

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV 2011-404-006314
[2012] NZHC 1884**

UNDER The Companies Act 1993

BETWEEN ADITUDE ADVERTISING LIMITED (IN
LIQUIDATION)
Plaintiff/respondent

AND TECHDAY LIMITED
Defendant/Applicant

Hearing: 2 February 2012

Counsel: P R Cogswell for applicant/defendant
S M Kilian for respondent/plaintiff

Judgment: 31 July 2012

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 31 July 2012 at 2.30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:
S Kilian, Kilian & Associates Limited, PO Box 300 845, Albany
Plaintiff Cogswell, Cogswell & Jaduram Lawyers, PO Box 6343, Wellesley Street, Auckland 1141

[1] This case concerns a dispute over the terms of a trading arrangement between the plaintiff, Aditude Advertising Limited (“Aditude”), now in liquidation, and the defendant, Techday Limited (“Techday”).

[2] Aditude says Techday owes it \$47,962.50 for work undertaken on its behalf. It made a statutory demand for payment, served on the defendant on 29 August 2011. Techday failed to respond to that demand. Consequently, Aditude has applied to put Techday into liquidation.

[3] Techday disputes Aditude’s contention that there is an outstanding debt (notwithstanding that it did not apply to set aside the statutory demand). It has applied for an order restraining advertising of the application for liquidation, and for a stay of the liquidation proceedings.

Background

[4] Until it was put into liquidation by its shareholders in May 2011, Aditude was in the advertising and marketing business. Techday is in the business of publishing periodicals and marketing.

[5] From May 2010 until shortly before Aditude went into liquidation, Aditude and Techday provided one another with services through a trading system known as Bartercard. As part of its services, Aditude provided design personnel to work for Techday. In return, Techday provided Aditude with advertising space in its periodicals.

[6] All of the parties’ dealings were conducted through the Bartercard system, without any exchange of cash (although there is an issue as to whether all transactions were meant to be and were in fact put through the Bartercard system, or just the net position after off-setting the value of the respective services).

[7] At the time that Aditude went into liquidation Aditude had a credit balance in its Bartercard account. The liquidators formed the view that they could not use that credit and so they disclaimed the Bartercard membership. They also analysed the

trading arrangements between Aditude and Techday, and made demand on Techday for the cash amount of the invoices that Aditude had rendered to it over the course of the trading relationship, after giving credit for any invoices that Techday had rendered to Aditude up to the date of liquidation.

[8] Aditude issued a statutory demand for the balance that the liquidators calculated was due, being \$47,962.50.

[9] Techday did not apply to have the statutory demand set aside. It says that it did not do so as it had informed the liquidators of its position both before and after issue of the demand and its director, Mr Mitchell, was preoccupied with a family bereavement and business matters at the time.

The legal principles

[10] The application is brought under r 31.11 of the High Court Rules. The principles which the court applies when determining such applications have been developed in decisions over many years. They are succinctly summarised in *Heath & Whale on Insolvency*:¹

- The Court has an inherent jurisdiction to stay liquidation proceedings where the debt upon which such proceedings are founded is the subject of a genuine dispute.
- The jurisdiction is an inherent one to prevent abuse of process. There is no inflexible rule.
- The governing consideration is whether the proceedings suggest unfairness or undue pressure.
- It is a serious matter to stay liquidation proceedings, so 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 are usually considered on an application for interim injunction.
- If there has been an opportunity to file appropriate affidavits, the applicant is required to establish a strong prima facie case of the existence of a genuine dispute on substantial grounds, or show that there are clear and persuasive grounds for a stay.
- If the defendant company can show a strong prima facie case that it is entitled to a set-off then the Court has a discretion to order a stay. A dispute as to only part of a debt is not sufficient to justify a stay.

¹ Heath J and Michael Whale (eds) *Heath & Whale on Insolvency* (looseleaf ed, LexisNexis) at [20.30].

