

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

**CIV 2008-419-001620**

IN THE MATTER OF     the Companies Act 1993

BETWEEN                THE COMMISSIONER OF INLAND  
                              REVENUE  
                              Plaintiff

AND                       TUWELL TRUST LIMITED  
                              Defendant

Hearing:           6 March 2009

Appearances: A MacFarlane for Plaintiff  
                  M Patel for Defendant

Judgment:       6 March 2009

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**JUDGMENT OF COOPER J**

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Solicitors:  
Inland Revenue Department, Legal and Technical Services, PO Box 432, Hamilton  
M Patel Law, PO Box 1519, Hamilton 3204

[1] In its statement of claim filed on 12 November 2008, the plaintiff seeks an order putting the defendant into liquidation. The plaintiff claims that the defendant is indebted to it in respect of PAYE in the sum of \$7,141.67, and Goods and Services Tax (“GST”) of \$39,274.77, a total indebtedness of \$46,416.44. Included in that total are interest and penalties down to 6 October 2008. Such interest and penalties, of course, continue to accrue.

[2] On 11 September 2008 a demand was made by the plaintiff on the defendant under the provisions of s 289 of the Companies Act 1993 for payment of the sum of \$34,081.18, being the sum allegedly owing at that stage. The defendant did not pay on the demand.

[3] The defence raised is that the defendant has never conducted any taxable activity. It claims that it mistakenly filed returns for GST purposes when it had not derived taxable income at all. Further, it asserts that it has not at any stage engaged any employees and is not liable to pay PAYE.

[4] The statement of defence also includes bare denials that the defendant company is insolvent and unable to pay its debts.

### **Preliminary Issues**

[5] Before dealing with the facts I record that a memorandum was filed on 2 March 2009 in which the plaintiff sought that the Court order two named persons to file affidavits. However, Ms MacFarlane has effectively abandoned that application this morning.

[6] Another preliminary issue that was raised by Mr Patel on behalf of the defendant concerned certain statements in one of the affidavits on which the plaintiff relies for the purposes of today’s hearing. The affidavit in question was the second affidavit of Christine Astrella, sworn on 16 February 2009. Mr Patel objected to the contents of paragraph 6 of that affidavit on the basis that it was hearsay. He objected to the last sentence in paragraph 9 of the affidavit on the basis that it consisted of

argument or submission and was not evidence that the Court should properly take into account.

[7] Ms MacFarlane properly I think, accepted that Mr Patel's submissions were correct. I ruled that those parts of the affidavit would not be read and I have not taken them into account.

## **Facts**

[8] It is admitted on the pleadings that Tuwell Trust Ltd was incorporated under the Companies Act 1993 on 13 February 2002. Its registered office is at 3/380 Thames Street, Morrinsville.

[9] In relation to the issues now raised, the plaintiff relies on two affidavits of Christine Dawn Astrella. The first, sworn on 7 November 2008, simply verified the allegations in the statement of claim in the standard way. The second is the affidavit sworn on 16 February 2009, to which I have already referred. That affidavit established that the defendant, Tuwell Trust Ltd, applied for an IRD number. The application was received by the Inland Revenue Department on 8 May 2006. The form by which the application was made gave a street address of 30 Avalon Drive, Hamilton, and a postal address of PO Box 5350, Frankton, Hamilton. The company's taxable activity was described as that of a refuse contractor. The director named was Heather Anne Jacobs.

[10] Accompanying the application for the IRD number was a faxed message, dated 8 May 2006, from an accountant, Mr Malcolm Mulligan. Mr Mulligan requested that the company be registered for the purposes of income tax, PAYE and GST. Mr Mulligan asked for urgency. He asked the Department to include the company on his "agency listing". Attached to Ms Astrella's second affidavit is a facsimile to Mr Mulligan from the Department. It was dated 11 May 2006, and headed "Agent's Confirmation of IRD Numbers and Registrations". It stated that the company had been registered for the purposes of GST and PAYE. It gave the IRD number of 93-666-348.

[11] GST returns and PAYE returns were filed by the company under the relevant IRD number subsequent to its registration in May 2006.

[12] The defendant relies on an affidavit sworn by Damian Karl Jacobs on 4 February 2009. Mr Jacobs says that he is the director of the defendant. He says that the defendant, although registered for GST purposes, has never conducted any taxable activity, neither has it employed any person.

