IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-1434

IN THE MATTER OF	an application under sections 239ABD(b) and 239ABE(b) Companies Act 1993
BETWEEN	PACIFIC TRAWLING LIMITED Appellant
AND	PETER COLEMAN AS ADMINISTRATOR OF E&B MANAGEMENT LIMITED Respondent

Hearing: 28 March 2011

Counsel: NT Gray for applicant
PJ Morris for respondent

Judgment: 29 March 2011 at 3:30pm

JUDGMENT OF FAIRE J

This judgment was delivered by me on 29 March 2011 at 3:30pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date...............

Solicitors: Sainsbury Logan & Williams, PO Box 41, Napier
Stace Hammond, PO Box 19 101, Hamilton

[1] Mr PME Coleman was appointed administrator of E&B Management Ltd pursuant the Companies Act 1993, s 239I on 1 February 2011.

[2] The applicant applies for orders:

(a) For leave pursuant to the Companies Act 1993, s 239ABE(b) to bring an originating application for order giving it permission to take possession of a fishing trawler; and

(b) If leave is granted, an order pursuant the Companies Act 1993, s 239ABD(b) that it be entitled to take possession of the fishing trawler, the Pacific Explorer.

[3] E&B Management Ltd was the subject of applications heard by this court on 23 March 2011. Those applications were:

(a) An application by Mr Coleman pursuant to the Companies Act 1993, s 239AT for an order extending the time for convening a watershed meeting; and

(b) An application by the Ministry of Fisheries, pursuant to the Companies Act 1993, s 246 for the appointment of an interim liquidator. Such application is subject to the Companies Act 1993, s 239ABW which prohibits the making of an order appointing an interim liquidator unless the court is satisfied that it is in the interests of the company's creditors for the company to continue in administration rather than have an interim liquidator appointed.

[4] The two applications mentioned were heard by Priestley J. His Honour has reserved his decision on those applications.

[5] A resolution of those applications will clearly impact on the two applications that I am considering. The Companies Act 1993, s 239ABX provides that the appointment of a liquidator to a company in administration ends the administration.

[6] The applicant's applications were accompanied by a memorandum of counsel. It sought an urgent hearing date for the applications. The applicant reported that it was particularly concerned to know by the end of March 2011 whether the court would grant it leave to take physical possession of the fishing trawler, Pacific Explorer.

[7] Pacific Explorer is a 30.12 metre refrigerated stern trawler which was built in 1983. Counsel confirmed to me that the vessel is registered under the Ship Registration Act 1992. Matters pertaining to security interests in the vessel are therefore not covered by the Personal Property Securities Act 1999. They are covered specifically Ship Registration Act 1992. Transfers, transmissions and mortgages of ships are specifically dealt with in the Ship Registration Act 1992, Part III.

[8] The reason given for urgency in the hearing and disposal of this application was given as a need to confirm an order overseas for the supply of long-line machinery to refit Pacific Explorer so that it could operate as a long-liner fishing vessel. The machinery necessary would have to come from Norway. If permission is given the applicant would wish the vessel to be converted into a long-liner to fish the ling season from July to October.

[9] The application for urgency was dealt with Associate Judge Bell who issued minutes respectively on 18 March 2011 and 22 March 2011. Necessarily the parties and, in particular, the respondent have had to act within a short space of time to provide the notice of opposition and affidavits in opposition. I accept that this has placed the parties at some disadvantage and that a degree of licence was therefore permitted in the information that was placed before the court to enable this application to be considered on an urgent basis.

[10] That applicant and E&B Management Ltd entered into an agreement on 11 September 2008 under which the applicant agreed to sell to E&B Management Ltd the MV Pacific Explorer. The price recorded in the agreement is $850,000 plus GST. Payments were to be paid on a periodic basis so that:

(a) on 12 September 2008 a payment of $5,000 was required;

(b) on 20 October 2008 a payment of $106,250 was required, being the total GST on the transaction;

(c) on 30 November 2008 the sum of $200,000 was required; and

(d) from 12 September 2008, the date of settlement, $5,000 per week was required to be paid on each Friday. Interest was required to be paid on the outstanding purchase price at the rate of 10 per cent per annum. Provision was made for the payment of default interest at the rate of 15 per cent.

