IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-002453
[2013] NZHC 3419

UNDER THE	Companies Act 1993
IN THE MATTER OF	the liquidation of Maclean Computing Limited
BETWEEN	DAMIEN GRANT AND STEVEN KHOV Applicants
AND	WESTCON GROUP NZ LIMITED Respondent

Hearing: 12 December 2013

Appearances: B Norling and A Ho for the Applicants
M Arthur and J Marcetic for the Respondent

Judgment: 17 December 2013

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
17.12.13 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

[1] The applicants are the liquidators of Maclean Computing Limited (In liquidation) (Maclean). Maclean was put into liquidation by special resolution of its shareholders on 13 July 2012. The applicants seek orders that amounts totalling $274,617.49 received by the respondent (Westcon) prior to liquidation be set aside and that Westcon pay that sum to them.

[2] On 10 may 2012 the applicants filed in this Court their originating application to set aside voidable transactions. It claims:

(a) Transactions totalling $274,617.49 were entered into within the specified period (of two years prior to the date of liquidation).

(b) Of that total sum transactions totalling $37,303 were entered into within the restricted period (within six months prior to liquidation).

(c) The payments made by Maclean were entered into at a time when it was unable to pay its due debts and they enabled Westcon to receive more towards satisfaction of its debt than it would have received or have been likely to receive in Maclean's liquidation.

(d) The financial statements of Maclean indicate that at all relevant times it was unable to pay its due debts.

(e) The proof of debts that were filed in Maclean's liquidation indicates that at all relevant times, it was unable to pay its due debts.

(f) The applicants believe Westcon has no valid defence to the transactions being set aside.

[3] Mr Grant, one of the applicants, has sworn an affidavit in support of the application. He deposes that Westcon is "a distributor of network infrastructure, data centre and security". Maclean provided IT support to medium-sized New Zealand businesses.

[4] On 10 September 2012 the applicants requested a statement of account from Westcon summarising the details of all invoices issued and payments received. Westcon responded on 7 November 2012. From the applicant's analysis of this it was determined there were some 53 payments made by Maclean to Westcon over the period 29 March 2011 to 30 April 2012 which the applicant's say were voidable transactions because they were entered into at a time when Maclean was unable to pay its debts and thereby enabled Westcon to receive more towards satisfaction of its debt than would likely have been received in Maclean's liquidation. .

[5] On 7 December 2012 the applicants served a notice to set aside as voidable transactions all payments received by Westcon since 29 March 2011. By letter dated 19 December 2012 Westcon objected to the notice, noting its reasons for objection.

[6] Mr Grant reports that in the liquidation the applicants received proofs of debts totalling $2,479,859.97. Of this amount $1,334,876.18 was owed to preferential creditors and $271,245.38 was owed to secured creditors. Mr Grant concludes that the clear evidence is that Westcon received more in satisfaction of its debts than it would have in the liquidation of Maclean.

[7] In its notice of opposition to the liquidators application Westcon claims:

(a) That none of the transactions listed in the notice of application:

(i) Is a transaction by Maclean;

(ii) Was entered into at a time when Maclean was unable to pay its debts;

(iii) Enabled Westcon to receive more in satisfaction of a debt than it would have likely received in Maclean's liquidation, because:

1. Westcon did not receive more than it should have because of its status as a secured creditor of Maclean.

2. The amount of $18,303 credited by Westcon to Maclean's account on 30 August 2011 was a payment made by way of set off and had that set off not occurred, it would have occurred in a liquidation, in accordance with s 310 of the Act.

[8] Mr Frost financial director of Westcon swore an affidavit on its behalf in opposition. He deposed Westcon was a distributor of IT products and services and among other things it supplied hardware and software to customers for IT systems and infrastructure for them to resell to their customers or for their internal use.

[9] Mr Frost says Westcon began trading with Maclean around July 2000. Maclean signed up to their standard terms of trade including 30 day repayment terms. Westcon retained title in any goods until they were fully paid for.

[10] Around June 2009 Westcon started experiencing some late payment issues with Maclean. Mr Frost deposed "I asked Maclean to complete a new credit application form and to sign up to their updated terms of trade. As before those terms provided that Westcon would retain title in goods they supplied and that Maclean would grant Westcon a security interest in the goods they supplied and their proceeds".

[11] It is accepted that Weston held a registered security interest in the goods they supplied to Maclean and also in the proceeds (the payment) of those goods that they supplied to Maclean.

Chronology

[12] The Court has received a number of affidavits in this case, some of those containing exhibited material of considerable length. The Court has heard the extensive submissions of counsel regarding proper inferences to be drawn from the material provided.