[13] The substance of the defence now put forward rests on paragraph 3 of Mr Jacobs' affidavit which is in the following terms:

As evident from the copy each of the attached contract dated 30 May 2006 entered into between Tuwell Trust and Waste Management NZ Limited ("WML") and WML generated tax invoice dated 31 July 2008 (which had been issued every month in the name of Tuwell Trust) the defendant is not and never has been a party to the contract and in respect of which tax invoices have been issued under the name of Tuwell Trust. Tuwell Trust is a completely separate and different body from the defendant. Copies of the Contract dated 30 May 2008 and a tax invoice dated 31 July 2008 are annexed here to marked with letters "A" and "B".

[14] Although he referred to a copy of the contract with Waste Management NZ Ltd as an exhibit, it was only the front page of the contract that was attached with the appendices (specific and general contract conditions) omitted. However, that does not matter for present purposes. In accordance with Mr Jacobs' claim in paragraph 3, the annexure showed that the parties to the contract were indeed Waste Management NZ Ltd and Tuwell Trust. The tax invoice attached was also on the letterhead of Tuwell Trust. In that respect, Mr Jacobs' statement that it was a "WML generated tax invoice" does not appear to be correct. It is headed up as a Tuwell Trust invoice, and the defendant's argument depends on that fact.

[15] I note also that the GST number on the tax invoice, namely 93-666-348, was the IRD number given to Tuwell Trust Ltd and that the then director of Tuwell Trust Ltd, Heather Maxwell Jacobs, was also shown as the owner of Tuwell Trust in the contract documents.

[16] In succeeding paragraphs of his affidavit, Mr Jacobs recorded that he had instructed the defendant's tax agent to file amended tax returns and he also attached

a letter dated 2 February 2009 from the company's solicitor, Mr Patel which was in the following terms:

**CIR V TUWELL TRUST LIMITED**

We act for the defendant herein Tuwell Trust Limited and refer to the liquidation proceedings scheduled to be called this morning at 10.45 at the Hamilton High Court.

Our instructions are that amended nil returns had been filed with the Department on the defendant's behalf last week to reflect the correct status of the defendant from the time of its inception in that:

- (a) the defendant had not derived any taxable income at any stage so as to be obligated to be either registered for GST or collect and return GST and as such not liable to pay GST.
- (b) the defendant had under a genuine honest mistake and due to no deliberate intentional or conscious action on its part and which had inadvertently compounded over the years acted under the misapprehension misunderstanding and mistaken belief that it was the party that had contracted with Waste Management NZ Limited for waste collection and disposal services when in fact as evident from the relative contract dated 20 May 2006 the contract was not related to it but was between Tuwell Trust and Waste Management NZ Limited. This is reinforced by virtue of the fact that the relative tax invoices have at all material times been issued in the name and style of "Tuwell Trust" a completely distinct and separate entity from Tuwell Trust Limited.
- (c) the defendant has not engaged any employees to work for the company and as such has at no stage been liable for any PAYE either.

We enclose herewith a copy each of the subject contract dated 30 May 2006 and a tax invoice dated 31 July 2008 verifying our client's position and contentions hereinabove set forth and by way of affirmation of the factual matrices and the true and correct state of affairs.

Unfortunately, it was not until only a few days ago that the writer had sighted the relative contract and tax invoice which led to an enquiry to be conducted leading to the discovery of the aforestated error.

In the circumstances we request you not to seek or obtain an order for liquidation of our client company and the matter be adjourned for a period of 6 weeks to enable Counsel to liaise in view to resolution.

[17] Mr Jacobs swore to the accuracy and truth of the matters contained in the letter. Essentially the solicitor's letter is reflected in the terms of Mr Jacobs' affidavit. In paragraph 5 of the affidavit, Mr Jacobs also referred to what he described as a genuine error that had only come to light recently and continued:

By the time the above was discovered the time for applying to set aside the statutory demand served on the defendant and the time for filing a defence to the statement of claim had already expired.

[18] In context, Mr Jacobs' reference to "the above" is a reference to the discovery that the company had never traded and it had been a mistake to file returns with the Inland Revenue Department. Faire AJ subsequently ordered the defendant to file the statement of defence, to which I have already referred.

