at 12:30 pm pursuant to r 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Date: ……..……..

Solicitors:
Gaze Burt, PO Box 301 251, Albany, North Shore City
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[1] On 15 December 2009 I heard the defendant's application for an extension of time to file a statement of defence.

[2] After hearing the parties, I adjourned the case to 16 December 2009 to allow the defendant time to pay the plaintiff the sum of $8,405.32, the amount which the plaintiff says is owing.

[3] I now give my reasons for my decision.

[4] The plaintiff and the defendant are related companies. They have common shareholders who have more than half the issued shares in each company – s 2(3)(c) of the Companies Act 1993.

[5] Neither is trading. The plaintiff is in liquidation under order of the High Court of 28 November 2008. Further, a receiver was appointed on 16 July 2009. The defendant is in receivership, the receiver, Mr Richardson, having been appointed on 14 January 2009.

[6] The plaintiff says that the defendant owes it the sum of $8,405.32. The defendant says that the plaintiff owes it the sum of $1,803,100. The defendant does not accept the debt claimed by the plaintiff. The plaintiff accepts some parts of the debt claimed by the defendant but reserves the right to investigate other parts.

[7] On 13 May 2009 the plaintiff's liquidators wrote to the receiver of the defendant in the following terms:

> Amount: $8,405.32
>
> **Re: Statutory Demand of Debt Owed to Merlot Investments Limited (In Liquidation)**
>
> The above-mentioned company was put into liquidation on the 18th of September 2008 by order of the High Court in Auckland, naming Damien Grant and Steven Khov as joint and several liquidators. It has come to our attention that $8,405.32 is owed by Merlot (Wanaka) Limited (In Receivership) to the company in Liquidation.
>
> We hereby require that you enter into one of the following courses of action:

(a) Make payment of the $8,405.32 to the offices of Waterstone Insolvency, at Unit K1, 75 Corinthian Drive, Albany.

(b) Enter into a compromise under Part 14 of the Companies Act 1993.

(c) Enter into a compound with the liquidators of the aforementioned company.

(d) Give a charge over your company's property sufficient to secure payment of the debt.

If one of these actions is not taken within 15 days of service of this Statutory Demand you shall be presumed to be unable to pay your debts and an application will be made at the High Court in Auckland for Merlot (Wanaka) Limited to be placed into liquidation.

This letter purports to be a statutory demand under s 289 of the Companies Act, but it was not served on the registered office of the company. The letter gives no information whatsoever what the alleged debt of $8,405.32 was for.

[8] The actual statutory demand served on the registered office of the defendant on 27 May 2009 is in almost identical terms, except that the notice began with these words: "As you have been made aware in previous correspondence". Like the letter of 15 May 2009, the demand of 27 May 2009 did not identify the debt. Understandably, Mr Richardson, the receiver, says that the statutory demand does not set out any details or explanation of what the debt relates to. He says that when he received the letter of 15 May 2009 he did not know anything about the debt and in his affidavit of 28 August 2009 says that he still does not have any details about the debt.

[9] Since the issue of this proceeding, the plaintiff has had the opportunity to tell the Court and the defendant what this debt is for and when it was incurred and to provide information to support its assertion that it is owed the sum it says is due. In the statement of claim, the plaintiff has pleaded that the debt is an inter-company loan. However, despite the defendant's evidence that it cannot establish the validity of this claimed debt, the plaintiff has kept all other information about the alleged debt to itself.

[10] Two points arise out of this. The first is that the statutory demand is invalid. A debt which is the subject of a statutory demand must be identified. A company

receiving a statutory demand under s 289 needs to decide what position it will take in relation to the demand. It needs to decide whether there is a substantial dispute about the debt requiring an application under s 290. Alternatively, it needs to consider what action it should take under s 289(2)(d) in relation to the debt. A company cannot do this if the debt, the subject of the demand, is not identified. A company presented with a demand for an unidentified debt is left in the difficult position of not knowing how to respond to the demand.

[11] The plaintiff's response was to suggest that it is always open to a company served with a statutory demand where the debt is not identified to make application under s 290 to have the demand set aside. That is not a proper response. A company ought not to be put to the trouble of applying under s 290 simply to find out what the debt is. The creditor is required to identify the debt in its notice, not to leave the company guessing what the debt might be.

[12] Identification of the debt will depend on the circumstances. A formal pleading in the nature of a statement of claim is not required. Sometimes before a statutory demand has been served there will have been correspondence, invoices, statements and demands for payment so that the debt can be readily identified from earlier dealings between the parties. While that may pass muster in some cases, those preparing statutory demands can avoid difficulties by providing information in the statutory demand which adequately identifies the debt. Attaching copies of statements and invoices to a demand can also assist in providing adequate information.

