

ACB, RSS

Cap. C.

SET3

IN THE COURT OF APPEAL OF NEW ZEALAND

CA.60/89

UNDER The Companies Act 1955

BETWEEN TAXI TRUCKS LIMITED

Appellant

A N D GORDON DESMOND NICHOLSON

Respondent

Coram Cooke P
Casey J
Hardie Boys J

Hearing 02 May 1989

Counsel B.J. Meffin for appellant
D.K Wilson for respondent

Judgment 30 May 1989

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

This is an appeal against the refusal of an order staying winding-up proceedings. The appellant is in business as a general goods carrier. The respondent claims it owes him \$5,279-41 pursuant to a contract whereby he as an owner-driver was to be paid, in accordance with an agreed formula, for goods he carried on the appellant's behalf. The appellant disputes both the amount and its liability to pay anything, asserting that the respondent's contract was not with it, but with another company, Red Express Andair Transport Group Ltd, now in receivership. There are similar claims, apparently giving rise to the same issues, by seven other owner-drivers to whom some \$28,000 is alleged to be owing.

The respondent served a notice under s.218 of the Companies Act on 10 June 1988, (as we were told did the other seven drivers), and filed its statement of claim (under the newly prescribed Part IXA of the High Court Rules) on 28 October 1988, but service was not effected until 20 January 1989. Within the prescribed seven day time limit the appellant applied under R.700K for an order restraining publication of the advertising of the proceeding and staying any further proceeding in relation to the winding-up. The application was accompanied by an affidavit by the appellant's director, Mr King. It came before a Master on 24 February 1989 and, no affidavit in opposition having been filed, was adjourned to 8 March. The Master, intimating that Mr King's affidavit seemed to show that there was a serious issue to be tried, made interim orders. An affidavit by Mr Nicholson in opposition was filed shortly afterwards, but no reply was made to it by Mr King. This was, we were told, partly because of the intimation which had been given by the Master, partly because Mr King was out of the country for a period, and partly because it was not expected that the Court would attempt to resolve the conflict in evidence that was apparent from the two affidavits.

However the application was heard by Sinclair J on 8 March and dismissed in an oral judgment delivered that day. The Judge was able to dispose of the matter in this fashion because Mr Nicholson's affidavit had satisfied him that there was ample evidence of the existence of a contract

between the parties entitling him to payment, and because he understood there was no dispute as to quantum. The absence of an answering affidavit from the appellant doubtless facilitated this view of the matter; indeed it may have provided encouragement for the Judge to go further and make these comments, to which Mr Meffin took particular exception on the appeal:

I am of the view that Mr King's affidavit is less than frank and so as not to beat about the bush, the plain inference to be drawn is that his acquaintance with the truth is somewhat distant. Just on the face of the documents produced and the contents of the two affidavits, the evidence of Mr Nicholson is infinitely preferable to that of Mr King's and as I have already stated, Mr King has been shown to be a stranger to the truth.

It has long been settled that the Court may under its inherent jurisdiction restrain or stay winding-up proceedings that are an abuse of the Court's process. The abuse consists of using the winding-up procedure, involving as it does the advertising of the petition with the likely consequence of serious commercial damage to the company, as a means of obtaining payment of a genuinely disputed debt. For in general, a winding-up order will not be made where there is a genuine dispute. This is not an inflexible rule, as was stated in and illustrated by Bateman Television Ltd v. Coleridge Finance Co Ltd [1969] NZLR 794 (CA); [1971] NZLR 929 (PC); and in this respect the law in New Zealand differs somewhat from that in England, which is more unbending. The principles to be applied appear succinctly in this passage of the judgment of this Court in

Exchange Finance Co Ltd v. Lemmington Holdings Ltd [1984] 2
NZLR 242, 245, which follows a reference to the judgments in
the Bateman case:

Obviously the jurisdiction to restrain winding-up proceedings has to be exercised with that settled New Zealand law in mind. We think that the governing consideration can only be whether presenting or proceeding with a petition savours of unfairness or undue pressure. Whether that stigma attaches to a petition must depend on the particular facts. In many cases where there appears to be a genuine and substantial dispute about the present existence of a debt it will be right to grant an injunction. But there will be cases sufficiently out of the ordinary to justify a Judge in holding his hand.