[19] These statements were followed by a bald assertion by Mr Jacobs that the defendant is a solvent company able to pay its just debts as they fall due. One wonders frankly what those debts could be, in light of the claim that the company, which claimed through its agent to be a refuse contractor, has never conducted any taxable activity, nor employed any persons. Mr Jacobs' further claim that any order made for the liquidation of the defendant would be "harsh and unjust" is also puzzling in the context of the assertions that the company has never traded.

### **Evaluation**

[20] As some of the observations already made may imply, I am satisfied that the defence on which the defendant relies is without merit. It hinges solely on the facts that the contract with Waste Management Ltd referred to Tuwell Trust and invoices were sent out on letterhead that referred to "Tuwell Trust" and not to "Tuwell Trust Ltd."

[21] On the other hand, the GST number given on the invoice exhibited to Mr Jacobs' affidavit was that given by the Inland Revenue Department to Tuwell Trust Ltd in May 2006. Moreover, it was Tuwell Trust Ltd that filed GST and PAYE returns once the company was registered for GST purposes. Having received a statutory demand for the debt claimed by the plaintiff, the company did not respond within the time limited for applications to set aside such demands. It was only after the demand was served that it was "discovered", evidently by Mr Patel, that the defendant had not been trading. I find the scenario that the defendant has endeavoured to paint implausible.

[22] In my view, the various documents upon which the plaintiff is in a position to rely show that it was the company that was trading and the defendant has simply sought to take opportunistic advantage of the fact that the Waste Management Ltd contract and the invoices (assuming other invoices were in the name of the Tuwell Trust) did not properly set out its name in full.

[23] It is not uncommon for people not versed in the law to trade using company names which omit the statutory reference to their limited liability. I am of the view that that is what has happened in this case. That conclusion is, I think, compelled by the relevant facts including the company's GST number appearing on the invoices; the facts that its director was referred to as Heather Anne Jacobs, who was the same person who signed the contract on behalf of Tuwell Trust; the fact that the street address of Tuwell Trust is the same as that of the company; the fact that the company's taxable activity was described as refuse contracting; and the fact that the company has filed GST and PAYE returns over the period since it was registered. I also infer that the reason that Mr Mulligan sought that the applications for registration for income tax, PAYE and GST purposes be dealt with urgently, was so that the company could commence to trade: at the time he made his request the contract with Waste Management Ltd would have been in the offing.

[24] I mention also that, although he asserted that Tuwell Trust is "a completely separate and different body from the defendant", Mr Jacobs did not explain what the Trust was, or what his relationship to it was or how he was familiar with its affairs. Nevertheless assuming, as he would imply, that he is familiar with the affairs of the Trust, it is telling that he makes no reference to the Trust being registered for GST or PAYE purposes. Ms Astrella's evidence is that the Inland Revenue Department does not hold any registration details for an entity called Tuwell Trust. It would seem that, if the defendant's assertions are correct, those concerned in the management of the defendant have taken no steps since discovery of the "mistake", to ensure that the Trust pays its tax. It is to be remembered that on the evidence of the Waste Management contract Ms Jacobs "owns" the Trust. This is another consideration that leads me to doubt the accuracy of Mr Jacobs' evidence.

[25] The plaintiff is entitled to rely on the non-payment of the statutory demand as evidence of the company's inability to pay its debts as they become due. The bald assertion by Mr Jacobs in his affidavit of 4 February 2009, that the defendant is a solvent company able to pay its just debts as they fall due, is simply an assertion, unsupported by any evidence beyond the assertion.

[26] I satisfied that the procedures must precede an order placing the defendant in liquidation have been properly attended to. In the circumstances, I am satisfied that the plaintiff is entitled to the order that it claims.

### **Result**

[27] For the reasons given, I now make an order placing the defendant company in liquidation. I note the time as 10.37 a.m.

[28] I appoint Dennis Clifford Parsons to be the liquidator of Tuwell Trust Ltd, noting that his consent to the appointment is on the file.

[29] The plaintiff seeks costs on a Category 2 Band B basis. Mr Patel has not been in a position to oppose that. I make an order accordingly for the payment of the plaintiff's costs in accordance with Category 2B and the plaintiff is also entitled to its disbursements in the usual way.