IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-485-1162
[2012] NZHC 2943

UNDER	The Companies Act 1993
BETWEEN	THE UNIVERSITY OF AUCKLAND Plaintiff
AND	BOUNTIFUL HOLDINGS LIMITED Defendant

Hearing: 1 November 2012

Counsel: DJ Neutze for plaintiff
EJ Grove for defendant

Judgment: 7 November 2012

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to put company into liquidation]

Solicitors: Brookfields, PO Box 204, Auckland 1140
Skeates Law Ltd, PO Box 56 179, Auckland

[1] The plaintiff applies for an order that the defendant be placed into liquidation and that Boris van Delden and Roy Horrocks of Auckland, Insolvency Practitioners, be appointed liquidators. A consent in accordance with the Companies Act 1993 by the proposed liquidators has been filed.

[2] The plaintiff pleads the following:

1. **BOUNTIFUL HOLDINGS LIMITED** ("defendant company") was incorporated in November 2007 under the Companies Act 1993.

2. The registered office of the defendant company is at 187 Featherston Street, Level 3, AMP Chambers, Wellington.

3. The defendant company is indebted to the plaintiff in the sum of $31,934.97.

4. On 24 January 2012 the plaintiff served on the defendant company a statutory demand pursuant to section 289 of the Companies Act 1993 demanding payment of $37,270.65, being the amount owing by the defendant company as particularised below:

   (a) Percentage rent for 2010 and 2011; and

   (b) Unpaid rental and operating expenses for November 2011, December 2011 and January 2012;

   within 15 working days of the service of the statutory demand ("the demand").

5. On 8 February 2012, the defendant company applied to set aside the demand.

6. On 8 May 2012, Judge R M Bell made the following orders:

   (a) The demand was upheld;

   (b) The defendant company was ordered to pay the plaintiff an adjusted amount of $31,934.97 ("the debt");

   (c) The debt was to be paid to the plaintiff by 25 May 2012; and

   (d) If the defendant company failed to pay the debt to the plaintiff by 25 May 2012, the plaintiff would be entitled to apply for the defendant company to be put into liquidation.

7. The defendant company failed and/or neglected to pay the debt to the plaintiff by 25 May 2012.

8. Further, the defendant company has not:

(a) Entered into a compromise under Part XIV of the Companies Act 1993; or

(b) Otherwise compounded with the plaintiff;

(c) Given a charge over its property to secure payment of the debt

to the reasonable satisfaction of the plaintiff.

[3] The defendant admits the above allegations.

[4] The defendant invites the Court to exercise its discretion not to liquidate it. It pleads that it was induced to enter into the lease on which the debt, which is the subject of the demand issued in this case, by representations from the plaintiff that it would be awarded all, or substantially all, of the plaintiff's short courses catering work in the building in which the leased premises existed and would also be the caterer for functions in the building. It says that it has a current arbitration in relation to the inducement claim and, that until that arbitration is disposed, it would not be an appropriate for an order appointing a liquidator to be made.

[5] The Companies Act 1993, s 241 gives the court a discretion to appoint a liquidator if it is satisfied that the company is unable to pay its debts. The Companies Act 1993, s 287 provides that:

287 Meaning of inability to pay debts

Unless the contrary is proved and subject to section 288 of this Act, a company is presumed to be unable to pay its debts if –

(a) the company has failed to comply with a statutory demand …

[6] The approach that the court should take in considering an opposed application to appoint a liquidator has been examined in a number of authorities. In *Bateman Television Ltd (in liq) v Coleridge Finance Co Ltd* reference was made to the general rule that no order will be made on a petition founded on a debt which was genuinely disputed.[1] To apply to wind up a company in such a circumstance is an abuse of the court's process. The court has an inherent jurisdiction to prevent such an abuse of process. The position has been considered in a number of cases both in

[1] *Bateman Television Ltd (in liq) v Coleridge Finance Co Ltd* [1971] NZLR 929 (PC).