[11] Any dispute as to whether a debt is due and payable is usually addressed first on an application to set aside a statutory demand. The learned authors summarise the particular considerations that apply on an application for stay where a party has failed to take steps to set aside the statutory demand:²

The Courts have been prepared to entertain an application for a stay, even though a subsisting statutory demand has not been challenged. However, in light of the strict time limits permitted in respect of statutory demands, good reasons will need to be advanced to justify a challenge to a debt under High Court Rule 31.11 [R 700K of the 1985 High Court Rules] when no challenge was made to the statutory demand under the procedure set out in s 290 of the Act.

The Courts have adopted the following principles in these cases:

- Each case must be considered on its particular facts;
- A defendant which fails to apply to set aside a statutory demand on the ground that the debt is disputed will need to show some exceptional factor to justify the failure to apply (in light of the strict time limits permitted in respect of statutory demands): that factor is likely to reflect the existence of a genuine dispute;
- The Court retains a discretion to consider a dispute where it is satisfied that there is a genuine basis for it;
- A defence raised late may well count against the defendant in costs.

The Courts have given orders staying liquidation proceedings conditional upon payment into Court or some other form of security being provided. Such an order is normally made because the financial ability of the applicant for the order is suspect and/or the counterclaim or set-off raised by the applicant for the order is weak.

(citations omitted)

The contentions in this case

[12] Techday says that the application for liquidation should be stayed (and advertising restrained) because the debt identified in the statutory demand is not a debt due as all of their trading was conducted under the Bartercard system which provides for credits of trade dollars rather than payments in cash.

[13] If Aditude succeeds in persuading the Court that the Bartercard arrangement can be ignored, Techday says that they were in a continuing business relationship under which Techday's indebtedness to Aditude fluctuated with mutual credits and debits and it is entitled to offset credits due to it. It says that the balance due after

² Ibid.

allowing for set-offs and agreed contra arrangements is \$9,420.09, and it has credit available to meet that amount. It acknowledges that there is a dispute as to the set-offs and contra arrangements but says that that dispute cannot be resolved in this summary proceeding; that dispute must be determined in an ordinary civil action.

[14] In the alternative, Techday says that Aditude is no longer entitled to any unpaid amounts as it has assigned the debts and there is no evidence that the debts have been reassigned back.

[15] Lastly, Techday says that it is solvent.

[16] The issues raised by these contentions are:

- (a) Is there a debt due to Aditude as a result of the trading arrangement?
- (b) If so, is there a dispute over that debt as a result of the claimed set-offs and contra arrangement?
- (c) In the alternative, is there a dispute as to whether any debt is due to Aditude by reason of the debt having been assigned?

[17] Aditude says that Techday has attempted to “create” a dispute because it is unable to pay the debt demanded. It points to Techday’s failure to apply to set aside the statutory demand, and its extraordinary behaviour in purporting to issue “credit notes” on behalf of Aditude for advertising – contending that this was fraudulent. It says that none of the matters raised provides a valid basis for defence.

The Bartercard arrangement

[18] It is necessary to give a brief outline of the Bartercard system in order to understand the arguments presented for Techday.

[19] Bartercard is a credit trading system operated by Bartercard Exchange Limited (“Bartercard”). It allows members to trade their goods and services without exchanging cash or other legal tender. Bartercard facilitates trades by directing

members to each other, and by acting as a record-keeper and administrator for the trade transactions. It receives transaction and service fees for its services.

[20] Bartercard administers the system in accordance with rules to which members agree to be bound when joining. The rules provide for the sale and purchase of goods or services between members by reference to “trade dollars” which are credited to the account of the selling member and debited to the account of the buying member.