[13] Counsel differ about whether Maclean's three major suppliers (of which Westcon was one), including Express Data, supported Maclean's debt restructuring proposal first raised in February 2011.

[14] Initially it was forcefully contended on behalf of the applicants that the Inland Revenue Department (IRD) did not support nor participate in the restructuring programme which Westcon agreed to.

[15] Indeed when it became clear to the Court that significance may attach to the question of whether or not the IRD did agree to Maclean's restructuring proposal, the Court adjourned the first hearing of this matter on 30 September 2013 to enable additional evidence to be obtained. Following this, further affidavits were filed. It is clear from the additional evidence that the IRD agreed to Maclean's February 2011 restructuring proposal albeit that those final terms of agreement were not concluded until April 2011.

[16] As to whether or not Express Data likewise concluded a proposal with Maclean there was no agreement between counsel. Quite clearly Express Data rejected the initial proposal. However, the Court is firmly of the view that an accord was reached with Express Data for the structured repayment of its debt. The clear evidence is that, as occurred with other major creditors, an agreement was reached for the repayment of Express Data's debt by equal monthly payments – in Express Data's case over a period of six months.

[17] The following description of the events records what the Court accepts for relevant purposes, did occur.

[18] Between February 2011 and March 2011 and following some credit limit issues with Westcon, Maclean entered into debt rescheduling arrangements with its bank, the IRD and its two major suppliers namely Westcon and Ingram Micro. Later, agreement was reached on the basis that the existing debt of the three major suppliers (including Express Data) would be ring fenced and paid off by regular monthly payments over 12 months (or as it appears in the case of Express Data over 6 months).

[19] All of the transactions at issue in this proceeding took place after this point.

[20] Between March 2011 and October 2011 Westcon received payments from Maclean in accordance with their debt rescheduling agreement.

[21] In November 2011 Maclean asked for a suspension of payment instalments to suppliers, the bank and the IRD until April 2012, in order to manage their forecast cash flow requirements.

[22] On 16 December 2011 Maclean agreed with the Bank, Westcon and Ingram Micro to reduce monthly payments until March 2012, following which there was to be a return to the previously agreed level of monthly repayments.

[23] In accordance with that further agreement Westcon received payments of sufficient regularity and in such sums as to meet Maclean's promises.

[24] Meanwhile Maclean attempted to sell its premises and its book of small customers to trade out of its financial issues.

[25] On 1 April 2012 the temporary December 2011 repayment agreement expired triggering a return to the original March 2011 agreement by which Westcon was to receive $35,000 per month. Westcon received a payment of $3,000 on 5 April 2011.

[26] On 23 April 2012 Westcon agreed that a further $10,000 payment by Maclean would be acceptable in the interim. Westcon received $10,000 on 30 April 2011 but thereafter received nothing from Westcon.

[27] Further rescheduling negotiations ensued but these failed when in July 2012 liquidators were appointed to Maclean by a resolution of Maclean's shareholders.

Issues

[28] These focus upon s 292 of the Companies Act 1993 (the Act) which states that an insolvent transaction:

(a) Is entered into at a time when the company is unable to pay its due debts.

(b) Enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

[29] Much of the content of counsels' submissions focussed upon whether or not and at the time Maclean made its payments, it was "unable to pay its due debts".

[30] Of significance to that enquiry were the agreements Maclean obtained from its major creditors for the rescheduling of debt repayments. The liquidator's position is that those agreements amounted to little more than indulgences and did not affect payment obligations to creditors because at all times those debts were due for repayment. The liquidator's position is that a balance sheet analysis demonstrates corporate insolvency. Further and notwithstanding the willingness of the major creditors to defer repayment obligations, the liquidators say Maclean was unable to pay its debts as they fell due.

Legal principles

[31] The principles regarding a creditor's ability to pay its due debts are well established. There is no disagreement between counsel regarding these. Those principles were helpfully set out by Associate Judge Faire in *Blanchett v Joinery Direct Limited* [1].

[32] Of those principles and for present relevant purposes they include the making of an inquiry at the time the payment is made; of having regard to the recent past to see if there was an inability to pay debts as they became due; that "as they become due" means as they become legally due; that an ability to pay involves a substantial element of immediacy to provide payment from cash and non-cash resources but that an excess of assets over liabilities would not of itself satisfy the test if there is no ability to pay; that an ability to procure sufficient money to pay debts by realisation by sale or mortgaging or pledging assets within a relatively short period of time will satisfy the test; and that consideration is required of the company's financial position

[1] CIV 2007-419-1690, 23 December 2008.

in its entirety because a temporary lack of liquidity does not necessarily evidence insolvency.