relation to opposed applications to wind up and in respect of applications for orders restraining advertising and staying proceedings: *Exchange Finance Co Ltd v Lemington Holdings Ltd; Taxi Trucks Ltd v Nicholson; Edge Computers Ltd v Colonial Enterprises Ltd*.[2]

[7] From the authorities I extract the following specific principles which are applicable to such applications:

a) A winding up order will not be made where there is a genuine and substantial dispute as to the existence of a debt such that it would be an abuse of the process of the court to order a winding up;

b) In such circumstances, the dispute, if genuine and substantially disputed, should be resolved through action commenced in the ordinary way and not in the companies court;

c) The assessment of whether there is a genuine and substantial dispute is made on the material before the court at the time and not on the hypothesis that some other material, which has not been produced, might nonetheless be available;

d) The governing consideration is whether proceeding with an application savours of unfairness or undue pressure.

[8] Although the position adopted by the defendant is one of inviting the Court to dismiss the proceeding, in view of the fact that the defendant's case in reality requires no step to be taken by way of the appointment of the liquidators until the arbitration proceeding is disposed of, it is appropriate that I refer to the judgment of Wallace J in *Nemisis Holdings Ltd v North Harbour Industrial Holdings Ltd*.[3] His Honour said:

> The Court has an inherent jurisdiction to stay winding up proceedings where the debt upon which such proceedings are founded is the subject of genuine dispute. …The decisions make it clear that the jurisidiction to stay

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2 *Exchange Finance Co Ltd v Lemmington Holdings Ltd* [1984] 2 NZLR 242 (CA), *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297 (CA), *Edge Computers Ltd v Colonial Enterprises Ltd* (1996) 9 PRNZ 621 (CA).

3 *Nemisis Holdings Ltd v North Harbour Industrial Holdings Ltd* (1989) 1 PRNZ 379 (HC) at 385.

> [proceedings] is an inherent one to prevent abuse of process and that there is no inflexible rule. The governing consideration is whether the proceedings savour of unfairness or undue pressure. It is, however, a serious matter to stay winding up proceedings so that the decision to do so is never made lightly. The onus is on the applicant and it is normally necessary to demonstrate "something more" than the balance of convenience considerations which it is usually appropriate to consider on an application for an interim injunction.

Background

[9] The plaintiff and defendant entered into an agreement to lease on 19 February 2008. The lease concerned a portion of the plaintiff's building known as the Owen G Glenn Building in Grafton Road, Auckland.

[10] The leased premises are located on the third floor of the building. The building was completed in about 2007 and has since late 2007 housed the University's business school.

[11] The agreement to lease:

(a) Records the parties' agreement to lease the premises and provides for the execution of a lease in the form of the Auckland District Law Society Commercial Lease 5th Edition 2008 draft;

(b) Provides for works to be carried out by the plaintiff University on certain terms;

(c) Provides for the defendant to carry out fitout work to the restaurant which was to be operated under the lease, subject to the landlord's approval;

(d) Provides for any differences between the parties to be referred to arbitration;

(e) Contained a no representation clause as follows:

> The obligations of the landlord are exclusively set forth in this agreement and the lease. Subject to the provisions in this agreement and the lease. The tenant enters into the agreement entirely in reliance on its own judgment and not upon any statement, representation or warranty made by the landlord or any other person.

(f) Contained a no-merger clause in the following form:

> The obligations and warranties of the parties under this agreement insofar as they have not been fulfilled at the time of the signing of the lease will not merge but will remain in force and effect.

[12] The parties executed a deed of lease which is dated 28 April 2008. It records:

(a) The commencement date for the lease as 1 March 2008;

(b) A four-year term with two three-year rights of renewal;

(c) Annual rent of $60,000 to be paid monthly with a percentage rent increase of 2.5 per cent of the annual gross sales in excess of $1,000,000;

(d) A no set-off for rent provision as follows:

> All rent shall be paid without any deduction or set-off by direct payment to the landlord or as the landlord may direct.

