IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2011-409-1519

BETWEEN	ROONEY EARTHMOVING LIMITED Plaintiff
AND	KELVIN DOUGLAS MCTAGUE First Defendant
AND	CLARENCE HENRY WHITING Second Defendant
AND	KERRY WAYNE BARTLETT Third Defendant
AND	BMW CONTRACTING LIMITED Fourth Defendant

(Heard at Christchurch)

Appearances: N R W Davidson QC and R S Brown for Plaintiff
K T Dalziel for Fourth Defendant

Judgment: 13 October 2011

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
as to particular discovery and other matters

The application

[1] The plaintiff (Rooney) seeks from the fourth defendant (BMW):

1. A full list of the aged creditors of BMW Contracting

2. A full list of the aged debtors of BMW Contracting

3. A verified answer as to whether BMW has with the identified aged creditors any time payment arrangements and, if so, what

The nature of this proceeding

[2] Rooney applies for orders that BMW be put into liquidation and that an interim liquidator be appointed.

[3] Rooney alleges that BMW is unable to pay its debts. It invokes s 241(4)(a) Companies Act 1993. For standing, Rooney relies upon the provisions of s 241(2)(c)(iv) of the Act, alleging that it is a creditor in the sense that it is a contingent or prospective creditor.

[4] The creditor/debtor relationship is said to arise out of the employment relationship which existed until mid-2004 between Rooney as employer and the first, second and third defendants as employees. BMW is a competitor of Rooney in earthmoving. The allegation is that economic reports were committed by the defendants, including BMW, from mid-2004 when the first, second and third defendants took up employment with BMW. In August 2009, the Employment Court determined that the first, second and third defendants had breached duties as employees of Rooney. The quantum hearing in the Employment Court took place in June 2011 and a judgment is awaited.

[5] In the meantime, in October 2009, Rooney had obtained from this Court a freezing order in relation to the assets of BMW which required BMW to regularly report on its financial position.

[6] Reporting by BMW occurred. There was also subsequent relaxation of the freezing order by this Court to allow the sale of some items of plant.

[7] The present application proceeds from a perception by those advising Rooney, particularly from their analysis of the annual accounts for the year ended 31 March 2011, that BMW is trading in breach of the solvency tests under s 241(4)(a) of the Act.

The focus of the solvency examination

[8] Rooney's expert, Mr B G Hadlee, has deposed that his analysis of BMW's 31 March 2011 financial statements leads to the conclusion that:

1. A working capital deficit of $607,000 exists so that short-term liabilities exceeded available assets to pay bills as they fell due;

2. There was $687,000 available to meet $1,294,000 of short-term obligations assuming that all accounts receivable were collectable;

3. Working capital ratio had deteriorated to 0.5:1 as at 31 March 2011;

4. The consequence was that BMW was insolvent in terms of the first limb (the cash-flow test) of the solvency test.

[9] In his affidavit on behalf of BMW in opposition, BMW's accountant, Mr P D Bean, confirms a working capital deficiency of $232,000 and deposes –

> ... the debts were either paid or had arrangements in place.

[10] Mr Hadlee has responded to that evidence, including by deposing that Mr Bean's reference to "arrangements" suggests that BMW has not been able to pay its accounts as they fell due, constituting an inability to satisfy the solvency test under s 4(1)(a) of the Act.

The urgency of the interlocutory applications

[11] The winding up application has a hearing date of 25 October 2011. Having regard to the nature of the application it is important that the proceeding be heard on its allocated hearing date. There is no other full day available for hearing before 2012.

[12] It is to the credit of both counsel that no issue has been taken with the informality attaching to the present applications. The appropriate concern of Ms

Dalziel for BMW was that any orders for discovery or the like should not prejudice the ability of either party to be ready for the hearing. It transpired that that concern attached less to the present discovery issues than to some related issues concerning inspection of plant, which have now been able to be dealt with by agreement in a separate minute.

