IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2018-404-000551
[2018] NZHC 1774

UNDER	Section 241(4) of the Companies Act 1993
IN THE MATTER	of the liquation of The Spa & Pool Factory Ltd
BETWEEN	DANIEL BLOMFIELD CONSULTING LIMITED Plaintiff
AND	THE SPA & POOL FACTORY LIMITED Defendant

Hearing: 17 July 2018

Appearances: A Ho for the Plaintiff
M G Locke for the Defendant

Judgment: 17 July 2018

ORAL JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

Introduction

[1] The plaintiff company, Daniel Blomfield Consulting Limited, seeks to place the defendant company into liquidation on the grounds that it did not pay an amount demanded by a statutory demand. The amount at issue is the sum of $8,082.95.

[2] A company is of course presumed, under s 287 Companies Act 1993 to be unable to pay its debts if it has failed to comply with a statutory demand.

[3] The defendant company did not seek to set aside the statutory demand, and says that this was a matter of oversight. It seeks to defend the liquidation on the basis of a genuine dispute between the parties in relation to the debt. The defendant company also says that it is not insolvent. I note that the defendant's solicitors, Turner Hopkins, are holding the sum of $8,082.95 in their trust account.

[4] Ordinarily disputes in the modest sum of $8,082.95 should be resolved in the Disputes Tribunal. In my view it is regrettable that that course did not happen here.

[5] The liquidation has not yet been advertised. Mr Ho on behalf of the plaintiff company seeks a determination from this Court that there is no genuinely arguable dispute, and that the proceedings then be adjourned for advertising and for a liquidation hearing to proceed on an undefended basis.

[6] That approach, namely the lifting of the interim restraint on advertising following a determination of the issue of whether there is a genuine arguable defence, was directly foreshadowed by Associate Judge Smith in his minute of 25 May 2018. His Honour held in that minute that the matter to be addressed at the hearing today will be the continuation or otherwise of the interim restraint on advertising.

[7] The defendant in its written submissions has challenged this approach and says that the hearing today can only be the liquidation hearing. It says there is a genuine dispute and the matter should be transferred to the Disputes Tribunal, which is the appropriate forum for the resolution of the modest amount in dispute.

[8] The critical issue I must determine is whether I can deal with the proceedings in the manner contended for by the plaintiff, and if so then consider the issue of whether or not there is a genuinely arguable defence by the defendant company.

Decision

[9] In my view it is appropriate for me to determine at this juncture the question of whether or not the defendant company has a genuinely arguable defence. The matter before me today is the issue of whether or not the interim restraint on advertising should be lifted. That is what Associate Judge Smith expressly contemplated at para [4] of his minute of 25 May 2018.

[10] I reject the submissions of the defendant that I cannot determine the question of whether or not the defendant has a genuinely arguable defence in the absence of hearing the application for liquidation. This is not the hearing of the liquidation hearing, but simply a consideration of whether or not the interim restraint should be lifted. The question of whether the defendant company has a genuinely arguable defence, as alleged, is relevant to my determination of whether the interim restraint should be lifted or not.

[11] I note also the submissions at para [27] of the defendant's submission, that where matters in dispute are insubstantial, the Court shall wherever possible proceed to save the parties expense and determine matters properly before it. In my submission those concerns are relevant here.

[12] I now turn to consider the question of whether there is a genuinely arguable defence.

The defendant's defence

[13] The matters in dispute between the parties relate to the construction of a swimming pool and the costs associated with the excavation necessary for the installation of the pool.

[14] The defendant says that it had no contractual relationship with the plaintiff company. The defendant says that the only relevant contract was between Mr West, the owner of the pool and the person who commissioned its installation, and the plaintiff.

[15] It is not apparently in dispute that the sale and purchase agreement between Mr West and the defendant excluded excavation. However, the plaintiff says that it had a contract with the defendant for the hireage of machinery, for the transportation of machinery, and for the provision of scoria. The defendant says that any responsibility for those costs fall on Mr West.

[16] Problems seem to have arisen from mistakes made by Mr Pierson, an employee of the defendant. Mr Pierson was the person on site responsible for the supply of the pool to Mr West.

[17] It is clear from the evidence before me that Mr Pierson played a significant role in the matters at issue between the parties. There is direct evidence from both Mr Blomfield and Mr West as to the role of Mr Pierson. Mr West gives first-hand evidence of his direct dealings with Mr Pierson, and Mr Blomfield gives evidence of his own personal direct dealings with Mr Pierson.

[18] The defendant company complains that it did not have an adequate opportunity to respond to some of the evidence from Mr Blomfield and Mr West. However, I reject that contention. It is clear from the timetable order imposed by Associate Judge Smith on 25 May 2018 that the defendant has had an opportunity to respond to further evidence from the plaintiff. In response to the timetable directions of Associate Judge Smith the plaintiff filed affidavit evidence from Mr West and from Mr Blomfield. The defendant, in accordance with the timetable, had the opportunity to respond to that evidence, but has chosen not to do so.

[19] In the circumstances, I am satisfied that the plaintiff has established there was a direct contractual relationship between the parties. This is apparent from the evidence of Mr Blomfield that he dealt directly with Mr Pierson on behalf of the defendant. The evidence is also supported by that of Mr West. I accept the submission

of the defendant that the application for credit form of itself is not conclusive proof of a direct contract between the parties. However, given the correspondence from Mr Blomfield to Mr Pierson, including hourly rates and the like, and the return by the defendant company of the completed application for credit form, I am satisfied that there was a direct contractual relationship between the parties.

[20] I also accept the contention of the plaintiffs that this is a relatively straightforward case of the plaintiff seeking to enforce contractual payments for amounts which were due and owing by the defendant company. As the plaintiffs submit, the defendant was not charged for earthworks, but simply for the supply of machinery, the cost of hireage, and the provision of scoria. I find that the defendant company is contractually liable for the outstanding sum and has failed to make payment. Accordingly I find that the defendant company has no genuinely arguable defence.

[21] I now turn to the question of the consequences of my findings. In my view the sensible way is to proceed as follows. I make a determination that the defendant company on its statement of defence has no genuinely arguable defence to the plaintiff's claim that it owes the plaintiff the sum of $8,082.95. On that basis I make an order that the interim restraint on advertising be lifted and the matter be listed in a liquidation list in a month or six weeks' time.

[22] I further order that the restraint on advertising not be lifted for one week, to enable the defendant company, which has lodged funds in its solicitor's trust account, to make payment.

[23] I award costs to the plaintiff company on a 2B basis. That of course would, in the ordinary course, be added to the debt that the defendant company owes to the plaintiff.

[24] I accordingly adjourn the proceedings to **10 August 2018 at 10.45 am**.

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Associate Judge P J Andrew