[21] The rules of the trading programme include provisions for:

- (a) the establishment of trading accounts for members (maintained by Bartercard) to record the results of trades in “trade dollars”;
- (b) members with credit balances to obtain goods and services from another member to the value of the credit balance;
- (c) credit balances not to be a liability or debt payable by Bartercard to any member;
- (d) members with debit balances either to supply goods or services of equivalent value to another member or, if no such trade is undertaken, to pay Bartercard (as distinct from another member) the cash equivalent of the debit balance;
- (e) the conduct of trades under which members first negotiate the terms of their trade, and the buying member is required to disclose its intention “to pay with trade dollars” before the trade becomes binding;
- (f) all trades to be conducted in trade dollars save in certain defined circumstances (none of which apply in this case), including obtaining the prior consent of Bartercard to a trade partly or wholly in cash;

- (g) termination of a member's participation in the trading programme by a member (having provided written notice to Bartercard of its intention to do so), or by Bartercard for breach of the rules or insolvency;
- (h) the consequences of termination, including a period (120 days on a default basis) in which a member with a credit balance may "spend out" the credit balance, and a different period (30 days) in which a member with a debit balance may sell goods or services to reduce the balance and after which it must pay Bartercard the cash equivalent of the remaining debit balance (the rules do not provide for the application of any such cash payments: in particular, there is no provision for it to be paid to other members).

Is there a debt due?

[22] The liquidators have analysed the trading history between Aditude and Techday and have made demand for the balance that they say Aditude has invoiced Techday, after allowing a set-off of any invoices rendered by Techday as at the date of liquidation. They acknowledge that Aditude had a credit of "trade dollars" in its Bartercard account as at the date of liquidation, at least partly attributable to the trades with Techday, but formed the view that they could not use that credit and require cash to meet provable claims (including preferential debt owed to the Commissioner of Inland Revenue). For that reason they disclaimed the Bartercard arrangement and contend that they can pursue recovery of the debt from Techday.

[23] The liquidators' position focuses entirely on the relationship between Aditude and Techday. The liquidators do not have any greater rights than Aditude had against Techday at the point of liquidation. It does not take into account the Bartercard arrangement. However, it is apparent from the analysis of the Bartercard system given above, and the evidence before the Court that:

- (a) The parties agreed to trade under the Bartercard system;

- (b) Both Aditude and Techday signed agreements to be bound by the trading rules;
- (c) The trading rules anticipate completion of a trade by the crediting and debiting of members' accounts;
- (d) If the trade results in a debit balance in a buying member's trade account (because it has insufficient trade dollars to meet the value of the trade and no or an insufficient line of credit has been approved by Bartercard), the buying member must either sell products or services (trade) to generate sufficient trade dollars or pay cash **to Bartercard**;
- (e) There is no provision for payment to a member in cash instead of trade dollars.

[24] The Bartercard arrangement is not merely a bilateral one. It results in credits and debits that can be used in trades with any members. This provides added support to the view that there was no obligation to a selling member once the transaction is completed by crediting and debiting in respect of accounts (the rules provide for some limited exceptions to this general principle where the parties agree to reverse a transaction or there is some doubt as to the authenticity of a transaction, but neither of those circumstances apply in this case).

[25] I accept the submission of counsel for Techday that if Aditude was now permitted to pursue a claim for payment in cash, that would be tantamount to permitting it to change the terms of the arrangement unilaterally.

[26] The liquidators' disclaimer of the Bartercard arrangement does not affect trades that are already completed. Although the liquidators could theoretically have used the credit balance to procure goods and services from members of the scheme (including Techday) they concluded that there was no value in doing so. Although they had the right to take that view, that is an entirely different matter to saying that they were then able to demand payment in cash.

[27] Counsel for Aditude argued that it had to be possible to require payments in cash in order to comply with legal obligations such as the obligation to account for GST on transactions (and trade dollars could not be used to meet such obligations). I do not accept this argument. The trading rules (clause 24) expressly state that members must comply with all legal obligations. In particular, clause 24.1 provides that selling members “shall charge any appropriate taxes applicable to a Trade and collect, record and pay these as required by law.” Such taxes are to be charged in trade dollars: clause 9.5 provides that “all tips, gratuities and any tax or duty applicable on any Trade shall be paid in Trade Dollars by the Buying Member at the point of purchase”. Therefore, the seller’s tax obligations are to be met from trade dollars paid by buyers and no allowance is made in the rules for cash payments.