[13] Rooney has only recently made specific requests for the information which is now the subject of the applications before the Court. I do not find that to be a ground for refusing to consider the applications on their merits. Mr Hadlee's affidavit adequately explains the way in which his analysis has taken place and how he has come to the conclusion that the information sought is relevant. Mr Bean's statement in his affidavit filed on 23 August 2011 that BMW "had arrangements in place" is the sort of development which can appropriately lead experts to consider further lines of enquiry relevant. Accordingly, the comparative lateness of these issues arising before the hearing should not stand in the way of further disclosure if it is appropriate. That matter should be determined in accordance with the usual principles.

Rooney's grounds of application

[14] Mr Davidson submits that the particular documents sought are relevant. He relies upon the evidence filed by Mr Hadlee in that regard. In particular the documents sought are said to be relevant to the central issue in this proceeding, namely the solvency or insolvency of BMW. The Court's jurisdiction to make a discovery order other than in default terms arises under r 8.18(1) High Court Rules.

[15] The application for an order directing a named officer of BMW (Mr Bartlett) to answer specific questions relating to time payment arrangements with creditors is in the nature of an interrogatory. Normally an interrogatory is administered by notice under the provisions of r 8.1 High Court Rules. However, a Judge has jurisdiction under r 8.5(1) to order answers to interrogatories specified or referred to in an order. The interrogatories must relate to matters in question in the proceeding: see r 8.5(2). The Judge must be satisfied that the order is necessary when it is made: see r 8.5(4).

[16] Mr Davidson says for the same reasons that apply in relation to the discovery issue that the question identified for answer by Mr Bartlett relates to the issue of solvency which is the central issue in the proceeding.

BMW's grounds of opposition

[17] BMW opposed the application on the grounds:

1. The material sought is not relevant to the proceeding;

2. The documents sought are confidential to BMW;

3. The application amounts to a "fishing expedition";

4. The application is oppressive (pursuant to the test which balances cost and time against the value of the information).

[18] Ms Dalziel developed these grounds further in her submissions. It is convenient to identify the points made in her submissions and to discuss them at the same time.

Relevance

[19] Ms Dalziel's first point was that the documentation now sought was not sought earlier either in relation to the freezing order proceeding or in relation to an application for further discovery pursued by Rooney earlier this year. A failure to request documentation earlier can not of itself indicate irrelevance unless it clearly demonstrates an insincerity on the part of the expert who claims relevance. Ms Dalziel does not impugn Mr Hadlee's sincerity. In any event, Mr Hadlee has accepted his duty of impartiality in terms of the code of conduct for expert witnesses. His assessment of the need for the documents is entitled to weight in this interlocutory context.

[20] Ms Dalziel then referred to passages in Mr Hadlee's evidence which indicated he had been able to make an assessment on the information before him. It was submitted that no further information could therefore be needed. Mr Davidson observed, correctly in my view, that where witnesses are required to be available for cross-examination (as in this case) the parties should have access to relevant information in circumstances where, for instance, the degree of insolvency is simply made worse. In that way, if the expert witness comes to make concessions before or at the hearing, which eliminate some of the expert's grounds of analysis from consideration, a state of insolvency may still be demonstrated. In other words, it remains relevant at this point for Rooney to be able to demonstrate that the extent of BMW's insolvency may be worse than Mr Hadlee has concluded on the basis of the information he already has.

[21] This aspect of Ms Dalziel's submissions cannot in my judgment alter the assessment of relevance – at most it might impact on any question of oppression, to which I will return.

[22] Thirdly, Ms Dalziel referred to evidence from BMW's expert, Mr R S Bijl, as to no statutory demands having been made of the company and arrangements being in place. She suggested that this indicated that the relevant evidence is before the Court. She returned to her earlier comment that the further information now sought could have been sought at an earlier date which would have enabled both parties to fully assess it.

[23] The Court in relation to the present enquiry is not focussed on the evidence which one or more of the witnesses (such as Mr Bijl) may have given. It is concerned with the documents upon which assessments as to solvency may be made. It is not an answer in that regard to say that a witness has covered the point. Another witness, on assessing the documents, may come to a different conclusion. Once again, the delay in seeking that information cannot inform its relevance.

