IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009 409 672

IN THE MATTER OF	of the Companies Act 1993
BETWEEN	THE COMMISSIONER OF INLAND REVENUE Plaintiff
AND	THE FISH & CHIP SHOP CO. LIMITED Defendant

Hearing: 17 and 21 July 2009

Appearances: P Cassidy and S Weston for Plaintiff
A J Forbes QC for Defendant

Judgment: 21 July 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

Background

[1] By this claim the plaintiff seeks an order that the defendant be put into liquidation. The defendant relies on the statutory presumption arising from non-payment following a statutory demand. The defendant neither applied to set aside the statutory demand nor filed a statement of defence.

[2] I have recorded the history to date in my judgment of 14 July 2009 and my subsequent Minute of 15 July 2009.

[3] Pursuant to the 14 July 2009 judgment the plaintiff has correctly sealed an interlocutory order which reads:

a) The defendant company was refused leave to file a statement of defence.

b) Pursuant to the terms of High Court Rule 31.20, the defendant company must not be allowed to appear at the hearing of the plaintiff's application for an order that the defendant company be put into liquidation.

[4] Notwithstanding that, Mr Forbes on 14 July 2009 signalled an intention to appear for the purposes of making submissions as to the inability of the Commissioner to depart from pleadings and to make an unspecified application or applications. As my Minute of 15 July 2009 indicates I made no ruling at that time as to whether the Court was in a position to hear from Mr Forbes for even limited purposes. The proceeding was adjourned to 17 July 2009 for the purposes of my hearing submissions from counsel with a right to be heard.

The defendant's applications

[5] On 16 July 2009 the defendant filed a notice of application. The orders sought were:

1.1 Special leave be granted to the defendant to appear at a further hearing of this proceeding on 17 July 2009 as to whether the plaintiff can or should obtain an liquidation order when the defendant otherwise can and will pay (by bank cheque) the amount claimed in the plaintiff's statutory demand dated 11 February 2009 and statement of claim dated 31 March 2009 (High Court Rules r 31.20).

1.2 Alternatively, that the defendant be granted an extension of time to file a statement of defence for this purpose (rr 31.20, 31.22(1)(a);

1.3 The defendant be granted an extension of time for complying with the statutory demand (Companies Act 1993 ss289(2)(d), 290(3)).

[6] The defendant's notice of application stated that the following grounds were relied on:

2.1 The statutory demand and statement of claim payment of $30,693 and no other amount;

2.2 A statutory demand must be in respect of a debt that, at the date of demand, is *"owing by the company" "that is due"* and not less than the prescribed amount and which requires the company *"to pay the debt"* (s289(1), (2)(a) and (d).

2.3 Neither the statutory demand or statement of claim provides any basis for the defendant to be able to calculate any further amount that is claimed to be due, whether for penalties, interest or otherwise and the defendant had no obligation to make that calculation.

2.4 A liquidation order cannot be made if the defendant pays the amount claimed;

2.5 Alternatively, a liquidation order should not be made, in the court's discretion, in the circumstances.

2.6 The statutory presumption as to the defendant being unable to pay its debts under the Companies Act 1993 s 287 only arises if the defendant has failed to comply with the statutory demand.

2.7 The statement of claim does not plead any other ground for the statutory presumption to apply or as to other proof as to the defendant being unable to pay its debts, in terms of s288(2);

2.8 There is no sufficient other proof of such inability before the court, in terms of s288(2);

Synopsis of submissions for plaintiff

[7] Counsel for the plaintiff on 16 July 2009 filed as previously directed a synopsis of the submissions to be made for the plaintiff. The submissions addressed two matters. First it was submitted that the Court is functus officio with regard to the issue of the appearance of the defendant and that accordingly the defendant must

not appear. Secondly, submissions were made as to the appropriateness of making an order to wind up the defendant.

Hearing on 17 July 2009

[8] At the commencement of the hearing on 17 July 2009 Mr Forbes appeared and sought to be heard on behalf of the defendant in support of his interlocutory applications. Mr Cassidy for the plaintiff objected to the Court hearing Mr Forbes (or the defendant) having regard to the judgment dated 14 July 2009. I indicated to Mr Cassidy that I would note his objection but I would nevertheless hear Mr Forbes in relation to the application, reserving the issue as to the defendant's right to be heard at all.