(e) A provision requiring the parties to refer any disputes in relation to the lease to arbitration, with a specific provision that:

> The procedures described in this clause [the arbitration clause] shall not prevent the landlord from taking proceedings for the recovery of any rent or other moneys payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default prescribed in clause 28.1 hereof.

[13] The defendant's operation from the leased premises has not been successful. The result is that the defendant is insolvent and cannot meet either limb of the insolvency test set out in s 4 of the Companies Act 1993. The defendant's position is that it has been put into this situation by the actions of the plaintiff.

Arbitration

[14] The defendant initiated arbitration proceedings with the plaintiff in February 2011. The process, through no fault of the arbitrator, has been the subject of delay and lack of progress. The arbitrator's minutes, which are numerous, have been made available to me. What I set out is not a complete summary of the history of that proceeding to date, but at least gives an indication of the problems associated with the defendant's position.

(a) The arbitrator records in his minute of 23 May 2011 that the defendant had still not executed the arbitration agreement;

(b) In the same minute he records that the plaintiff has complied with the arrangements for security for his costs, but that the defendant has not;

(c) In the same minute the arbitrator records:[4]

> The Claimant wishes to add a cause of action which has to do with a partnership type relationship between the parties giving rise to good faith obligations. By consent the Claimant will file and serve amended points of claim by 4pm on 26 May 2011. If I may I would comment that it would be helpful to all concerned if the nature of that relationship and its translation into finite consequences for the catering arrangements might need to be spelled out with great particularity otherwise the danger is that at the hearing it will be difficult to convert that into something of legal consequence.

(d) In the same minute a fixture was set for 28 July 2011 in expectation that the matter could be disposed of within two days. For reasons which will later emerge, that could not proceed;

(e) New points of claim were filed with the arbitrator and were the subject of a review in a conference held with counsel with the arbitrator on 28 July 2011. The arbitrator's comments are

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[4] Minute of Hon Robert Fisher QC, 23/5/11 at [4].

contained in his minute issued on that day. He notes that the points of claim now contain a claim pleaded in :

(i) Estoppel; and

(ii) Breach of the Fair Trading Act 1986.

He noted that the defendant's counsel advised him that the estoppel claim:

> Is now concerned with promissory estoppel (that is to say the University's failure to carry out a promise which, although falling short of contract, is still enforceable in equity on the ground that it would be unconscionable not to do so).

He also recorded that the second cause of action under the Fair Trading Act required a consideration of the same two parts that apply to the estoppel cause of action. The first part requires a consideration of alleged representations and, in particular, a representation that the defendant would have exclusive catering rights. There is then the second aspect, which is a second set of representations or promises, which allege that the defendant was to have preferred caterer status. So far as the Fair Trading Act is concerned, the allegation, he records, was that the exclusivity was asserted as a misleading representation at the time the fitout began. The preferred caterer status was a misleading representation by the time the lease was executed. The arbitrator records the he had a useful discussion with counsel as to what was now involved in the substantive hearing. His comments are helpful as I weigh the defendant's position in relation to the arbitration proceeding. He said:

> Regrettably, however, the nature of causes of action is such that merely to find that certain representations or promises were made during the negotiating phase would not result in any particular legal outcome without comparing that with the conduct which subsequently occurred to see whether there was an inconsistency for

> legal purposes. That drives me to the reluctant conclusion that the first substantive hearing must deal with all questions of liability. The question of quantum can however be left to a subsequent hearing. I would certainly encourage Counsel to come to an agreement wherever possible to shorten the evidence, but in the absence of any clearly defined qualifications the default position will be as just described; namely all matters affecting liability to be in the first hearing and quantum at a later hearing.

And then he added:

> The present estimate of the first hearing is two weeks.

He next makes reference to the question of security for costs.