[13] In this case, the demand contained no identification of the debt. The correspondence sent before the demand did not assist the receiver in identifying the debt. Even now, there is not enough information to learn when the debt was incurred, what it was for and whether it has been repaid.

[14] The document being invalid, the defendant has not failed to comply with a statutory demand for the purpose of s 288(1) of the Companies Act.

[15] The second point is that, even now, the plaintiff has not put sufficient evidence before the Court to satisfy me that it is a creditor of the defendant. While the plaintiff has provided a verifying affidavit, once the defendant properly put the validity of the debt in issue, it was incumbent on the plaintiff to show that it was a creditor of the defendant. I am not satisfied that it has.

[16] The statement of claim pleads an alleged failure to comply with a statutory demand, but it does not contain any pleading as to the particular ground under s 241(4) relied on for an order that the company be put into liquidation. The plaintiff probably intended to rely on s 241(4)(a): inability to pay its debts. Whether a company is able to pay its debts or not is a question of fact. A failure to comply with a statutory demand creates a rebuttable presumption that the company is unable to pay its debts (s 287(a)). A plea of non-compliance with a statutory demand may be understood by those versed in the Companies Act to give rise to the presumption, but statements of claim are not written just for that select readership. A statement of claim for putting a company into liquidation should state expressly which of the grounds in s 241(4) the plaintiff relies on.

[17] On 20 August 2009 the defendant lodged a proof of debt with the plaintiff claiming an indebtedness of $1,803,100. The proof of debt had attached to it a spreadsheet showing 13 payments made by the defendant between February and May 2008. The plaintiff acknowledges that these payments were made, but queries whether all these payments were funds advanced by the defendant to the plaintiff. It notes that whereas some payments were made to allow the plaintiff to discharge its own liabilities and were therefore funds lent, others were simply payments of "funds available" or "sale proceeds". It says that the status of those payments is uncertain. I note that, despite the provision of the information by the defendant to the plaintiff, the plaintiff has had over three months to investigate these payments. That may be compared with the short time and minimal information given in the plaintiff's demand.

[18] The plaintiff acknowledges that payments received from the defendant used to discharge its own liabilities are funds advanced. The items in the proof of debt for these parts total $413,590.35. That part of the proof of debt at least is undisputed.

[19] The plaintiff says that the sums claimed by the defendant cannot be set-off against the debt claimed by the plaintiff, because the transactions all took place during the restricted period of two years before liquidation and were between related persons – s 310(3)(a), (5), (7)(b). The defendant's response to that was that as it was not known what the debt claimed by the plaintiff was for and when it was incurred, if at all, it is not possible to decide how s 310 applies in this case. I accept that the s 310 point remains open because of this uncertainty.

[20] This proceeding has been duly advertised. It has been called in Court on earlier occasions. No other creditor has filed an appearance under rule 31.18 in this proceeding.

[21] The defendant advised that it wants to adopt a pragmatic approach to the present proceeding. It is prepared to pay the plaintiff the sum claimed in the statement of claim (whether the claim is good or not) plus any sum ordered by the Court for costs so as to bring the present proceeding to an end. It saw this as a cost effective way of bringing the matter to an end rather than conducting a defended hearing. Funds had been found to make the payment. I also understood that the defendant effectively had no other assets apart from whatever it could recover from the plaintiff under its proof of debt. The defendant advised that payment could be made almost immediately. It also advised that it had conveyed this position to the plaintiff earlier.

[22] The plaintiff rejected this proposal. It voiced its suspicion how the defendant could pay the sum in question when it was apparently insolvent and without assets. It also maintained that it was necessary to have the defendant wound up and relied on cases such as *Re Feltex Carpets Ltd* (2006) 3 NZCCLR 714 and *Commissioner of Inland Revenue v Chester Trustee Services Ltd* (2002) 9 NZCLC 236,016.

[23] With respect, the plaintiff has missed the point. Once the plaintiff has been paid any debt it claims, it no longer has the status of a creditor under s 241(2)(c)(iv) of the Companies Act. It no longer has standing to maintain its proceeding. In this case, the plaintiff has fallen short in establishing that it is a creditor, yet the defendant is willing to pay the amount the plaintiff claims. Apparently the receiver

or parties associated with the secured creditor who appointed the receiver have funds to clear away someone claiming to be an unsecured creditor. I find it surprising that the plaintiff has not accepted the offer made by the defendant.

