IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-000505
[2019] NZHC 2151

BETWEEN	SANDFIELD ASSOCIATES LIMITED First Plaintiff
	CONVENDIUM LIMITED (IN LIQUIDATION) Second Plaintiff
AND	PAUL MARK MONNERY, JULIE ANN MONNERY and DAVID GRIFFITHS Defendants

Hearing: 27 August 2019

Appearances: D J Chisholm QC for Plaintiffs
C Carruthers QC for Defendants

Judgment: 30 August 2019

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Introduction

[1] The defendants, trustees of the P and J Monnery Family Trust, have shares in Convendium Ltd, the second plaintiff. That company is now in liquidation. At liquidation, they held just under 50 per cent of the shares in the company, though they had a larger proportion in the early years of the company.

[2] Convendium Ltd was incorporated in 2005. Its business was the development, marketing and sale of cashless payment systems used in vending machines such as drink and snack dispensers and for washing machines in laundromats. When the company was established, the defendants injected funds into the company by way of shareholders' advances. Over time, those advances were repaid. They continued to receive drawings from the company, which has put them in debt to the company. In this proceeding the plaintiffs say that the defendants owe Convendium some $560,000. They sue to recover the overdrawn advances and have applied for summary judgment.

[3] Sandfield Associates Ltd is a creditor of Convendium Ltd. It is a software developer and licensed Convendium Ltd to use its software, called the Festival Payments system. Sandfield says that Convendium owes it $339,000. In November 2017 it served a statutory demand on Convendium Ltd and successfully applied for the company to be put into liquidation. The liquidation order was made in February this year. The liquidators are Mr Christopher McCullagh and Mr Stephen Lawrence. Mr Paul Monnery, the first defendant, was the sole director of Convendium from the early days of the company at least until October 2015, when he was ousted. The company was removed from the Register but was apparently restored to enable Sandfield to pursue its remedies against the company and against the defendants.

[4] As a matter of background which I will come back to, Mr Monnery has started his own proceeding against other people associated with shareholders in Convendium, alleging that they acted wrongfully to oust him as director of the company. They allege economic torts, conspiracy by unlawful means and intentionally causing economic loss by unlawful means. The proceeding is pending in the Wellington High Court. I will need to address that later in the judgment.

[5] The principles on which the courts decide plaintiffs' applications for summary judgment are well known. I need do no more than refer to the Court of Appeal's re-statement of the principles in *Krukziener v Hanover Finance Ltd*.[1]

Procedural matters

[6] Some procedural matters need to be addressed before I move on to the substantive issues. When the proceeding started, Sandfield was the only plaintiff. It alleged one cause of action, a claim under s 301 of the Companies Act 1993, seeking orders for the defendants to repay the shareholders' advances to Convendium. In June it applied for Convendium to be added as a second plaintiff. One of the liquidators has given evidence. Convendium agrees to be joined as a second plaintiff. An amended statement of claim has been filed showing Convendium as the second plaintiff with a cause of action by it seeking repayment of the overdrawn account. That is a claim in common law and does not rely on s 301 of the Companies Act. There was no opposition to Convendium being added as the second plaintiff. I make an order adding it accordingly.

[7] For the summary judgment application I will focus on Convendium's claim suing at common law for repayment of the shareholders' advances rather than the claim made by Sandfield under s 301 of the Companies Act. That is because it is not clear that Sandfield can use s 301 in this case. The section says:

> **301 Power of Court to require persons to repay money or return property**
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> (1) If, in the course of the liquidation of a company, it appears to the Court that a person who has taken part in the formation or promotion of the company, or a past or present director, manager, administrator, liquidator, or receiver of the company, has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company, the Court may, on the application of the liquidator or a creditor or shareholder, –
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> (a) Inquire into the conduct of the promoter, director, manager, administrator, liquidator, or receiver; and
>
> (b) Order that person –

[1] *Krukziener v Hanover Finance Ltd* (2008) 19 PRNZ 162 at [26]–[27].

(i) To repay or restore the money or property or any part of it with interest at a rate the Court thinks just; or

(ii) To contribute such sum to the assets of the company by way of compensation as the Court thinks just; or

(c) Where the application is made by a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the Court thinks just to the creditor.

…

[8] The section does not create a cause of action as such but provides a procedural mechanism by which certain claims may be enforced once the company has gone into liquidation.[2] Sandfield qualifies as a creditor under s 301. It is not clear that the defendants can be sued under s 301. They are shareholders, whereas the section contemplates claims against promoters, directors, managers, administrators, liquidators and receivers. While the defendants injected funds into the company by way of investment, and while Mr Monnery was a director, it is not clear that there is any claim against the shareholders for breach of duty for having injected funds into the company at the outset. There is no claim of liability incurred in connection with the formation or promotion of the company. The claim against them is for actions later on in withdrawing funds from the company.