Considerations

Whether Maclean was able to pay its debts when they were due

[33] The liquidator's position is that it is wrong for Westcon to focus upon the agreements of the major creditors to defer repayment obligations. Further, that such agreements did not affect or alter the liability of Maclean to make payments in accordance with contractual commitments which provided for payments to be made monthly and in the case of Westcon recorded that a debt became immediately due and payable in the event that Maclean endeavoured to renegotiate its payment obligations.

[34] Beyond that, a considerable focus of the liquidator's submissions are that it is plainly apparent from relevant annual balance sheets that Maclean's liabilities exceeded its assets by around $2M throughout. In the broader picture of things proof of insolvency and it follows proof of an inability to pay debts, was, Mr Norling submitted, plain. Although Maclean entered into an instalment arrangement with the IRD pursuant to s 177B of the Tax Administration Act 1994 Maclean's failure to pay GST and PAYE and other tax obligations clearly proved that Maclean was insolvent. Mr Norling relies upon the comment of Heath J in *Syntax Holdings (Auckland) Limited v Bishop*[2] when the learned Judge commented:

> ... a failure to pay GST and PAYE on a regular basis is a sure sign of a company in "trouble" because these funds are only ever meant to be held by a company for a short period of time prior to payment to the Commissioner of Inland Revenue. The funds have a quasi-trust character to them.

[35] In summary regarding Maclean's ability to pay debts Mr Norling submits:

(a) At the times those payments were made by Maclean it was hopelessly insolvent.

[2] [2011] NZHC 2171 at [12].

(b) The financial statements evidence substantial deficits of available assets to meet liabilities.

(c) Some but not all creditors gave Maclean indulgences and allowed Maclean time to pay but in any case Maclean was unable to pay those creditors in accordance with those payment arrangements. Despite a payment arrangement, the debts were always "payable" and as such, the debts were due.

(d) In such circumstances and on an objective assessment, Maclean was undoubtedly unable to pay its due debts when they were legally due.

Whether Westcon received a greater payment by these transactions than it would otherwise have received in the liquidation

[36] The applicants submit it is clear that Westcon would not have received as much in the liquidation as it did by those transactions which are the subject of the present enquiry, notwithstanding Westcon's position that it had a registered interest in the product it provided for on sale by Maclean. Westcon says it asked the liquidator to identify among the liquidation asset collectables the unsold product it supplied. It requested these be returned to Westcon. Westcon considered the value in those would affect the amount able to be recovered by the liquidators if they should succeed with their claim of voidable transactions.

[37] In response to this position Mr Norling submitted on behalf of the liquidators that it has been impossible to identify the extent if any of those products supplied to Maclean which have not been on sold, due to the inadequacy of Maclean's records. Further there are insufficient details in records of payments to Maclean to identify whether any of those has particular reference to an on sale of Westcon's product.

Discussions

[38] The Court does not consider that there is sufficiency in Westcon's claims of a secured interest of stock which may still have been in the possession of Maclean

when the liquidators were appointed, to the extent that they should persuade a Court that Westcon has not received more by the payment transactions than it would have in Maclean's liquidation.

[39] The clear evidence is that Westcon did not, directly, supply any product to Maclean for a period of about 18 months prior to the liquidation. It is reasonable to infer that none such product would have been identifiable among Maclean's assets collectables at the date of liquidation.

[40] Although Westcon's security interest attached to the proceeds received from the sale of its product it appears clear in this case that such would have been paid into Maclean's bank accounts which clearly were in overdraft at all relevant times. It is clear law that in those circumstances no property exists in those overdraft accounts which is capable of sustaining a claim of a security interest.

[41] Further support for the liquidator's position in this respect is provided by Westcon's failure to respond to the liquidator's initial letter asking creditors to identify the nature of property over which a security interest was claimed, failing which it was stated, such claims would be surrendered to the liquidators.

[42] That leaves us with what, in this case, is the primary issue for determination namely whether, because of the agreements with the major creditors, Maclean was able to pay its debts as they became due.

[43] If the liquidators are to succeed with their setting aside application then they have the onus of proof that Maclean could not pay its due debts, and they must prove as well that Westcon received more from the Maclean payments than it would have in Maclean's liquidation.

[44] That means that unless the liquidators can prove both elements their application must fail.

[45] The Court has already held that the liquidators have proved the second part of their application namely that Westcon received more by the transactions than they would have in Maclean's liquidation.

[46] To an extent the liquidators are assisted in their task of providing proof because in the restricted period of six months prior to liquidation there is a presumption that any payments were insolvent transactions.