(f) The arbitrator issued a minute on 7 February 2012 to the effect that the arbitration proceedings would be stayed indefinitely until the security for costs which he ordered were paid. This was to take effect from 13 February 2012. It was followed with an application to vary the order that had been made, which was dismissed by the arbitrator on 14 May 2012.

[15] There is no quantification of the defendant's claim in the arbitration proceeding at all. Mr Grove complains that the reason for this is that he required further discovery from the University before he could attempt to ascertain what the potential loss of profits might have been. Mr Neutze referred me to the initial expected profits and what had been achieved to show that there was in fact little difference. I do not regard what has been provided to me as being of great assistance because the nature of the catering work seems to have changed with the result that the relationship of gross income to net income may well have been quite different in the defendant's business operation. What can be said, however, is that there is a far from complete case, even at this stage, relating to the defendant's claim.

[16] Although I can give the parties no definitive position in relation to the merits of the defendant's claim, nor do I believe I should in this case, it is nevertheless appropriate to point out that the defendant's case suffers from additional problems to those that I have already mentioned and that were identified in the arbitrator's

minutes. There is, first, clause 10 of the agreement to lease and the no representation provision. Mr Neutze helpfully referred me to *Brownlie v Shotover Mining Ltd*, *David v TFAC Ltd* and *PAE (New Zealand) Ltd v Brosnahan*.[5] It is sufficient that I record that this clause poses problems for the defendant's current causes of action in the arbitration.

[17] I have already recorded that the current arbitration is indefinitely stayed. No material has been placed before me to indicate that the defendant or its directors are in a position to currently prosecute the arbitration. Accordingly, if I were to do nothing with this application, the parties would still be left with a stayed arbitration with the probability that the only order that might occur would be its dismissal for failure to prosecute, having regard to the order of stay.

Rent default

[18] The defendant failed to make payment for rent and operating expenses due under the lease for the months of November 2011, December 2011 and January 2012. It made no payment of the percentage rent due under the lease for 2010 and 2011.

Statutory demand and notice of intention to cancel the lease

[19] On 18 January 2012 the plaintiff served a statutory demand for the unpaid rent. At the same time a notice of intention to cancel the lease pursuant to s 245 of the Property Law Act 2007 was served.

The plaintiff re-entering the premises

[20] The plaintiff exercised its right of re-entry and went into possession on 15 February 2012, thereby cancelling the lease.

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5 *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992; *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239; *PAE (New Zealand) Ltd v Brosnahan* CIV-2005-485-843, 10 September 2008.

The defendant's application to set aside the statutory demand

[21] The defendant applied to set aside the statutory demand. The application was the subject of an opposed hearing before Associate Judge Bell on 8 May 2012.[6] His Honour dismissed the application. In doing so he varied the amount demanded in the statutory demand to $31,934.97 to allow for certain invoices that had not been paid by the plaintiff to the defendant. He required the defendant to pay that sum to the plaintiff by 25 May 2012, and ordered that if the defendant failed to do so, an application to appoint a liquidator could be made. The order was made under s 291(1)(a) of the Companies Act 1993.

[22] It is clear from Associate Judge Bell's decision that the application to set aside was made pursuant to s 290(4)(b) of the Companies Act 1993. In short, the defendant sought to establish an arguable case that it had a counterclaim, set-off or cross-demand for the amount specified in the demand less an amount not less than the amount specified in the demand less the prescribed sum. There appears to have been no specific reliance on s 290(4)(a), namely that there is a substantial dispute as to whether or not the rent was due or owing. One can only surmise as to the reason for this. That would be that the defendant had determined that it should not seek the cancellation of the lease and rely on the possibility of orders pursuant to s 9 of the Contractual Remedies Act 1979. His Honour made it clear that his examination of the merits of the case were not the subject of a full assessment because, as he quite rightly said, that was a matter for the arbitrator. However, understandably, he found it necessary to consider the effect of the no set-off clause. He referred to *Browns Real Estate Ltd v Grand Lakes Properties Ltd* and concluded that for the purposes of the statutory demand the no set-off provision in the lease applied.[7] The result was, as the Court of Appeal concluded in *Laywood v Holmes Constructions Wellington Ltd*, that the demand should not be set aside.[8]