[11] Title was provided to remain with the vendor until all the purchase price and interest had been paid. Possession, however, was given to the purchaser on the settlement date, namely 12 September 2008. Risk in the vessel passed to the purchaser on taking possession. The purchaser was therefore responsible for the cost of insurance which the vendor was to arrange.

[12] The evidence discloses several occasions where breach of the payment requirements on the part of E&B Management Ltd occurred. Two such breaches led to the issue of statutory demands. The breaches on those occasions were cured.

[13] There is currently a dispute as to the amount allegedly due to complete the obligations of E&B Management Ltd to purchase the vessel. Mr Coleman claimed that E&B Management Ltd had paid $777,553 towards the purchase of the vessel as at 18 February 2011. He calculated that the outstanding balance owing to the applicant for the purchase is currently $72,447. Of that sum, $33,550 is overdue.

[14] By contrast Mr GJ Robinson, a director of the applicant, presented a schedule disclosing the default position at 18 February 2011 at $80,246 and disclosing that at that date there was required to be paid to complete the purchase a sum $216,890.39.

[15] Part of the difference between the two positions relates to how payments made by E&B Management Ltd have been apportioned as between the purchase contract and other responsibilities.

[16] For reasons which I will shortly set out, I do regard resolution of that matter in this application at this time as being important for the disposal of this application.

[17] Mr Coleman produced a valuation of MV Pacific Explorer dated 14 July 2010. The valuation was completed by Maritime International Ltd for the purpose of E&B Management Ltd seeking a loan. The report has not been produced as the report of an expert and, in particular, in compliance with the High Court Rules dealing with expert reports. I accept, however, that it is the best that could be provided to the court in the very limited time that was available to the respondent. The significance of the report is that a valuation of the vessel is given at $1,500,000 plus GST.

[18] On 18 February 2011 the applicant gave notice cancelling the purchase contract. The grounds for cancellation were explained by Mr Gray in his submissions as being made in reliance on the Contractual Remedies Act 1979, s 7(3)(b) and (4)(b)(i).

[19] The Contractual Remedies Act 1979, s 7(3)(b) provides:

> **7 Cancellation of contract**
>
> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—
>
> …
>
> (b) A [term] in the contract is broken by another party to that contract; or

The Contractual Remedies Act 1979, s 7(4)(b) provides:

(4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if,—

…

(b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—

(i) Substantially to reduce the benefit of the contract to the cancelling party;

…

[20] It is appropriate to record the rules which apply to cancellation which are provided for in the Contractual Remedies Act 1979, s 8. In particular s 8(3) provides:

8 Rules applying to cancellation

(3) Subject to this Act, when a contract is cancelled the following provisions shall apply:

(a) So far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further:

(b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

[21] The applicant's position is that it is entitled as the owner of the vessel to possession of it. That arises from the fact that under the contract until the full purchase price is paid it remains the owner.

[22] Cancellation in this case gives the applicant a substantial advantage over and above what it might have expected to have received had the contract been performed. In short, it would be permitted to retain the payments already made which it has estimated at some $633,110 together with the vessel. I have already recorded that the only evidence as to the vessel's value before the court is that of $1.5 million. Had the contract been performed and everything due and owing to the applicant been paid it might have expected to have been paid the current amount due on its calculation of $216,890 plus the outstanding sums due as at 18 February 2011 of

$80,246 plus, possibly the insurance due on the vessel and some other debts which Mr Robinson calculated amounted to $39,840.17.

[23] Although I cannot, in this proceeding, calculate the precise windfall to the applicant that would occur as a result of the application of the Contractual Remedies Act 1979, s 8(3) the general position indicates that there would have to be some relief granted by the court to E&B Management Ltd pursuant to the powers vested in the court by the Contractual Remedies Act 1979, s 9.

[24] I am proceeding on the assumption that what would be the likely damages and therefore the end result of the balancing of positions that would undoubtedly have to be undertaken when the court considers the position pursuant to the Contractual Remedies Act 1979, s9 leads to a position where the applicant's ownership of Pacific Explorer will easily cover any real losses that the applicant has sustained by virtue of E&B Management Ltd's breach. That is an important conclusion because it means that the need for an urgent order on this application, in my view, cannot presently be justified.

[25] The matters pertaining to Pacific Explorer and the fishing operations of E&B Management Ltd have been the subject of yet a further court application recently. That concerned an application to the District Court in Wellington for the release of a fishing permit held by one Simon Rushbridge. In a reserved decision issued by District Court Judge Thomas on 24 March 2011 the court ordered the release of the fishing permit from suspension. Some criticism is made by Mr Gray as to the disclosure that he says was not made to the Judge in the course of that proceeding.