The defendant's submissions

[9] In his submissions Mr Forbes opened with the indication that the present application proceeds on different grounds to those advanced on 13 July 2009. In support of his submission that the defendant should be heard and that then one or more of its application should be granted, Mr Forbes dealt with the three applications in a slightly different order to that in the notice. I will deal with each of those in turn.

Extension of time for complying with statutory demand

[10] By s 289 Companies Act 1993, a statutory demand must be paid within fifteen working days of the date of service or such longer period as the Court may require.

[11] Mr Forbes noted that the effect of r 31.20 (which was relevant to my judgment of 14 July 2009) is that a debtor/defendant is precluded from making any

appearance in the proceeding if the defendant did not file a statement of defence within the time prescribed and has not subsequently obtained an extension of time for special leave. Mr Forbes's rhetorical question was "Where does that (the effect of r 31.20) leave the Court's jurisdiction to extend the time for compliance under s289 Companies Act?" In response to my question as to whether that was a submission that the rule is ultra vires to that extent, Mr Forbes while noting that it was one way of putting the matter submitted that an equally correct outcome would be to read r 31.20 down so as not to interfere with the Court's ability to extend time under s289 Companies Act.

[12] There is another response to the suggestion of a vires issue and in my view arises out of the proposition that an extension of time cannot be granted unless an application is made within 10 working days referred to in s290 which I will return to. At this point, however, I do not need to determine the vires or otherwise of r 31.20. On the facts of this case, the application intended to be made by the defendant on 16 July 2009, granting an extension of time for complying with the statutory demand, is so unmeritorious that it could not be granted assuming the jurisdiction remains unaffected by r 31.20.

[13] I note the following matters in particular:

(a) The statutory demand was served on the defendant on 13 February 2009.

(b) It relates to GST (and other minor) debts dating to 2008.

(c) The amount of the demand has never been in dispute.

(d) The proceeding was filed on 6 April 2009.

(e) The proceeding was served upon the defendant on 16 April 2009.

(f) The proceeding was advertised on 20 May 2009 and 21 May 2009.

[14] Mr Forbes on this occasion, as in previous submissions, emphasised that from the time the defendant came to deal with the debt the sole issue was always as to obtaining further time for payment and it was not a dispute as to the debt itself. Accordingly there could have been no application at the outset to set the debt aside (the time for which had long since passed on one view) and working out an instalment arrangement would be dependent on mutual progress with the plaintiff.

[15] On 28 May 2009, two working days before the hearing of the liquidation application, the debtor first contacted the plaintiff as to an instalment arrangement to include the plaintiff. That was more than 3 months after the statutory demand had issued.

[16] For the Commissioner in relation to what I will call the vires issue Mr Cassidy has referred me today to the decision of Master Faire in *Vice Versa Limited v Forsyth* (2002) 9 NZCLC 262,837, which he summarised in these terms in his submissions which I accept to be an accurate summary:

> 10. In *Vice Versa Ltd v Forsyth* (2002) 9 NZCLC 262,837 the applicant company was served with a statutory demand. The company applied under s290 of the Companies Act 1993 for an order extending the time for complying with the demand. The application was not filed within the 10 working days required by s290(2)(a) of the Companies Act 1993. Master Faire held that Court had no jurisdiction to consider the application. Following a review of the statutory provisions, he concluded that:
>
> 10.1 The Court's jurisdiction to hear an application pursuant t s290 requires compliance with the time limit.
>
> 10.2 If the time limits have not been complied with there is no valid application.
>
> 10.3 If there is no application to hear, in terms of s 290(3) there is no basis to extend time for compliance.

> 11. Master Faire suggested that once a statutory demand has been served and the time for compliance with it has expired the appropriate place to determine inability to pay debts is at the hearing of an application under s241 of the Companies Act 1993.

[17] Mr Cassidy then referred me to a decision of Master Gambrill which Master Faire declined to follow. And finally Mr Cassidy on this topic referred to *Corporate Debt: Statutory Demands*, 2004 Andrew Beck, in which the author suggests that Master Faire's approach is correct at law.