[24] The way to test the genuineness of the defendant's offer is to give the defendant the opportunity to make the payment. I accordingly adjourned the case until 16 December 2009 for payment to be made. When the case is heard again, I will hear the parties as to costs.

[25] I also note the following four points.

[26] First, I have not made any determination whether the defendant is indebted to the plaintiff. I have not received enough information to help me one way or the other.

[27] Second, I have not determined how much the plaintiff owes the defendant, other than that it is at least $413,590.35.

[28] Third, after this proceeding had been filed in Court, a receiver of the plaintiff was appointed under a general security agreement held by the trustee of the Churchside Trust. The receiver purported to assign the debt, the subject of the plaintiff's claim, to the Churchside Trust. But the plaintiff properly pointed out that this was ineffective. The plaintiff referred to s 31 of the Receiverships Act 1993 which provides:

> **31 Powers of receiver on liquidation or bankruptcy**
>
> **(1)** Subject to subsection (2) of this section, a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of property of—
>
> (a) a company that is being wound up or that has been put into liquidation; or
>
> (b) a debtor who has been adjudged bankrupt under the Insolvency Act 2006—
>
> unless the Court orders otherwise.

> **(2)** A receiver holding office in respect of property referred to in subsection (1) of this section may act as the agent of the grantor only—
>
> (a) with the approval of the Court; or
>
> (b) with the written consent of the liquidator or the Official Assignee, as the case may be.
>
> **(3)** A receiver who, by reason of subsection (2) of this section, is not able to act as the agent of the grantor does not, by reason only of that fact, become the agent of a person by whom or in whose interests the receiver was appointed.
>
> **(4)** A debt or liability incurred by a grantor through the acts of a receiver who is acting as the agent of the grantor in accordance with subsection (2) of this section is not a cost, charge or expense of the liquidation or the administration of the bankrupt's estate.

[29] The defendant referred to the deed of assignment under which the receiver had assigned the deed as an agent of the plaintiff. The receiver did this without either the approval of the Court or the consent of the liquidator. I accept the plaintiff's submission that the assignment was ineffective.

[30] Fourth, if required, I would have granted the defendant's application for an extension of time to file and serve a statement of defence. Service of the proceeding was completed on 24 July 2009 when the plaintiff served the verifying affidavit on the defendant (the notice of proceeding and statement of claim had been served earlier). The ten working days for filing a statement of defence expired on 7 August 2009. The case was first called in Court on 21 August 2009. The defendant's application for extension of time was filed on 28 August 2009.

[31] The receiver of the defendant has given an explanation about the delay in responding to the proceeding. He was unable to establish the validity of the debt claimed by the plaintiff. He had tried to resolve this matter informally by telephoning the liquidator who had issued the statutory demand, but this telephone call had been unproductive. He had experienced difficulties in obtaining company records from the defendant's former lawyers. He needed to uplift these records to make his own inquiries as to the debt claimed by the plaintiff and also to investigate the transactions between the plaintiff and the defendant.

[32] I accept that he was handicapped for reasons largely outside his control. Until the information came to hand, he could not have responsibly arranged a

response to the statutory demand or a defence to the proceeding. With hindsight it might be said that the receiver ought to have obtained these records even before he received the letter of 15 May 2009 from the plaintiff. However, when investigating the reasons for the delay in filing a statement of defence, it is the defendant's conduct after it has been served that needs to be examined, not what might have been done earlier.

[33] Given the deficiencies in the plaintiff's claim which outweighed any inconvenience arising out of delays by the defendant, the interests of justice required that time for filing and serving the statement of defence be extended.

[34] When the case was called on 16 December 2009, the parties advised me that the defendant had paid the plaintiff the sum in the statement of claim. I then heard the parties' submissions as to costs.

[35] The defendant did not seek costs. That was responsible. The defendant had not filed a statement of defence in time and was seeking an extension. Rule 14.7(f)(i) applies.

[36] The plaintiff did seek costs but it is not appropriate that the plaintiff recover costs. The plaintiff's success in recovering payment owes more to the pragmatic position taken by the defendant than to the merits of the plaintiff's claim. In terms of r 14.7 the amount sought by the plaintiff was of exceptionally low value in terms of r 14.7(b), being an amount within the jurisdiction of the Disputes Tribunal. While the plaintiff has successfully recovered payment, it failed on the key issues of the validity of the statutory demand and proof of the debt it claimed – r 14.7(d). Its failure to accept the defendant's offer of payment was unreasonable – r 14.7(f)(v). There is therefore no order as to costs.

[37] The proceeding to have the defendant put into liquidation is dismissed.

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R Bell
Associate Judge