[26] Mr Gray also relies on another difficulty that has not yet been finally determined. That arises from the fact that the vessel is subject to seizure by the Ministry of Fisheries. That seizure apparently is made based on the alleged commission of an offence against Fisheries Act 1996, s 79A(9).

[27] Mr Coleman has reviewed the company's position. He says that the only realistic alternative to E&B Management Ltd going into liquidation is for it to demise charter the Pacific Explorer to another company and for that company to

subsequently fish under the authority of Mr Rushbridge's permits. He says that that could secure a flow of moneys to the company from the charter fee. In addition, it would supply fish so that the company could service its customers. That is essential, he believes, to the prospect of paying back the various creditors and putting the company on a sound economic footing. That whole process, of course, is dependent upon the company having possession of Pacific Explorer and for the vessel to operate under appropriate licences. It would also require payment of the defaults under the sale and purchase contract. Whether the company's creditors would accept a deed of company arrangement at a watershed meeting to allow such arrangement to proceed is yet to be determined.

[28] I now consider the statutory basis for the applications and the authorities that were referred to by counsel.

[29] The applicant's application is twofold. First, because E&B Management Ltd is in administration pursuant to the Companies Act 1993, Part 15A a proceeding against the company in relation to any of its property cannot begin or continue except with the administrator's written consent or with the permission of the court: S 239ABE. The administrator has not consented to this proceeding being continued. That is the reason why the applicant therefore makes application for the court's permission to begin this proceeding.

[30] The second aspect of the application arises by virtue of the operation of the Companies Act 1993, s 239ABD. That provides that whilst a company is in administration the owner of property that was used or occupied or is in the possession of the company must not take possession of that property or otherwise recover it except with the administrator's written consent or with the permission of the court. Once again, the administrator has not consented to the yielding up of possession to the applicant. For that reason, the applicant seeks the court's permission to take possession of the vessel.

[31] The reasons advanced for the applicant's application in summary are:

(a) It wishes to use the vessel to fish for profit, subject to the vessel being released from the Ministry of Fisheries seizure;

(b) It will suffer loss if it is unable earn revenue from operating the vessel;

(c) E&B Management Ltd appears to have no means of obtaining the release of the vessel from the Ministry of Fisheries and paying its creditor; and

(d) The loss to the applicant would be greater than any benefit or advantage that might inure to the company's creditors if the prohibition from recovery of the vessel as provided for in the Companies Act 1993, s 239ABD were to continue.

[32] The administrator opposes the application and advances the following specific matters:

(a) The respondent company holds significant equity in MV Pacific Explorer as the result of the payments it has made. That equity in the vessel is an asset of the company available to its creditors;

(b) There is a dispute over the amount of arrears owing under the sale and purchase contract. The company has sufficient assets to meet arrears. There have been delays in payments under the contract which have been accepted or, at least, have not led to an alleged cancellation in the past;

(c) The orders sought by the applicant undermine the objects of the Companies Act 1993, Part 15A; and

(d) There is, in fact, no justification for an urgent hearing of the application. The creditors should be allowed to decide at a watershed meeting whether the respondent should pay the outstanding arrears and proceed with a deed of company arrangement.

[33] The above is but a summary of the matters that were advanced in opposition but represent the important matters that were relied upon by Mr Morris.

[34] Counsel's research had located one case in New Zealand where the court has been asked to consider giving permission to the bringing of a proceeding in relation to property of a company in administration. Randerson J had to consider the position in *Maxim Group Ltd v Jones Publishing Ltd*.[1] His Honour drew attention to the objects of the Companies Act 1993, Part 15A as set out in s 239. He cited with approval the passage in *Heath & Whale on Insolvency*:[2]

> One of the main purposes of voluntary administration, within the context of the statutory objects ... , is to provide a breathing space free from creditor enforcements, steps and proceedings, during which the administrator can assess and investigate the company's situation, continue to run the business if appropriate, and put together a proposal for the company's future, which will usually take the form of a DOCA.