[18] As against that approach Mr Forbes today referred me to the commentary in *Morison's Company & Securities Law*. At CA 290 013 the authors refer to decisions of this Court in which extensions of time have been granted. Mr Forbes correctly noted the discussion of the decisions of Associate Judge Gendall in *Direct Fish Markets Limited v Seamart (Wholesale) Limited* HC Wellington CIV 2005-485-561 30.5.05, and Gendall J in *Skipjack Limited v Hung & Others* HC Blenheim CIV2005-40685 29.6.05. Those are cases in which extensions were granted.

[19] I note also from my own research the discussion *Morison's Company & Securities Law* Vol.2 paragraph 53.6 – again a discussion as to extension under s290. In that context two cases are referred to as involving extension of time, being a decision *Landrover Parts Limited v Ford Specialities Limited* HC Auckland CIV 2008-404-3242, 4 July 2008, Robinson AJ, and a decision of this Court in *Ingleburn Developments v BRC Limited* (2008) 10 NZCLC 264,325. The latter case is not particularly on point, but the earlier case involved a setting aside application which failed by the barest of margins because the application had not been served in time, but the Judge granted an extension of some few days in a similar way to that in the cases referred to by Mr Forbes.

[20] I acknowledge that it might be argued, as did Mr Forbes today, that the *Vice Versa* decision affects matters under s290 only and does not limit the timing of any extension of time as referred to in s289. I read the considered analysis of the Act by Master Faire in *Vice Versa* as proceeding on the structure of the liquidation

procedures and applying with force to both s289 and s290. For that reason I adopt Andrew Beck's preference of Master Faire's decision over Master Gambrill's. But returning to the facts of this case – the facts of this case mean that I can resolve the issue on the merits in any event.

[21] In the present case, the defendant did not bring any formal application to this Court either before or after the commencement of the present proceeding, at least until the application dated 16 July 2009 filed 2 days after the judgment of this Court refusing the defendant leave to be heard. That judgment had occurred after the Court had allowed the defendant (through Mr Forbes) to be heard. In the course of the defendant's submissions at that hearing no suggestion was made of an application for an extension of time to pay the sum demanded in the statutory demand.

[22] There is also the matter of the period over which the defendant has known beyond a peradventure that the plaintiff was insisting on immediate payment and not payment by instalments. When the defendant put an instalment proposal to the plaintiff, the plaintiff's ultimate response dated 3 July 2009 contained a rejection of the defendant's proposal and the plaintiff's counter offer expressed clearly in terms that time was of the essence and conditions had to be met by 8 July and 9 July 2009, as the case may be. They were not. By reason of the various appearances and adjournments that then occurred the defendant effectively obtained an additional week beyond the hearing date of 13 July 2009 but still did not make the payment required by the statutory demand. At least through part of that time counsel for the defendant was indicating that a bank cheque was immediately available for the plaintiff but for reasons known to the defendant the bank cheque was never unconditionally handed over to the plaintiff.

[23] Against this background, in my judgment there is no merit in a suggestion that it would be just to permit the defendant additional time for the payment of the statutory demand. If necessary, I would also have held that it would be a very rare case, if the jurisdiction exists, that the Court would entertain the concept of

extending the time for payment on a statutory demand when the conduct of the defendant had allowed the plaintiff to proceed with a winding up application based on the debt in question. The defendant's remedies, if any, as Master Faire's analysis suggests, should lie in the liquidation process itself.

[24] Given my conclusions as to the merits of the proposed application to set aside the statutory demand, I am not required to finally decide whether jurisdiction exists to hear such an application when I have given judgment in the terms of the judgment dated 14 July 2009. Mr Forbes submits that the defendant was entitled to bring such an application as of right and that it is not subject to r 31.20. I have doubts as to whether that submission is correct given that the defendant chose to bring this application in the context of the hearing of the proceeding, but I do not need to decide that point.

Application for extension of time to file statements of defence

[25] The second proposed application contained in the defendant's application dated 16 July 2009 was for an order granting an extension of time to file a statement of defence under r 31.20.

[26] As the order sealed on 15 July 2009 indicates, it was the intention of the Court through the judgment dated 14 July 2009 to refuse leave to file a statement of defence.