[28] Counsel for Aditude also sought to rely on clause 3.4 of the trading rules, which reads:

- 3.4 Debit Balance a Liability of Member. A Member whose Trade Account has a debit balance is liable to either:
 - (a) supply goods or services to an equivalent value to another Member; or
 - (b) if the Member has not discharged the Member’s liability by supplying goods or services to another Member, to pay to Bartercard an amount in cash in New Zealand Dollars equivalent to the amount in Trade Dollars of the debit balance.

[29] I do not see that this helps Aditude. Clause 3.4 provides for the payment to be made to Bartercard, rather than to any member. If Bartercard required a payment in cash, that would be credited to clear Techday’s debit balance but the rules make no provision for any payment out to a member in cash. Indeed the following two clauses (3.5 and 3.6) make it clear that a member cannot call for a payment in cash:

- 3.5 No Obligation to Redeem or Convert. Under no circumstances shall Bartercard be under any obligation to any Member to redeem or convert to cash or pay any amount for or in respect of Trade Dollars nor do Bartercard warrant this [sic] negotiability of Trade Dollars.
- 3.6 Restrictions on Use.
 - (a) Trade Dollars may only be used in the manner and for the purpose set forth in these Rules.

- (b) For the avoidance of doubt, Trade Dollars must not be exchanged between Members for any cash consideration.

[30] Finally, counsel for Aditude relied on a provision in the trading rules (clause 22) that Bartercard was not liable for any matter arising out of any transactions between members, and stipulating that it was for the parties to a particular trade to resolve any dispute. In my view this reinforces, rather than detracts from, the conclusion that the parties' arrangements under the Bartercard system were concluded with the completion of the trade.

[31] In summary Aditude and Techday agreed to conduct their trading relationship under the Bartercard system. Aditude's invoices were annotated to this effect. Aditude has received credit in terms of trade dollars for some of those trades, under the Bartercard system. There is no provision under the trading rules for that arrangement to be reversed (or not in any way that can assist Aditude). The credit balance in Aditude's Bartercard account at the date of liquidation is not a debt due to Aditude. The liquidators are limited to Aditude's rights under the Bartercard arrangement unless Aditude's entry into the agreement can be challenged as a preference; that is a matter for a separate proceeding.

Dispute over set-offs and contra arrangements

[32] In view of the decision that I have reached that Aditude's invoices under the Bartercard system do not represent a "debt due", it is not necessary for me to consider Techday's ancillary argument that there is a dispute as to the quantum of any sum due. Nevertheless, for the sake of completeness I will address this argument briefly. In essence, Techday contends that the parties agreed to provide services to one another, and Aditude's invoices do not allow for Techday's services in providing advertising for Aditude. Aditude, on the other hand, contends that its invoices represented the net position.

[33] The difference between the parties appears to stem from different views of the terms of their agreement. Aditude relies on a written proposal prior to the commencement of their trading relationship, which appears to indicate a net amount payable to it after giving credit for advertising. It says that credits claimed by

Techday were issued “fraudulently” by Techday in an attempt to support its position that there is a dispute. Techday contends that they agreed orally (and subsequent to the proposal) to different terms, and that at the point of liquidation it had not invoiced a number of its services (predominantly advertising provided) which it was entitled to do under the arrangement. It says that this was because the parties were working on an off-set arrangement, that they were each aware of the overall position, and that the “credit notes” it issued were merely a reflection of the overall trading position that had been agreed.

[34] The documents tend to favour Aditude’s view of the matter (that there was a net payment due to Aditude after offsetting advertising). However, it is not possible, on the evidence before the Court, to establish how Aditude arrives at its claim of \$47,962.50, when the contra arrangement ceased (Techday contends that it continued to provide advertising until February 2011). The picture is further confused by Aditude having provided the services of an additional consultant in the latter part of the trading relationship, but has not shown how the added cost fits into the alleged contra arrangement (in terms of invoicing in net terms).