[35] His Honour completed his general analysis with the following observations:[3]

> [41] The "breathing space" or "moratorium" commences from the time of appointment of the administrator and prevents court proceedings against the company, other than with the consent of the administrator or the permission of the court. With certain exceptions, it also prevents other forms of execution and the enforcement of rights by owners and lessors of properties. The moratorium lasts for the duration of the voluntary administration which is constrained by statutory time periods: see the further description in *Heath & Whale on Insolvency* at 17.6.
>
> …
>
> [43] As noted in *Brooker's Company & Securities Law* at CA239ABE.05, the Australian cases suggest that the courts will be very reluctant to grant leave although I would be reluctant to adopt an exceptional circumstances test. Unlike a company in liquidation, a company that is in administration is seeking to continue to trade and to maximise the chances of it remaining in business. A relevant consideration in granting permission will be whether the grant of permission would be consistent with the statutory objectives. Other matters likely to be of relevance are whether the grant of permission to bring or continue legal proceedings will divert the attention of the administrator from the task at hand or would result in burdensome legal costs being incurred which would otherwise be available for

---

[1] *Maxim Group Ltd v Jones Publishing Ltd* HC Auckland CIV 2008-404-8179, 17 December 2008.

[2] *Heath & Whale on Insolvency* (looseleaf ed, LexisNexis 2008) at 17.6.

[3] *Maxim Group Ltd v Jones Publishing Ltd* at [41], [43] & [44].

> creditors generally. The interests of the creditors as a whole are to be considered: *J & B Records v Brashs Pty Ltd* (1994) 13 ACSR 680 at 682.
>
> [44] There is also authority for the proposition that it is inappropriate to grant leave to enable an individual creditor to advance his or her interests against the collective interests of the creditors: *Foxcraft v The Ink Group Pty Ltd* (1994) 15 ACSR 203.

[36] In addition to the above summary there is, of course, the Australian authorities. The New Zealand provision in the Companies Act 1993, Part 15 is based on an Australian model, although there are some differences between the Australian legislation and the New Zealand statutory regime.[4]

[37] The equivalent provision to the Companies Act 1993, s 239ABD is the Corporations Act, s 440C(b). In *re Java 452 Pty Ltd (Admin appointed)* the court considered an application by a lessor to take possession of premises leased by the company in administration from which it ran a café.[5] The company was in breach of an essential term: the obligation to pay rent. The court referred to its obligation to balance the statutory objects with the rights of the people dealing with the company under administration and with the administrator. The court said:[6]

> Part 5.3A was introduced in 1992 following the report of the Australian Law Reform Commission, called the Harmer report (ALRC 45). Its scheme, generally, is to confer on the creditors of a company which is insolvent or likely to be so the power to determine its future. For this purpose its affairs are temporarily entrusted to an administrator which reports to the creditors. A feature of the legislative scheme is that the rights of creditors and charges against the company and its property are restricted during the period from the beginning of the administration until the holding and conclusion of the second meeting of creditors. This will ordinarily be a very limited period because the meeting will normally be first held within about 33 days after the beginning of the administration and its business concluded within 60 days thereafter: ss 439A(1), 439A(2), 439B(2). This period is to enable the administrator to take possession of the company's assets and books, to investigate its affairs and to consider possible causes of action, to prepare a report to creditors and to enable the creditors themselves to consider the options provided under s 439C. During this period the ordinary right to sue the company and even enforcement processes are, generally speaking, suspended: ss 440D, 440E. The intention of the legislation is to create a short breathing space for the company and those in control of it. It prevents creditors during this period, even secured creditors, from engaging in a

---

4 At [38].

5 *re Java 452 Pty Ltd (Admin appointed)* (1999) 32 ACSR 507.

6 At [31].

> disorderly and distracting grab for the assets of the company which might prejudice the interests of the creditors as a whole and jeopardise the possibility that the business of the company might be continued under a company deed of arrangement or otherwise with the support of the creditors.And:[7]
>
> No guidance is given in the statute as to the manner in which the discretion to grant leave might be exercised. In these circumstances, I see my task as that of giving effect to the object of Pt 5.3A as that appears in s 435A and, generally, from the legislation. At the same time I must have regard to the fact that, in many respects, the statute intrudes upon the rights of persons dealing with the company under administration and with the administrators themselves. I must seek to balance the statutory objects with the rights of those persons, bearing in mind that, in the case of conflict, the will of Parliament must prevail.