[47] The liquidators urge the Court to look at the broader picture including the balance sheets and they request the Court to reject claims that the majority of creditors agreed to payment delays or that those agreements were in any event effective to procure a legally binding commitment of the creditors. The applicants say that those agreements do not provide any deferment of legal obligations to pay the debts and therefore because Maclean could not afford to make the payments when it was obliged to, it was unable to pay its debts when they were due.

[48] The Court takes a different view regarding the effect of those agreements for rescheduling payments. Those agreements were reached after a careful and thorough exchange of communications and correspondence. The solutions agreed by those were not as were originally proposed by Maclean. Rather they were negotiated solutions and provided commitments by creditors. It appears there would have been sufficient support from its major creditors to have enabled Maclean to obtain approval to a Part 14 Companies Act 1993 proposal. A successful Part 14 application has the effect of compelling the participation of minority creditors who will not accept a payment compromise.

[49] A reasonable inference in this case is that there was sufficient support from all major creditors. A Part 14 application was not required.

[50] Annual balance sheets can provide assistance. In this case these show a significant overall net deficit. A balance sheet analysis however is only relevant to the extent that a company cannot pay its due debts and does not have the ability to procure sufficient money to pay debts by selling, mortgaging or pledging assets within a relatively short period of time.

[51] In this case and for the purpose of encouraging creditors to extend rescheduling arrangements Maclean promised to try and effect a sale of its business premises and its book of small customers.

[52] Mr Norling argued that the business premises had limited value if they could not be sold tenanted – as would be likely if Maclean went into liquidation. Mr Norling also noted that the business premises were not listed as assets in Maclean's balance sheet.

[53] Obviously a building would be more readily saleable if tenanted. The fact that it may not have been a listed asset of Maclean ignores Maclean's promise to provide the proceeds of sale for the purpose of enabling Maclean to meet its debt obligations.

[54] Whether a debt has or has not become due is to be determined by reference to the legal agreement of the parties.[3]

[55] A debt becomes due when it is payable. Whether it is payable is a matter for considering what obligations bind the company; it is not about the fact that the creditor might not be prepared to insist on payments strictly in accordance with agreed terms.

[56] In this case clearly the payments due to creditors was always owed by Maclean. The issue for us concerns the date on which those payments were due.

[57] The Court accepts Mr Arthur's submission that a creditor who agrees to formally reschedule its debt goes further than just forbearing to sue; it relinquishes its right to call for payment of the debt which has previously been due and owing. Having entered into the agreement, Westcon was required to abide by the terms of the agreement and await payment of the debt over 12 monthly instalments, as each instalment fell legally due.

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[3] *Pioneer Concrete Pty Limited v Ellston* (1985) 10 aclr 289 (VSC) at p.301.

[58] In this Court's view Westcon contracted with Maclean to reschedule the payments as it did. At the very least it is arguable that Westcon is estopped from claiming it is entitled to pursue recovery of its debts pursuant to the parties original contracted terms.

[59] With respect to the negative position indicated on the balance sheets the Court considers that does not conclusively prove Maclean was unable to pay its debts as it fell due. Indeed albeit marginally, the balance sheet analysis shows improvement occurring during the rescheduling of debt period. Further there is clear evidence that employee fraud within Maclean may well have contributed to a breakdown of repayments in November 2011 which was the reason why Maclean sought a temporary adjustment to payment commitments at that time.

[60] Understandably the approach taken by the liquidators exhibits cynicism regarding claims that the major creditors agreed to rescheduling arrangements because it was in their interests to do so; that they, the creditors, realised Maclean was treading a fine line between survival and insolvency. Indeed the correspondence of the major creditors indicates their knowledge of this. These views notwithstanding, the Court believes the creditor's purpose was as well to assist a debtor who was putting enormous effort towards ensuring the company's survival. Formal arrangements were concluded. They did not involve the giving of a mere indulgence. Those arrangements bound the creditor to them. That those arrangements came unstuck in November 2011 appears to have been due to causes other than a failure of Maclean endeavours to achieve its payment promises.

Conclusions

[61] Notwithstanding an apparent poor balance sheet provision Maclean's rescheduling proposals offered a viable proposition for its purpose of meeting its debt obligations as they fell due. In the mix Maclean offered to sell assets. Maclean met those obligations for a period of eight – nine months during which time it appeared its recovery objectives were being attained. The payments they made during that period and after met their obligations albeit restructured by agreements, as they fell due.

[62] In the Court's view none of those payments was an avoidable transaction.

[63] Accordingly the liquidator's application must fail, and is dismissed.

[64] Counsel are to file and exchange memoranda as to costs. Costs issues will be dealt with on the papers in due course.

Associate Judge Christiansen