[9] There is authority that s 301 allows claims for breaches of duty, for example, misfeasance. But the section is not wide enough to encompass ordinary claims in debt. In *Re Etic Ltd*, a claim for repayment of a debt, Maugham J said of the equivalent English provision:[3]

> The conclusion at which I have arrived is that s 215 is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty, of course, would include a misfeasance or breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was vowed to have paid or returned to the company.

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2 *Benton v Priore* [2003] 1 NZLR 564 (HC); *Arataki Properties Ltd (in liq) v Craig* [1986] 2 NZLR 294 (CA).

3 *Re Etic Ltd* [1928] 1 Ch 861 at 875.

And:[4]

> But I have come to the conclusion that I cannot properly make an order against Mr Ballard to repay these sums under the summary jurisdiction under s 215, because I think it is obviously just that he should have an opportunity against a claim of this kind, *which at the most is a claim for repayment of a debt*, advanced him by the direction … of Mr Clements himself, moneys which Mr Ballard has had without any wrongful conduct on his part whatever, should be raised in an action in which there should be proper pleadings, and in which Mr Ballard should be entitled to set up such set-off or counterclaim as he may be advised.
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> (emphasis added)

[10] This case also is an ordinary debt collection proceeding. The shareholders are being asked to repay to the company funds they received from it. In the light of *Re Etic Ltd*, the proceeding may be outside the scope of s 301. Accordingly, it is safer to deal with the matter on the basis of the company's claim at common law for repayment of the debt.

Proof of the debt

[11] Advances on a shareholder's current account are a debt owed by the shareholder to the company and are repayable on demand. A liquidator is entitled to rely on financial statements and other accounting records prepared by the company before liquidation to establish the company's assets and liabilities. Under s 194 of the Companies Act, directors are under a duty at all times to keep accounting records and to correctly record the transactions of the company so as to enable the company to prepare its financial statements which should also be capable of being audited. In *EBR Holdings Ltd (in liq) v van Duyn*, Heath J considered some of the principles that apply in proceedings to recover a shareholder's current account debt.[5] He recognised that the legal onus remains on the company throughout to prove that the debtor owes the company the money in the amounts claimed. He said that in the context of an ordinary defended proceeding. In this case, where the plaintiff seeks summary judgment, the legal onus remains on the company to make out its case to the summary judgment standard, that is, to show that there is no arguable defence to the claim. In *EBR*

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4 At 876.

5 *EBR Holdings Ltd (in liq) v van Duyn* [2017] NZHC 1698.

Holdings, Heath J endorsed the approach taken in *Kiwibilt Engineering (in liq) v Pavlovich* which concerned a claim for recovery of sums owed under a shareholder's account. Judge McElrea noted that there was a strong inference from the accounts that the debt was owing to the company:[6]

> … But even in that case, it must be open to a director to show that the account was not correct. That is not to say that there is a legal onus of proof upon such a person, but only that in the absence of evidence to the contrary, the normal and proper inference to be drawn from the accounts would be that the amounts shown had been advanced to the director. It is, if you like, an "evidential onus" although speaking of it as an onus can be misleading. It is simply an application of the usual rules of evidence that apply in a commonsense way, in all cases, civil or criminal. Triers of fact are entitled to draw conclusions (or create inferences) from proved facts if in the circumstances they are logical conclusions to draw where the inference can properly be drawn against all the evidence including whether there is any evidence pointing in the opposite direction.

In the *EBR* case, Heath J said:[7]

> The liquidators come to the affairs of EBR as strangers, with no contemporaneous knowledge of the reasons why certain funds were advanced, and for what reason. The statutory scheme recognises the need for them to rely on financial statements prepared in the period before liquidation intervenes.

[12] In this case Convendium relies on accounting records, including financial statements. There are financial statements for the years ending 31 March 2010, 2011 and 2012. Mr Monnery has signed the accounts as the sole director of the company. The notes to the financial statements show a shareholders' current account under the name of the P and J Monnery Family Trust. The notes include this statement:

> These amounts are unsecured and repayable on demand. Any advances are subject to interest based on prescribed FBT interest rates.

[13] The 2010 accounts show that the shareholders were in credit to the company for some $256,000. The following year, 2011, the amount owing had reduced to some $180,000. In the following year, 2012, the shareholders had been fully repaid and there had been further drawings taken so that the shareholders owed the company some $69,000.

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6 *Kiwibilt Engineering (in liq) v Pavlovich* [2004] DCR 193 at [12].
7 *EBR Holdings Ltd (in liq) v van Duyn* [2017] NZHC 1698 at [85].