[27] That is the step which the Court understood the defendant wished to take following the oral submissions and application made by the defendant on 13 July 2009. It will be appreciated from my judgment dated 14 July 2009 that Mr Forbes in his submissions proper did not make any application of that nature but rather sought an adjournment of the proceeding. It may be that I have confused whether the leave then sought for the defendant by Mr Forbes in his reply was an extension of time to

file a defence or simply special leave to be heard. What I ruled was that there would be no extension of the time to file a defence.

[28] Accordingly, the defendant's second proposed application – for an extension of time to file a defence – is a matter upon which this Court has already ruled.

[29] For the defendant, the submissions filed for the hearing relied upon the doctrine of functus officio. The Court of Appeal dealt with the concept of functus officio, as Mr Cassidy has submitted, in *R v Nakhla (No. 2)* [1974] 1 NZLR 453 (CA). The head note accurately summarises the Court's judgment to this effect:

> Once a judgment of the Court (which is not a nullity) has been finally recorded the Court is functus officio and its inherent power to vary its judgment is lost.

[30] I regard this Court as functus officio in relation to any question as to the extension of time to file a defence.

Application for special leave to appear at the further hearing of this proceeding.

[31] The first of the proposed applications set out in the defendant's notice dated 16 July 2009 was for special leave for the defendant to appear at the further hearing of this proceeding on 17 July 2009. The special leave sought is expressly to be able the defendant to address the Court on whether the plaintiff can or should obtain a liquidation when the defendant can and will pay (by bank cheque) the amount claimed in the plaintiff's statutory demand dated 11 February 2009 and his statement of claim dated 31 March 2009. The leave is sought pursuant to r 31.20.

[32] Mr Forbes in his submissions to me emphasised that the present application is on a different basis to that put forward orally on 13 July 2009. In effect, by submitting that this is a different application in its nature the submission is that the Court is not functus officio with regard to this application.

[33] While the term "special leave" was used in the course of the hearing before me on 13 July 2009 that arose through the use of the term by Ms Clark when she was seeking to clarify exactly what the defendant's basis of application was. The term "special leave" was then used, including perhaps confusingly by me in my judgment of the following day. As now with the second proposed application, it appeared to me that the application then was for an extension of time to file a defence. To that extent my use of the term "special leave" in parts of my judgment was confusing. I note that the term "special leave" was not part of the interlocutory orders sealed and that the relevant part of the order as sealed reads:

> The defendant company was refused leave to file a statement of defence.

[34] Rule 31.20 refers to the right to appear "at the hearing of the proceeding". This is a reference not merely to the first hearing date but to any further hearing date to which the proceeding is adjourned.

[35] Having regard to the fact that the Court has not formally ruled on a special leave application in relation to this proceeding, I am not prepared to find that the Court is without jurisdiction to entertain an application for special leave for the hearing that has occurred. If I had expressly ruled on a special leave application in my judgment dated 14 July 2009 that would have been a very strong factor against entertaining a further application today. However, as the judgment sealed indicates the thrust of the earlier refusal was refusal of leave to file a statement of defence.

[36] The question then becomes one as to whether in the discretion of the Court special leave should be granted.

[37] At the point of my judgment of 14 July 2009 when I introduced the confusion between "special leave" and an extension of time for the filing of a defence, I set out principles applicable to special leave. I now repeat those.

[38] I adopt the first the following passage from the judgment of Paterson J in *Fresh Cut Flower Wholesalers Limited v The Living and Giving Gift Company Limited* (2001) 16 PRNZ 173 at 175, where his Honour said:

> **The law**
>
> [9] Neither counsel made submissions on the law applicable to an application for special leave. There are several helpful decisions of Masters referred to in para HR700T.04 of *McGechan on Procedure*. With respect, I adopt the principles applied by the Masters. First, leave should not be granted unless the applicant can show on the papers an arguable basis upon which it is not liable for the amount claimed. Further, in my view, even if there is an arguable defence, leave should not be granted if the applicant is insolvent.

[39] Secondly I adopt also the following discussion from *McGechan on Procedure* HR31.20.01, where the authors were referring to authority from the State of Victoria, where it was observed:

> …the Court stressed the adjective "special" and stated that it is for the applicant to make out a case to justify this, the general policy being that winding-up proceedings are not to be protracted for procedural reasons.