[35] In summary, the documentary evidence is not clear enough to negate Techday’s argument conclusively. It is not possible to resolve the difference on this application. Although it is possible that the Court could determine this point in a liquidation proceeding, that option is not available given my finding that there is no debt due.

Have the invoices been factored?

[36] As with the ancillary argument in relation to the Bartercard arrangement, I will address the arguments over the factoring agreement for the sake of completeness.

[37] Techday argues that it cannot sue for the “debt” in any event, as it has factored the invoices to a third party, Scottish Pacific Business Finance Limited (“Scottish Pacific”). In support of this argument, it refers to the endorsement to this effect on each of the invoices that Aditude issued. It also relies on a reference to the

arrangement in Aditude's last accounts. It says that there is no evidence that the debts have ever been reassigned to Aditude (as might be expected in the event that they were not paid).

[38] Aditude says that this argument is mere supposition on the part of Techday based on the very general standard wording on the invoices that "Our DEBTORS LEDGERS [sic] is factored..." It contends that there could be no reason to factor the invoices if the factor could not receive cash. Counsel for Aditude submitted that the defence should be rejected in the absence of any evidence of the alleged factoring arrangement. He pointed out that the liquidators had treated the 'Bartercard debt' separately from other debts recoverable in their report.

[39] It is for Techday to establish some evidential basis for its defence. I consider that the endorsement on the invoices, and the reference to some factoring arrangement in Aditude's accounts is a sufficient basis for the purpose of this application. I also take into account that Aditude has not put forward any evidence to counter this argument. Although it is not the strongest of arguments, it is another factor which persuades me that this dispute, as a whole, is not one for determination in a liquidation proceeding.

The presumption of insolvency

[40] As Techday failed to apply to set aside the statutory demand, the statutory presumption of insolvency arises. That is a factor to be taken into account when deciding whether or not to grant a stay. In clear cases of insolvency, there will be little point in granting a stay even if there were tenable arguments about some aspect of the debt.

[41] The presumption can of course be displaced by other evidence. In this case Techday asserts that it has a credit balance in its Bartercard account which, coupled with a credit facility available to it under its arrangements with Bartercard, would allow it to meet what it contends is properly due (assuming that it has a responsibility to Aditude for the whole of the debt).

[42] Counsel for Aditude argued that it is clear from Techday's own accounts that it does not have the trade dollars to meet Aditude's outstanding credit balance. . Whilst I accept that the evidence does not point to Techday having sufficient trade dollars, that would simply lead to Techday having a debit account balance and a liability to pay cash to Bartercard following a 30-day grace period in which it may attempt to reduce its balance by trading. Counsel further relied on correspondence from Techday's directors that he was not willing to pay cash to Bartercard, to be paid on to Aditude. However, Techday's director said in response that he did not want to pay one entity, and yet still be faced with a claim by the other.

[43] Equally significantly, however, for present purposes, Techday's accounts as at 31 October 2011 show a net equity of \$205,780.

[44] The evidence is not compelling, but it is sufficient to form the view that Techday is not clearly insolvent. I am not prepared to determine this matter on the basis of the presumption as to insolvency given the conclusion I have reached that there is no debt due. Techday can properly be criticised for its failure to challenge the statutory demand, but that aspect can be met by costs.

Decision

[45] This issue has arisen in the context of an application for liquidation. The conclusion that I have reached is based on evidence adduced in affidavits, and addressed summarily on this interlocutory application. On that evidence I conclude that it would be unsafe to allow this application for liquidation to proceed. I accept that there is a genuine basis for Techday's dispute over the debt. Given the nature of that dispute (that there is not a debt due) I do not consider it appropriate to order payment into Court at this time as a term of stay.

[46] I make an order for stay and restraint of advertising as sought in Techday's application.

Costs

[47] Weighing the various factors which have led to this application, and particularly Techday's failure to apply to set aside the statutory demand, I order that Techday pay costs to Aditude in respect of the issue of the substantive liquidation proceeding (together with disbursements as fixed by the Registrar), but make no order for costs on this application.

Associate Judge Abbott