[24] Fourthly, Ms Dalziel submitted that the obtaining of the documents now sought is likely to lead to requests for further information and more detailed work. She gave by way of example the assessment of bank overdraft arrangements and the

ability of BMW to extend bank loans. She suggested that that was excessive when the evidence is that no creditor (including the bank or the security holders), has called in its loans.

[25] This submission again confused relevance and possible oppression arguments, to which I will return. If it is a fact, as I find, that full lists of the aged creditors and the aged debtors of BMW are relevant to BMW's solvency, the fact that one party may then wish to consider further documentation in order to give a fuller picture does not detract from the relevance. In terms of the still existing test of relevance laid down in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co,*[1] the possibility that the documents might lead to further consideration of further documents and further analysis may even reinforce the relevance of the underlying documents.

Confidentiality

[26] In her written submissions Ms Dalziel had identified the confidentiality of BMW's financial records as a reason for not discovering them. She accepted that commercial sensitivity is often protected by limited disclosure, for instance by limitation to the other party's professional advisors. Ms Dalziel identified a concern in this case that the requested documents, if disclosed -

> will be used for further investigation.

[27] She referred to earlier direct contact between Rooney's solicitor and the valuer first employed by BMW. By reference to that contact, Ms Dalziel submitted that BMW is exposed to having all of its trade creditors and debtors, with whom it has arrangements, contacted by Rooney's solicitor to assess the validity of the arrangements.

[28] There was no property in the witness identified by Ms Dalziel. Rooney's solicitor was entitled to contact that person. He was in an altogether different category from the trade debtors and trade creditors of BMW, about whom I recognise

---

1 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA)

that BMW will have valid concerns of commercial sensitivity. There is no suggestion on the information before me that those advising Rooney have the intention of the further line of enquiry which BMW apparently fears they may pursue.

[29] The Court is able in any event to protect BMW's concerns as to commercial sensitivity through appropriate conditions attaching to a discovery order.

Fishing expedition

[30] Ms Dalziel repeated her submissions as to Mr Hadlee's previous assessment of the sufficiency of the information he had. From this Ms Dalziel developed a submission that the reason for the further request is that Mr Hadlee suspects that arrangements referred to in the evidence which Mr Hadlee had seen are a sham.

[31] For his part, Mr Davidson indicated that it was no part of Rooney's case that any arrangements with creditors are a sham. The information is sought simply to establish what arrangements are in place.

[32] I have found that evidence to be relevant. Its relevance is already suggested when BMW's own witness has referred to arrangements. It is not a fishing expedition when a party pursues the documentary evidence relating to something (such as arrangements) which the other party's witness has already referred to impliedly as relevant.

[33] In an alternative formulation of her "fishing expedition" submission, Ms Dalziel referred to Mr Hadlee's approach to valuation of the original assets. The suggestion in Ms Dalziel's submission was that Rooney was in this regard also seeking to establish that BMW's evidence as to asset valuation was a sham. I do not read the evidence to date as supporting that conclusion. Expert witnesses, governed by the code of conduct, are pursuing the lines of enquiry which they consider relevant and appropriate. Their positions and assessments cannot be fixed at a point of time – they will naturally develop and may come back to reassess matters which they have previously assumed. Furthermore, this aspect concerning the valuation of

assets appears to touch more on items of plant which have now been dealt with by consent in a separate minute of the Court. The plant value and valuation issues cannot helpfully inform the assessment of the relevance of the aged creditors and aged debtors.

Oppression

[34] Ms Dalziel submitted that the decision of this Court in *Mao-Che v Armstrong-Murray*[2] states an authoritative test of oppression. Wallace J, at 377, recognised that oppression is in its own right a substantial ground of objection to discovery. His Honour observed that consideration of oppression involves balancing the costs of discovery to the defendant against the potential value of discovery.