[14] For the year ending 31 March 2013 there is not a complete set of end of year financial statements. The evidence includes two pages called "Balance Sheet" and "Income Statement". The balance sheet page shows shareholder loans of $221,955. But there is no evidence that those documents have been adopted as final end of year accounts for the company.

[15] For the year ending 31 March 2014, the evidence includes a page called a "Trial Balance". Again, as that is called a 'trial balance', it is not clear that it has been adopted as part of the final end of year accounts for the company. It is not by itself adequate to establish the shareholders' indebtedness to the company. What I have been referring to are parts of the evidence in chief. Some of the shortfall has been tidied up as evidence in reply. The liquidator has included in his evidence a tax return for Convendium for the year ending 31 March 2014. It has been signed by Mr Monnery. The return was filed by chartered accountants acting for Convendium. One of the principals of that practice is Mr Griffiths, the third named defendant. The tax return records that the P and J Monnery Family Trust owed the company $450,061.37. Given that Mr Monnery signed the return, it is safe to assume that he has accepted as correct the amount recorded in the tax return as owing by the defendants.

[16] The evidence in chief shows a draft balance sheet as at 31 March 2015. Again, it is not safe to rely on that, being no more than a draft document. There is no evidence that it was formally adopted as the end of year accounts for the company. It was potentially open to revision and correction before being adopted.

[17] Again, in the evidence in reply, the liquidator has tried to tidy this aspect up. He has put in evidence copies of the company's bank statements. A number of these bank statements show payments to a company called Business Mobile Ltd. He has put in evidence a Companies Office search for Business Mobile Ltd. The people behind Business Mobile Ltd are the Monnery family. Mr Monnery was the director of Business Mobile Ltd. It was a related company. I accept the liquidators' position that payments to Business Mobile Ltd can be treated as drawings by the shareholders on their shareholders' account.

[18] I have not been able to trace all the payments identified by the liquidator. I have identified only these payments in the bank statements as payments to Business Mobile Ltd:

(a) 13 June 2014 - $16,666.66;

(b) 20 August 2014 - $12,500;

(c) 14 October 2014 – $12,500;

(d) 7 November 2014 - $2,500.

Mr Chisholm referred me to entries on some bank statements for "multiple payments" but, at least on a summary judgment basis, I cannot be satisfied that these payments or parts of them went to the shareholders. In the circumstances, I rely only on the figures given above. They come to $62,315.36. When that is added to the amount of drawings as at 31 March 2014, the total drawings come to $512,346.73.

[19] As shown in the financial statements for 2010 to 2012, the debt is repayable upon demand. In March 2019, Sandfield's lawyers wrote to the defendants' lawyers making demand for repayment of the shareholders' account. That demand is contestable because the right to require repayment of the shareholders' account belongs to the company, not to a creditor. It is not clear on the evidence that the creditor had the authority of the company to make demand on its behalf. That may be an added reason for treating the claim under s 301 with caution. The liquidators made a separate demand on 17 June 2019. I regard that as effective to call up the shareholders' current account.

The opposition to the claim

[20] For opposition to the summary judgment application, I record parts of Mr Monnery's affidavit:

> In respect of the amount I am alleged to owe Convendium, Sandfield knew full well that:

> 5.1 I was entitled to a minimum salary of $200,000
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> 5.2 I took drawings ranging from a minimum of $12,500 to $15,000 net not from the company but from the shareholders. These payments were debited to the shareholder's current account with the company. The money was paid by the company as and when I required it; but the payments were debited to the shareholders' current account to reflect that they were shareholders' funds. Bruce (and other shareholders) knew fully about this arrangement.
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> 5.3 It was agreed with the company's account and managed in the company's annual returns that, as I had a credit balance with the company, my drawings in the shareholders' current account will be debited against that balance, so as to save the company paying tax until it was in funds sufficient to meet my salary, with the adjustment being made then.
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> 5.4 The amount which I had drawn was recorded each year without dissent from shareholders.

To put that into context, "Bruce" is the director of Sandfield and Sandfield had taken a shareholding in the company, in part, it seems, because it had not been paid for its supply of software.

[21] I accept what Mr Monnery says about the payments he received as coming from shareholders. I understand that the shareholders he is referring to are himself and his co-trustees as trustees of the P and J Monnery Family Trust. In short, he is referring to two transactions: one, a drawing by the shareholders from the company, and the second, a further payment by the shareholders to himself. While the funds may have gone directly to himself, he is saying that they were routed through the shareholders. That by itself does not mean that the company is not entitled to look to the shareholders for the drawings debited against their account.