[38] The application in that case was dismissed by the court. In *Canberra International Airport Pty Ltd v Ansett Australia Ltd* the applicant applied to the court for leave to recover property leased by Ansett, namely the Ansett terminal and extension at Canberra Airport.[8] The court observed that the applicant for leave must satisfy the court that leave should be given. The court gave further guidance on the exercise of the discretion and said:[9]

> Leave may be granted if the statutory restraint imposed on the lessor will occasion the lessor loss or detriment (financial or otherwise) of a relevant kind. The loss or detriment may be regarded as relevant to a grant of leave where the Court considers it is greater than any benefit or advantage that might enure to the creditors by reason of the statutory restraint. The outcome of a grant of leave may depend on the history of the administration, the conduct of the parties, and whether terms may practically be imposed on a grant or refusal of leave to protect competing interests.

[39] And further, the court said:[10]

> The creditors should, so it seems to me, be allowed full opportunity to consider their options at the forthcoming creditors' meeting. The administrators have indicated that they intend to propose a deed of arrangement. That proposal should be considered by the creditors fully. As Byrne J said in *Re Java* at 517 "the imminence of the creditors' meeting and the prospect that they might be asked to consider a proposal for a deed of company arrangement" was "a powerful reason not to disturb the status quo". The intention of the legislation is that creditors be given a full opportunity to consider their options and that a lessor not be permitted to pre-empt that position by disturbing the company's possession of premises.

---

7 At [38].
8 *Canberra International Airport Pty Ltd v Ansett Australia Ltd* (2002) 20 ACLC 1,133.
9 At [24].
10 At [63].

> The fact that the applicant may suffer some further delay in re-taking possession does not lead me to a contrary conclusion.

[40] The applicant seeks a ruling so that its position is established by 31 March 2011. That is because it wishes to be in a position to utilise the vessel and convert it so that it can be used in a different fishing operation. Because of the pressure that that time limit has imposed a position has been reached where the evidence is incomplete in a number of areas and the outcome of another court application is not yet known. I have reached the conclusion that orders are not justified at the present time.

[41] My reasons for the conclusion just stated are:

(a) The loss of the vessel would have substantial effect on the body of creditors. If the creditors lost the vessel they would lose a vessel which, on the evidence before me, has a value of $1,500,000 less the amount due to the applicant, which would appear to be no more than $300,000;

(b) If an order is refused, the applicant will nevertheless retain its interest in the vessel as owner. The damages which the applicant has suffered as a result of the breach by non-payment of the moneys due under the contract of purchase at this stage appear to amount to no more than $300,000. There is ample equity in the vessel itself to cover those damages. Looked at, in the long term, there should be no detriment to the applicant by refusing an order for possession at this time;

(c) The contractual position between the parties on the merits suggests that there would be a need for relief in favour of E&B Management Ltd if the applicant's cancellation of the contract of purchase is upheld by the court and possession ordered. That is because there would be a substantial windfall to the applicant if it retained possession of the vessel and did not account for any of the moneys paid by way of purchase price by E&B Management Ltd;

(d) The application would, in any event, be of no effect if Priestley J determines that a liquidator should be appointed in respect of E&B Management Ltd. That is the effect of the Companies Act 1993, s 239ABX. My understanding is that a decision from his Honour is likely to be released shortly; and

(e) There has, however, been some delay in relation to the calling of the watershed meeting. One of the applications before Priestley J was for an extension of time for the convening of the watershed meeting pursuant to the Companies Act 1993, s 239AT. This all suggests to me that the application should currently be refused but not dismissed. A final determination should be made when the decision of Priestley J is delivered and, in particular, if any orders have been made in relation to the watershed meeting.

[42] On the question of costs, counsel were agreed that I should reserve costs so that they have the opportunity of discussing what is an appropriate outcome, failing which memoranda should be filed. That position can be covered by a specific direction for the filing of memoranda and is the reason for the orders that I make in respect of costs.

Orders

[43] I order as follows:

(a) No order is made on the application at this time.

(b) The application is, however, adjourned for a telephone conference before me at 9am on 20 April 2011 by which time it is anticipated that the decision in the liquidation proceeding will be to hand. The purpose of the adjournment is to determine what further hearing time should be allocated or, alternatively, if in fact the application is to proceed.

(c) Costs are reserved. It counsel cannot agree memoranda shall be filed in support, opposition and reply at seven-day intervals.

JA Faire J