Rule 700K(1) regulates the procedure for making the application. Subclause (2) directs the Court to deal with the application as if it were an application for an interim injunction, and enables the Court to impose terms on any order it makes. Subclause (3) states that nothing in the Rules limits the inherent jurisdiction of the Court. Counsel were agreed, and we think they were right, that there is nothing in Rule 700K to require modification of the principle enunciated in Exchange Finance Co Ltd v. Lemmington Holdings Ltd. The applicant must show a genuine and substantial dispute as to the existence of the debt, and that it would be unfair - as it usually would be - to allow that dispute to be resolved by the Companies Court rather than by action commenced in the usual way. That assessment must be made on the material before the Court, and not on the hypothesis that some other material, which has not been adduced, might nonetheless be available.

The two affidavits sworn in this case disclose extensive areas of dispute as to both facts and legal relationships. Mr King stated that prior to 1 October 1987 Mr Nicholson drove under a contract with New Zealand Express Co Ltd in what was known as its Red Express division; and that is not contested by the respondent. As from 30 September 1987 this division of New Zealand Express Co Ltd, and two other divisions of that company and an associated company, one of them known as Andair, were acquired by a newly formed company, Red Express Andair Transport Group Ltd (the Red Express Company), which was controlled by the appellant and another company, Alexandra's Couriers Ltd.

Mr Nicholson apparently continued to drive as he had before. Mr King said that Mr Nicholson remained in the Red Express division and produced a "sample contract", in blank, with "The Red Express Andair Transport Group", which he said contained the terms of Mr Nicholson's contract, although he did not say that the latter had signed such a document. Mr Nicholson said he was employed by Andair Express, which Mr King did not suggest was a separate legal entity; but invoices in the name of Andair Express Ltd point to the contrary being the case.

Mr King said that in February 1988 he and the principal of Alexandra's Couriers agreed on a restructuring which involved dividing the business of the Red Express Company between them as from 1 March 1988; and that all the owner

drivers were offered continuity of work provided they signed new contracts; alternatively their engagements would be terminated in accordance with the terms of their existing contracts: and here he referred to the sample.

Mr Nicholson, clearly referring to the same topic, said he attended a meeting at which a director of the appellant and of the Red Express Company informed the drivers that the appellant had acquired the Red Express business, that as from 1 March the drivers would all be employed by the appellant, and that they had until the end of March to sign contracts with the appellant, or resign.

On 11 February - whether this was before or after the meeting is unclear, although we think it is likely to have been before the meeting - Mr Nicholson wrote to the Manager, Andair Express, giving one month's notice of termination, but stating that he would work through to 31 March if there was a written guarantee that payment for that month would be made by 20 April. There is no evidence that the guarantee was given.

The respondent's claim is for work allegedly done after 1 March. Whether prior to that date he was working for the Red Express Company or another company, he asserts that from 1 March he was working for the appellant. Mr King's own account of the offer that was made in February tends to bear this out, for if the appellant was to take over the Red Express work, then presumably it would become the employer.

And further support is found in a memorandum which Mr King, as managing director of the appellant, sent to the drivers on 10 March. In it he confirmed that the appellant had taken over both the Andair and the Red Express operations; he welcomed "those drivers who have come across to us from Red Express Andair", and he sought patience and cooperation "For the benefit of all of Taxi Trucks". Yet further support is found in a letter Mr King, again as managing director of the appellant, sent to clients on 21 March in which he said that the Red Express Company had ceased trading on 29 February.

That the respondent understood he had begun to work for the appellant is clear from a letter he, along with other drivers, addressed to the appellant on 15 March, giving seven days notice of termination of "our association with Taxi Trucks Ltd". This period of notice was purportedly given pursuant to "the only document that we recognise as a working document for our association", namely "the N.Z. Express owner-driver contract". Contrary to Mr Meffin's submission, we do not see this letter as inconsistent with that of 11 February; but rather as recognition that there had been a change of employer.

The following day, 16 March, the Red Express Company went into receivership, and the purpose of Mr King's letter of 21 March was to assure clients that the business of that company was being, and had since 1 March been, taken over by

the appellant; and that an invoice/statement for work done in March would be sent out in due course under the name of Taxi Trucks. However little work was done after 22 March because on that day the drivers walked out, taking, Mr King claimed, most of the Red Express Company's clientele, and many of its financial records, particularly those relating to the Andair division. As a result of the receivership, and no doubt of this action too, the appellant and Alexandra's Couriers Ltd did not complete their acquisition of the Red Express Company's business. However, they continued to service some of that company's customers. Delivery dockets in the name of Andair Express Ltd were used. One of those produced was for cartage done by Mr Nicholson during March. And cartage evidenced by these dockets appears to have been invoiced in the name of the appellant, although a letter sent to customers by the appellant in May 1988 refers to "work performed by us on account of Andair Transport;" and states "Any transactions which occurred before March last, must be paid to the Receiver. Those occurring after that date, should be paid direct to our account.".

