IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2006 442 000481

BETWEEN	THE DUNES CAFÉ AND BAR LIMITED Plaintiff
AND	623 ROCKS ROAD LIMITED Defendant

Hearing: 27 August 2009

Counsel: Mrs Danielle Hampson on behalf of plaintiff
Simon E England for defendant

Judgment: 1 September 2009 at 3:00pm

RESERVED JUDGMENT OF HUGH WILLIAMS J

This judgment was delivered by
The Hon. Justice Hugh Williams
on

1 September 2009 at 3:00pm

pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

A. Orders as to admissibility as detailed in the judgment.

B. Timetable orders as detailed in the judgment

Introduction

[1] This hearing was convened to deal with an objection by Mr England, counsel for the defendant, to the form and content of an affidavit filed on 28 July 2009 by Mr Hampson, director of the plaintiff, concerning the plaintiff's defended interlocutory application under s 248(1)(c)(ii) of the Companies Act 1993.

[2] As set out in the Court's Minute dated 18 August 2009, timetable orders also required to be addressed.

Matters in Issue

[3] Since this Court's substantive judgment in the dispute between these parties was delivered, the defendant ("Rocks") has been placed in liquidation. Its liquidators' provisional report indicates a deficiency of over $19m.

[4] Rocks' liquidation on 25 March 2009 meant, in terms of s 248(1)(c)(i) of the Companies Act 1993, that persons such as the plaintiff ("Dunes") may not "continue legal proceedings against the company" without the agreement of the liquidators or leave of the Court.

[5] The Court having drawn that to the parties' attention in its Minute of 24 June 2009, Dunes filed an application on 8 July 2009 for an order authorising the continuation of these proceedings against Rocks and supported that application with an affidavit from its director, Mr Hampson.

[6] Rocks filed a notice of opposition to that application on 22 July 2009 and supported that with affidavits from its director, Dr Donald, and one of its liquidators, Ms Mason.

[7] Mr Hampson then filed what was required by the Rules to be regarded as an affidavit in reply, that being the affidavit of 28 July 2009.

[8] Mr England, for Rocks, filed a Memorandum dated 30 July 2009 raising issues concerning service of the proceedings – not pursued at the hearing on 27 August 2009 on receipt of satisfactory assurances on Dunes' behalf – and concerning the form of Mr Hampson's second affidavit. Mr England submitted it should either not be read or not accepted for filing.

[9] Mr England's objection was argued during the telephone hearing on 27 August 2009 and this judgment deals with that aspect of the matter.

Mr Hampson's second affidavit

[10] Approaching the matter, first, on a broad basis, Mr England submitted Mr Hampson's second affidavit was not strictly in reply in breach of rr 7.26 and 9.76; it contained hearsay without specific reference to the source of the documents relied on; and was unnecessarily argumentative and in the nature of submissions rather than evidence.

[11] The Court deals with Rocks' objections seriatim.

Paragraph 2:

[12] Paragraph 2 was argued as not being in reply. It merely repeats aspects of Mr Hampson's first affidavit. While it adds little, it is not objectionable and can stand.

Paragraph 3:

[13] Paragraph 3 merely sets out the material on which Mr Hampson wished to comment. The objection is not made out.

Paragraphs 4 to 7:

[14] Paragraphs 4-7 were said to be not in reply, to be irrelevant and be submissions.

[15] Paragraph 4 sets out why Dunes wishes to proceed to judgment even though Rocks is in liquidation. Mr Hampson advances reasons for that course "which were not included in my first affidavit". The first part of para 4 is no more than repetition of matters adverted to in Mr Hampson's first affidavit and can remain. The latter part of para 4 indicates some of the material which follows was not in reply but, in the form in which it appears, it can stand.

Paragraph 5:

[16] Paragraph 5 merely recites the New Zealand Bill of Rights Act 1990 s 27. That passage is in the nature of legal submissions, not evidence, and is not to be read.

Paragraph 6:

[17] Paragraph 6 is an observation on the impact of the New Zealand Bill of Rights Act 1990. It is in the nature of submissions and is not to be read.

Paragraph 7:

[18] Paragraph 7 similarly deals with the impact of the New Zealand Bill of Rights Act 1990. It is not to be read for much the same reasons.

Paragraphs 8-9:

[19] Paragraphs 8 and 9 were argued to be not in reply and to be of questionable relevance.

[20] The first sentence of para 8 merely recounts what has been previously said on Rocks' behalf. It is unexceptionable and may stand. The second sentence of para 8 is an observation on the exhibits to Dr Donald's affidavit and can remain, to be evaluated along with the material Dr Donald has put before the Court.

Paragraph 9:

[21] Paragraph 9 merely comments on the information put in evidence by Rocks' liquidators. It can stand.

Paragraphs 10-11:

[22] Paragraphs 10 and 11 were also argued to be not in reply, of questionable relevance, and argumentative.

[23] Para 10 merely exhibits passages from this Court's substantive judgment. It is thus in the nature of legal submissions and is not to be read – though the entire judgment forms part of the record of this case.

[24] Paragraph 11 describes the nature of Dunes' dealings with Dr Donald and the plaintiff's unwillingness to accept Dr Donald's word concerning Dunes' state of affairs without the ability to verify it.

[25] The way in which para 11 is couched is perhaps exaggerated but doubtless the paragraph reflects Dunes' view of statements made by Rocks' director. It may stand.

Paragraph 12:

[26] Paragraph 12 was argued as being not in reply, of questionable relevance, and hearsay as relying on documents sourced from external sources.