[40] In the present case, as the notice of application indicates, the defendant's purpose in seeking special leave was to enable the defendant to present submissions that a winding up order should not be made having regard to the advice that the defendant is ready and willing to pay by bank cheque the amount claimed in the statutory demand and in the statement of claim.

[41] By virtue of the procedure I have adopted in this hearing – which I regard as akin to that adopted by an appellate Court dealing with a leave application but also hearing submissions on the substance of a proposed appeal for convenience – I have had the benefit of submissions on the substance which would inform the discretion of the Court as to the leave.

[42] I turn to identify the point which the defendant seeks to argue in relation to the liquidation. It is this: the defendant can and will pay by bank cheque the amount

claimed in the plaintiff's statutory demand dated 11 February 2009 and the statement of claim dated 31 March 2009, with the consequence that the plaintiff is not entitled to calculate any further amount claimed to be due, whether for penalties, interest or otherwise in a relevant context in this proceeding.

[43] For such a point to succeed, it would need to stand in this case independently of the application for an extension of time of the statutory demand, as I have declined that application.

[44] As it is, Mr Forbes put the application for special leave to appear and argue this point independently as the defendant's first ground of application.

[45] In my judgment this ground for resisting winding up falls away for the simple reason that up to and including the date of hearing the defendant has chosen not to make any unconditional payment of the sum demanded by statutory demand or any part thereof. The Court has been given no evidence as to why payment has not been actually made. Rather, the plaintiff has provided in the normal way certification as to the fact that the full amount of the statutory demand remains unpaid.

[46] In the absence of evidence from the defendant, it is not for this Court to speculate on the reason why the defendant has not made any payment. The fact is that payment has not been made.

[47] What the Court has had from the defendant in relation to the issue has been in the form of submissions from counsel which has provided an explanation that a bank cheque is held and is available for payment. Counsel for the plaintiff invited the Court to ignore such information. One basis for ignoring it is that it is not properly before the Court in evidence although a statement as to the availability of a bank cheque, made by counsel in Court, would be a matter which I would be minded to accept as to fact. But the statement contained in the defendant's application, namely that "the defendant can and will pay" the amount claimed takes the factual position neither to the point of actual payment nor to a clear undertaking by the defendant

itself that the payment will be made unconditionally (i.e., regardless of what the Court's decision is concerning the plaintiff's right to continue with this winding up proceeding.) Again, upon the basis of the information provided to the Court by the defendant, it would be pure speculation to conclude as to whether the payment of the debt covered by the statutory demand has been offered to the Commissioner unconditionally. There would seem to be a real possibility that it has been not so offered, given that the Commissioner has provided updating information by affidavit and given also the fact that if the defendant had been intending to pay the money unconditionally, it could have been paid at any time over the last fortnight.

[48] As at today the Commissioner is entitled to proceed with his application to wind the defendant up. Strictly speaking the Court does not need to consider what the legal position would have been had the defendant made payment of the sum covered by the statutory demand or secured for it but refused to pay any additional sum on account of accrued penalties and interest.

[49] In these circumstances I reach the conclusion that it would be inappropriate for me both on the merits of the point to be pursued and having regard to the history I have previously set out to grant special leave to the defendant to be heard.

[50] Had I needed to resolve the case by reference to the Commissioner's standing to pursue his application notwithstanding payment of the sum covered by the statutory demand, I would have found the submissions for the Commissioner compelling. They reinforce the inappropriateness of granting the defendant special leave.

[51] Had it been necessary to do so, I would have found, even upon full satisfaction of the debt covered by the statutory demand, that the plaintiff continued to have standing to pursue a winding up order by reason of the following circumstances:

(a) In the absence of an extension of time for payment of the statutory demand, the defendant's failure to pay the $29,295.07 demanded under the statutory demand creates a presumption of insolvency.

(b) The presumption has not been rebutted.

(c) There is additional evidence as to cash flow insolvency which reinforces the presumption.

(d) The plaintiff has filed evidence deposing that the total sum of arrears owed by the defendant to the plaintiff now stands at $60,786.78.

(e) Even had the amount of the statutory demand been paid, the plaintiff remains a creditor in the proceeding as the term "creditor" is used in s241 Companies Act.