[35] For Rooney, Mr Davidson submits that the identity of BMW's aged creditors and aged debtors should not be difficult or oppressive. He expects that BMW's accountancy and management system, likely to be MYOB or something similar, should by its nature be able to produce electronically the relevant details virtually immediately. He submits in relation to arrangements with creditors, which he asks to be covered by affidavit, that that also should not be unduly onerous – the management team at BMW must know what those arrangements are.

[36] For her part, Ms Dalziel adopted her earlier submissions as to resulting enquiries which may be forced upon BMW. She submitted that the information BMW will have to provide will be in excess of the data on MYOB.

[37] I cannot find anything in the information before me or the submissions to justify a conclusion that providing any aspect of the three areas of information sought would be oppressive. The information sought is relevant and might indeed prove critical in the Court's determination of which side of the solvency/insolvency line BMW stands. The fact that it may not turn out to be critical does not reduce its relevance or importance at this point. As the requests exist at present, and leaving aside any attempt which Rooney might hereafter make to obtain further orders as to information, it appears to me that the time to gather the relevant documents, to

---

2 *Mao-Che v Armstrong-Murray* (1992) 6 PRNZ 371.

collate the requested information and to produce verified answers is likely to be modest in the context of the importance of the substantive issues to the parties. BMW has clearly signalled its view that the information sought will, if provided, produce no different outcome to that that will occur with the existing information. If that proves to be so, it is a matter that can be dealt with in the context of the costs of discovery. As it is, the information requested is relevant and on my perception unlikely to put BMW to extensive time or cost.

[38] I note that BMW did not present an assessment as to the time and cost which would be involved in producing the information. In fairness to Ms Dalziel, counsel co-operated to present submissions within a very restricted period and I should not read too much into the absence of detail in this regard. On the other hand, if there had been accounting advice that many hours would be taken in the exercise, I would have expected to have heard that. I did not.

Orders

[39] I order –

1. The fourth defendant is to provide to the plaintiff no later than ***5.00pm Monday 17 October 2011*** a full list of its aged creditors and a full list of its aged debtors.

2. By no later than ***5.00pm Tuesday 18 October 2011*** the fourth defendant through Mr Bartlett is to provide verified answers to the following questions namely:

   Does the fourth defendant have in place with any creditors arrangements for time payment of debt?

   If so - which creditors?

   - for how much debt?

- on what terms as to repayment?

3. It is a condition of the disclosure of the above information to the plaintiff that only the legal representatives and expert advisors to the plaintiff shall, without further order of the Court, have access to the information provided by the fourth defendant, without this order affecting the right of expert advisors to include relevant detail in any further evidence to be filed in Court.

Costs

[40] The present applications have been dealt with through good co-operation between counsel on an urgent and informal basis. As was part of Ms Dalziel's complaint, they have been dealt with at a relatively late date before the hearing. There is something in the nature of an indulgence in the granting of the applications in this way. It is my present view that in relation to these applications costs should lie where they fall save that the fourth defendant's costs of complying with inspection in relation to its documents and producing verification as to the questions asked should be fixed on a 2B basis and together with the disbursements to be ordered to be costs in the cause. If counsel have agreement on this approach, they should advise the Registrar accordingly and I will deal with costs briefly in a separate judgment. If there is any issue, then the party seeking costs should file its submissions on costs first to be followed within five working days by the party opposing costs and I will then deal with the costs issue on the papers.

[41] I thank counsel for the manner in which they have co-operated in dealing with these applications.

Associate Judge Osborne

Solicitors:
Meares Williams, PO Box 660, Christchurch (rsb@meareswilliams.co.nz)
Counsel: Mr N R W Davidson QC, PO Box 9344, Christchurch (nicholas@davidsonqc.co.nz)
Taylor Shaw, PO Box 1123, Christchurch (kathryn@taylorshaw.co.nz)
Counsel: Mr P J Shamy, PO Box 533, Christchurch (pjs@raydon.co.nz)