[27] The first sentence of para 12 is unexceptionable and can remain. The balance of the paragraph is hearsay but there is no proof that Dunes is able to comply with s 18 of the Evidence Act 2006. The second and third sentences of para 12 are therefore ruled inadmissible but, since it seems to be generally agreed by the parties that the apartments which formed the development which is the subject of the proceedings were sold at depressed prices well below expectation, what Mr Hampson said is in general agreement even if the statistics he proffers are inadmissible.

Paragraph 13:

[28] Paragraph 13 was similarly argued as not being in reply, of being of questionable relevance, being a statement of belief without specified grounds, and hearsay.

[29] In para 13 Mr Hampson expressed doubt as to Rocks' default interest rate and exhibited two Press reports concerning the financial position of a company which appeared to form part of Rocks' financing arrangements. That material is of no relevance to the dispute between these parties and para 13 is ruled inadmissible.

Paragraph 14

[30] Paragraph 14 was argued to be not strictly in reply, argumentative, legal submissions, and hearsay.

[31] Paragraph 14 merely makes some observations on the costs of a further hearing and on the fact that Rocks did not participate in the directed discussion on quantum. It replies to Dr Donald's comments on that topic. The paragraph does not add much to the matter but can stand.

Paragraph 15:

[32] Paragraph 15 was also argued to be not in reply, irrelevant and submissions.

[33] Paragraph 15 merely recounts three passages from Rocks' notice of opposition and supporting affidavits and makes some observation on them. It is admissible and can stand even though it adds little to the matter.

Paragraph 16:

[34] Paragraph 16 was again argued to be not in reply, argumentative, irrelevant, hearsay and legal submissions. It was also said to be "potentially defamatory" even though, of course, absolute privilege applies to Court proceedings.

[35] The first sentence of para 16 quotes comments said to have been made by Gendall J in relation to Dunes' application for an interim injunction. The second quote was certainly used but Mr England submitted the first was not part of the evidence. The first quote only can stand.

[36] The second sentence of para 16 purports to reproduce the effect of statements made to the Court during the hearing of the interim injunction application. Mr England disputed the accuracy of the statement and on that basis and because it does not relate to any further hearing between these parties, the sentence will not be read.

[37] The third sentence of para 16 describes statements as being "now known to be completely false" and makes observations on the consequences of what has occurred to date in this dispute and, possibly, on the relationship of other persons having financial dealings with Dr Donald.. This assertion that the statement was "now known to be completely false" is an observation of opinion but it is not in reply to the matters in issue in this case and will not be read. The rest of the sentence may also be submissions but, in any case, refers to matters which may lie in the future rather than be relevant to the completion of this case and will not be read.

[38] The fourth sentence of para 16 speaks of some development by Dr Donald or one of his companies elsewhere than Nelson. It is irrelevant to the circumstances of completion of this case and will not be read.

Paragraphs 17 and 18:

[39] Paragraphs 17 and 18 were argued to be not in reply and to be submissions.

[40] Paragraph 17 is an observation on the matters raised by Dr Donald in his affidavit and can stand.

[41] Paragraph 18 amounts to submissions on matters of equity. It will not be read.

Paragraph 19:

[42] Paragraph 19 was argued to be not in reply, argumentative and again amounting to submissions.

[43] The first two sentences of para 19 are Mr Hampson's view of Dr Donald's actions. Although there is a certain weight in Mr England's submissions that it is Rocks which is concerned in this case and not Dr Donald, the defendant's director has been closely identified with the defendant throughout the hearing and the statements may stand as Mr Hampson's opinion.

[44] The third and fourth sentences of para 19 amount to submissions and a statement of the plaintiff's present purpose. The third sentence amounts to submission and will not be read. The fourth sentence confirms the plaintiff's attitude and is admissible.

Future conduct of proceeding

[45] The plaintiff first wishes to complete the hearing of its claim against the defendant. It has applied for an order under s 248(1)(c)(ii) of the Companies Act 1993. That will have to be dealt with and granted before there is to be any hearing on quantum. The parties were agreed the s 248(1)(c)(ii) application will probably take up to a half day to hear. The Registrar is directed to make inquiries as to when a half day fixture for the hearing of that application can take place, but that direction is subject to what follows.

[46] Mr England advised that he was instructed to reserve his position concerning the level of participation by Rocks in any hearing on quantum, if leave were granted to proceed. He is to have 28 days from delivery of this judgment to obtain instructions on that score and to advise the Court and the plaintiff what length of hearing time is to be expected according to Rocks' intending participation in the hearing.

[47] The fixture for the hearing of the s 248(1)(c)(ii) application is to be followed - on the assumption that leave may be granted and that Rocks gives instructions that its position is to be fully defended at the hearing - by a fixture for that hearing.

[48] To make that clear, as advised on 27 August, what is envisaged is that the s 248(1)(c)(ii) hearing would occupy up to half a day, with the judgment being delivered that day or the next morning and, if the Court agrees the proceedings can continue, with the hearing of, say, 2-3 days dealing with quantum following immediately.

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HUGH WILLIAMS J.

Solicitors:	Hunter Ralfe Lawyers (Simon England), Nelson, for defendant
Liquidators:	Meltzer Mason Heath, P O Box 6302 Wellesley Street, Auckland 1141
Copy for:	Mr and Mrs Hampson, 26 Monaco View, Stoke, Nelson
Case Officer:	Russell Arnst, High Court, Nelson *Email:* russell.arnst@justice.govt.nz