(f) The issue at the hearing is no longer purely inter partes but involves the Court in a broader consideration of the public interest when the evidence before the Court is that the company is not able to meet its debts as they fall due. This is not a case in which the defendant has demonstrated it is solvent.

[52] Mr Forbes has referred me to a passage in *McGechan on Procedure* HR 31.11.04 which reads:

> In a case where the full amount has been paid over as security, it is difficult to imagine a situation where a liquidation order would be justified.

The authors go on to refer to two decisions in particular. Mr Forbes noted the approval of this passage by Master Thomson in *Airborne Freight Ltd v Fastway Express Parcels (NZ) Ltd* (1994) 7 PRNZ 372 at 375. As Mr Cassidy put it, in *Airborne Freight* the relevant relationship (contractual in that case) had in fact come

to an end . I see, as Mr Cassidy submitted, a different situation in this case where the Commissioner's relationship as a result of the tax legislation continues.

[53] As a general proposition the *McGechan* passage uncomplicated by the context of an increasing debt is a passage I would accept and adopt in its own context. But when applied to a defendant whose debt is increasing as a result of a statutory regime week by week and against a background of presumed insolvency or evidence of insolvency, I do not consider *Airborne Freight* particularly assists in this context.

[54] I had alerted counsel to the case of *Lane v Questknit Limited* HC Auckland CIV 2007 404 6164 5.11.08 (Asher J). That was a case in the Court's bankruptcy jurisdiction. The Court had to determine whether it had jurisdiction to proceed under a creditor's petition where the debtor met the debt referred to in the petition but there was a separate outstanding debt still owed by the debtor to the creditor. The Court held that *Questknit's* petition could not succeed as the state of affairs on which the petition was based no longer existed. The Court could not allow amendment under r 187 High Court Rules (as it then was) as that would introduce a statute barred claim arising 3 months after the pleaded act of bankruptcy.

[55] I accept Mr Cassidy's submission that the Companies Act and Insolvency Act regimes are materially different in that:

(a) Section 23(A) Insolvency Act 1967 is concerned with a specific debt due by a debtor to the petitioning creditor and is not concerned (as is the case with s241(4)(a) Companies Act 1993 with the debts of a debtor generally.)

(b) For the purposes of s241(4)(a) Companies Act it is the cash flow test (of solvency) which counts. If a company does not have assets to meet its current liabilities it is commercially insolvent and may be wound up.

[56] Accordingly, the plaintiff in this proceeding would have had standing as a creditor to pursue his application for winding up even had the sum referred to in the statutory demand been paid before the hearing.

[57] I note that my conclusion as to the Commissioner's continued standing in law introduces a certain common sense and practicality to the workability of the winding up regime. Creditors will frequently be demanding from debtors either judgment debts or contractual debts which carry interest as of right The creditor continues to be a creditor for those sums. The submissions of counsel for the defendant invite the conclusion (expressly recognised by counsel) that the plaintiff creditor should be left to its rights through debt collection or otherwise to later pick up the balance, notwithstanding that the plaintiff remains a creditor on the hearing date (for more than $2000.00) and the defendant is presumed to be insolvent. In my view, the Court should be reluctant to conclude that Parliament intended such an unwieldy and inconvenient outcome.

Residual discretion

[58] The Court retains in all winding up cases a discretion as to whether or not to make the order requested. In my judgment dated 14 July 2009 I considered factors going to the discretion as to extension of time to defend. At that time I took into account Mr Forbes's submissions as to the Commissioner's previous willingness to consider a payment proposal and as to the Commissioner's duties under the Tax Administration Act 1994.

[59] Nothing in the circumstances of this case and the way it has been argued since, leads me to the view that the discretion should be exercised against an order for winding up. A core debt relating to 2008 remains unpaid. Further debt has accrued. The debtor has either chosen to or been unable to pay the full debt. The debtor has had the benefit of additional time. Against that background I intend to make orders today.

Addendum

At the conclusion of the hearing counsel disagreed as to the orders to be made and I adjourned the matter until 3pm Friday 24 July 2009, with written submissions to be filed beforehand consecutively by Mr Forbes and then by Mr Cassidy.

ASSOCIATE JUDGE OSBORNE

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