IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-1314
[2016] NZHC 29

UNDER	the Companies Act 1993
IN THE MATTER	of Action Media Limited (In Liquidation)
BETWEEN	ACTION MEDIA LIMITED (IN LIQUIDATION) First Plaintiff
AND	HENRY DAVID LEVIN AND VIVIEN JUDITH MADSEN-RIES AS LIQUIDATORS OF ACTION MEDIA LIMITED (IN LIQUIDATION) Second Plaintiffs
AND	SEAN WESLEY MITCHELL First Defendant
AND	FARRY & CO TRUSTEES LIMITED Second Defendant

Hearing	28 January 2016
Appearances:	P Shackleton for the Plaintiffs P Cogswell for the Defendants
Judgment:	28 January 2016

ORAL DECISION OF THOMAS J

Solicitors:

Meredith Connell, Auckland.
Cogswell Law, Auckland.

[1] The defendants have applied on notice for orders vacating or adjourning the trial which is due to commence on 15 February 2016 for seven days.

[2] The application sets out three grounds in support of the proposition that the proceeding is not ready for trial:

(i) There are outstanding Court orders and a challenge by the first and second plaintiffs.

(ii) There are outstanding interlocutories, being the provision of supplementary discovery and inspection.

(iii) The first and second plaintiffs have not served their expert evidence.

[3] This matter was called on 25 January 2016 and was adjourned until today to investigate whether the outstanding discovery issues could be completed.

[4] At the hearing on 25 January 2016, I indicated to counsel that the issues raised by the plaintiffs, seeking clarification of the orders made by me on 9 December 2015, would not be taken any further and a written decision will be issued. The defendants accepted that, given the plaintiffs' expert evidence was served shortly after the required date, that ground in support of its application for an adjournment would not be pursued. Furthermore, the defendants accepted that the inspection of documents by the plaintiffs was a matter for the plaintiffs who confirm they do not see that as a reason to adjourn the trial. There is, therefore, one basis only on which the application for an adjournment is made and that relates to the provision of supplementary discovery.

[5] The outstanding discovery is that ordered by me in my decision of 9 December 2015, whereby the defendants' request for discovery of correspondence relating to the consideration of the creditor's compromise regarding the company was granted.

[6] When the matter was called on 25 January 2016, counsel for the plaintiffs confirmed that he had now sighted the affidavit of an IRD officer, Mr Orr, which, although relating to different proceedings, concerned the suitability of Mr Mitchell, the first defendant, to be a company director. The affidavit exhibited documents relevant to these proceedings and which would be covered by the order for particular discovery. It seems that Mr Orr is no longer employed by the IRD.

[7] The updated position this morning is that the IRD believes it has located the relevant files but they are in storage. They are expected next week, although no promises can be made.

[8] In those circumstances, Mr Cogswell maintains his application for an adjournment. He has a commitment for the whole of next week and that will likely involve him the following week as well.

[9] Mr Shackleton's position is that, having considered the affidavit of Mr Orr, the defendants can be satisfied that the exhibits to Mr Orr's affidavit contain an almost complete copy of the correspondence. It is not possible definitively to say there are no other items. There are four instances, Mr Shackleton advises the Court, where there are documents cross referenced which are not included as exhibits: one is a letter from Mr Mitchell to his accountant or perhaps the other way round; one is some form of response by the IRD to Mr Mitchell and two appear to be internal IRD documents.

[10] The point made by Mr Shackleton is essentially that the defendants have most of the documents and most of them would be in Mr Mitchell's control, in any event.

[11] Mr Cogswell's position is that, given the order, he should not have to rely on that assurance and until the files have indeed been located and examined he cannot be satisfied there is no further relevant material.

[12] The defence has referred to the creditor's compromise from the outset of proceedings. By the statement of defence dated 6 August 2014 Mr Mitchell, then the

sole defendant, raised the discussions, correspondence and agreement reached with the IRD about the company's future in the period following October 2009.

[13] The most recent statement of defence notes:

> In October 2009, the IRD issued a statutory demand. The IRD met with the sole director of the company and reviewed its trading history and prospects and agreed that the company was able to trade on, was able to repay the arrears and was able to meet its current taxes going forward. As a result of that investigation, the IRD specifically agreed an arrangement for the payment of tax arrears in order to allow the company to trade on. The IRD recognised that the company had the ability to meet its taxes going forward and to repay the arrears, hence the arrangement entered into.

[14] As noted in the judgment, information about the creditor's compromise is obviously relevant to the proceedings. The IRD is not only the largest creditor but the only creditor truly independent of the company.

[15] The defence has consistently raised this issue. It is difficult to see any prejudice to the plaintiffs in an adjournment given that it is the IRD, the holder of the documents at issue, who will be the main beneficiary of the proceedings if the plaintiffs are successful.

[16] In the circumstances, given the order that was made and the fact that there can be no assurances that there are not any other relevant documents, I accept the defence position that in the interests of justice the trial needs to be adjourned. I note Mr Cogswell has confirmed, in his view, the matter would be suitable for a backup fixture and I will advise the Registry accordingly.

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Thomas J