[23] The no set-off provision may well be, in most cases, the answer to applications to set aside statutory demands where such a clause exists or, for that

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6 *Bountiful Holdings Ltd v University of Auckland* [2012] NZHC 1070, 8 May 2012.
7 *Browns Real Estate Ltd v Grand Lakes Properties Ltd* [2010] NZCA 425, (2010) 20 PRNZ 141.
8 *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243

matter, applications in the personal insolvency area which are made to set aside bankruptcy notices. Different considerations may well apply when it comes either to an application to appoint a liquidator or to adjudicate a person a bankrupt.[9] Suffice to say, his Honour was clearly alive to the distinction when he was considering the defendant's application to set aside the statutory demand.

[24] His Honour considered whether there was any support for the proposition that there had been a deliberate strategy to cut off cashflow to the defendant and concluded "that the evidence does not point to any such deliberate Machiavellian conduct on the part of the university".[10]

[25] His Honour concluded, therefore, that it was appropriate to decline to make an order setting aside the statutory demand. He adopted the second of the two possibilities that are referred to in s 291(1)(a) and ordered that, if the sum which he found to be due was not paid to the University by 25 May 2012, the University was entitled to present an application to place the company into liquidation.

Relevant factors in the exercise of discretion in this case

[26] It is accepted that whilst the no set-off provision was an answer to the statutory demand application, it does not necessarily provide a definitive answer in this case. In other words, by itself, the bar to setting off a potential claim against the outstanding rent is not decisive of the exercise of discretion to appoint a liquidator.

[27] There are, however, a number of specific considerations that have a bearing on the exercise of discretion in this case. The important considerations, in my view, are the following:

(a) This company is clearly insolvent. Its principal asset, the lease, has been cancelled. Its only prospect of saving something from the disaster is to find a way of successfully prosecuting the arbitration proceedings;

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9 Above, n 8.
10 Above n 6 at [24].

(b) The arbitration proceedings, even if they are able to proceed, provides the defendant with a number of hurdles to overcome. I cannot, and do not, make any assessment as to the overall merits but simply record, as I have already done in this judgment, that the defendant does not have a clear case; and

(c) In any event, the arbitration proceedings, on the material before me, are destined to go nowhere. No prospect of security being provided to enable the arbitrator to proceed has been advanced to me. The only possibility that I can see, on the material placed before me, and one that I raised with counsel in the course of the hearing, is that if I were to appoint a liquidator and the creditors en masse determined, after careful analysis of the material, that they were prepared to spend the money and to provide the security and to prosecute the arbitration, the position might be different. That simply reinforces to me the case for the appointment of a liquidator.

[28] When I weigh the above factors up, I reach the conclusion that there is no foundation for the exercise of the discretion against the appointment of a liquidator. As already recorded earlier in this judgment, a consent by two liquidators who are known to the Court and who have provided the appropriate certificate in terms of s 280 of the Companies Act 1993 has been presented. That certificate confirms the position which has not been challenged in any way that these liquidators are entirely independent and, as one would expect as officers of the Court, will properly carry out the functions of a liquidator if they are appointed.

Orders

[29] I order that Boris van Delden and Roy Horrocks of Auckland, insolvency practitioners are appointed the liquidators.

[30] The order is made at 2:15pm on 7 November 2012.

Costs

[31] I canvassed with counsel at the conclusion of the hearing whether there should be any departure from the normal position that the successful party should be awarded costs on a 2B basis. Both counsel indicated to me that there was no sound reason for departing from that position. This hearing has occupied one full day.

[32] Accordingly I order that the defendant pay costs based on Category 2 Band B together with disbursements as fixed by the Registrar.

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JA Faire