Mr King asserted that the appellant had no contractual arrangement with the respondent; and Mr Meffin sought to explain what had happened on the basis that the appellant was doing no more than administering the Red Express Company's business pending acquisition of its assets. However, even if that were so, it would not preclude an arrangement whereby the drivers were employed by the

appellant in order to carry out the Red Express Company's work. In our view the evidence suggests strongly that whatever the arrangement between the companies may have been, as from 1 March Mr Nicholson was working for the appellant: that the Red Express Company having ceased to operate at the end of February, the respondent continued to work during March for the appellant, in accordance with what the drivers were told at the meeting in February.

It needs to be emphasised that this conclusion is reached on the evidence presently before the Court. This is an interlocutory application, directed solely to whether there should be a stay, and it would be wrong to express any concluded view on the merits of the dispute. It is unfortunate that the Judge saw fit to do so. It was premature to pronounce upon liability, and indeed he was not in a position to do so on the material before him, and his views can have no relevance to a final determination of the issues. Much of what Mr Meffin said in arguing the appeal was directed to the apparent conclusiveness of the Judge's findings. It was his case that a further examination of the facts might well lead to a different result. That may be so. But it is not sufficient for an applicant for a stay simply to show that there is a dispute. He must show that the dispute is genuine and substantial. For the reasons given, we are disposed to think that that test has not been satisfied in relation to the first point in issue, whether there was a contract between the parties.

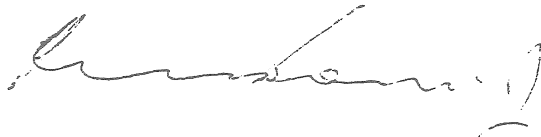
There is, however, the further point of quantum. The Judge correctly noted that there was no specific denial by Mr King of the amount alleged to be due to the respondent. But the application for stay itself makes a general denial of liability for that sum or any portion thereof, while Mr King's affidavit refers to the difficulties caused by the removal of records, with customers refusing to pay in the absence of proper documentation. There must be force in Mr Meffin's submission that the same records are necessary in order to establish what is due to the drivers, who were to be paid a proportion of the charge for each consignment. The fact that the appellant was able to prepare an invoice at the end of March shows that it had some records, but its state of uncertainty is perhaps indicated by the endorsement: "This statement does not necessarily cover all work performed by us to the date of the statement.".

A dispute as to the amount of a debt is not appropriate for resolution on the hearing of a winding-up application: a fortiori were the claims of the other seven drivers to be added in, by virtue of their joining as plaintiffs under R.700X. The issue on such a hearing is different: it is whether the company is insolvent. If it is, and a winding-up order is made, the amount properly payable to a creditor is determined in the course of the liquidation. If it is not, then no order can be made; and any dispute as to quantum remains unresolved. Mr King has asserted that the appellant is solvent, but as the Judge observed, he gave no

particulars. However, Mr Meffin informed us that the amount claimed has been paid into the appellant's solicitors' trust account, and awaits any order the Court may make in relation to it. Were that money to be paid into Court, pending determination of the appellant's liability by ordinary action, presumably in the District Court, the respondent would, we consider, have all the protection he could reasonably ask. Realistically, the alternative would be for the appellant to have to pay the full amount claimed not only by Mr Nicholson, but by the other drivers too, in order to avoid the further advertising of the proceeding; and that would be quite unjust. It is to be noted that through inadvertence or misunderstanding the proceeding has already been advertised in the Gazette; but what is of particular concern to the appellant is its advertising in a local Auckland newspaper.

For these reasons the appeal is allowed, and orders are made restraining further publication of the advertising, and staying any further proceeding in relation to the winding-up, pending resolution of the dispute in other proceedings; on terms that within seven days of delivery of this judgment the appellant pay the sum of \$5,279-41 into Court, to be paid out in accordance with the outcome of those other proceedings.

The appellant is entitled to its costs in this Court and in the Court below. The order for costs in the High Court is vacated and replaced by an order for \$400.00 in favour of the defendant there. The costs of the appellant in this Court are fixed at \$1,000.00 together with disbursements, including the reasonable travelling expenses of counsel, and if necessary his reasonable accommodation expenses, to be settled by the Registrar.

A handwritten signature in dark ink, appearing to be 'L. M. J.', is written across the middle of the page.

Solicitors

Neumegen & Co, Auckland for appellant
Whaley & Garnett, Auckland, for respondent