[22] Mr Monnery takes the position that he and his fellow shareholders should not be pursued because he worked for years without salary for the company. He refers to an understanding that once the company had prospered, funds would be available from which he could be credited with salary. The arrangement under which drawings were taken was with a view to reducing the liabilities of the company by not incurring expenses by way of salary and not having to pay tax on income.

[23] The plaintiffs say, however, that if there were to be any salary arrangement, it would have to meet the requirements of s 161 of the Companies Act. That section

applies to remuneration for directors' services as a director or in any other capacity. That remuneration can be given only if the board is satisfied that it is fair to do so. Directors voting in favour of any such remuneration are required to sign a certificate stating that the remuneration is fair and state their grounds of their opinion. There is no suggestion in this case that any such certificates were given. Section 161(5) provides that if there has not been compliance with s 161(1) and (4) the director who has received the benefits must refund them to the company, except to the extent that the benefits were fair to the company at the time they were given. I regard Mr Monnery's evidence as reflecting a deliberate decision not to take any salary and therefore no steps were taken to comply with s 161. With a view to minimising expenses, it was decided to take drawings in the hope that once matters came right adjustments could be made later.

[24] Mr Monnery suggests that the other shareholders acquiesced in this. I accept Mr Chisholm's submission on this point that Mr Monnery has described an arrangement made only between Mr Monnery and the company accountant. There is no reason to show that other shareholders consented. Certainly, they would have received financial statements for 2010, 2011 and 2012 which would have told them that Mr Monnery had received the funds by way of drawings which were repayable upon demand. That knowledge is not by itself enough to bar the company from requiring repayment of the funds advanced.

[25] Mr Chisholm supported that submission by referring also to ss 107 and 108 of the Companies Act. If there were to be a waiver of s 161, that would require a unanimous resolution of shareholders to come within s 107 of the Companies Act. A solvency certificate would also be required under s 108. It is plain on the evidence that the company was insolvent throughout. In short, with the company being insolvent, the liquidators are not precluded from realising assets of the company and cannot be barred from enforcing the debt, even if there were any acquiescence on the part of shareholders. After all, the liquidators are required to act in the interests of creditors first.

[26] The point I have reached now is that the company has proved the debt at least to the sum of $512,346. The matters that Mr Monnery has raised by way of defence

do not, in my judgment, bar the company from obtaining recovery from the trustees of the P and J Monnery Family Trust.

Other matters

[27] Mr Carruthers referred to other matters going to the background – Mr Monnery's evidence given in the Wellington proceeding against the other shareholders. Going back to 2014, a company called Push Developments Ltd had offered to provide funds to Convendium and to a related company, EFTPOS Vending Ltd. Those funds would allow the companies to be developed and would allow creditors, including Sandfield, to be repaid. In the event, Push reneged on the proposal to put funds in, but its promises to inject funds were never enforced against it. Instead, Mr Monnery says that there was a meeting of shareholders in 2014 to discuss the situation. He was assailed for his mismanagement and invited to consider alternatives, such as reducing his shareholding in the company. He says he was eventually ousted from any management of the company. The Creighton and Parsons interests have appropriated assets of the company to themselves. That has apparently led to his proceedings in Wellington. It was submitted that I ought to take those proceedings into account and to exercise my discretion against entering summary judgment at this stage.

[28] Mr Chisholm submitted that to the extent that any of those matters amounted to wrongs to the company, the liquidators may be able to enforce them. For example, if Push failed to inject capital when it promised to do so, that might be enforced by the liquidators. Similarly, if there has been any misappropriation by the Parson and Creighton interests, that would be enforceable by the liquidator as well.

[29] It is not clear to me that the matters that Mr Monnery is pursuing in his Wellington proceeding give him any reasonable argument to exercise the discretion in his favour on the summary judgment application. There is guidance on the exercise of the discretion in the Court of Appeal's decision in *Bromley Industries Ltd v Fitzsimons*. At [65] the Court said:[8]

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8 *Bromley Industries Ltd v Fitzsimons* [2009] NZCA 382 at [57]–[69].

> Generally the exercise of the residual discretion not to allow summary judgment will only be invoked in limited cases, such as to avoid oppression or injustice, or where the proceeding involves the actions or possible liability of a third party not before the Court, or if the proceedings are of a particular nature that opportunity should be given to allow discovery, or where the circumstances of the case disclose very unusual features which support a conclusion that the entry of summary judgment would be oppressive or unjust.

And at [67]:

> There is a difference between whether the entry of a summary judgment may be unjust and whether the subsequent execution of the judgment may lead to a miscarriage of justice. The High Court Rules provide for the latter situation in r 17.29. An application under that rule is the appropriate way to have the Court consider the effect of execution of the judgment on parties in the respondents' position.

[30] This case is not unusual. Shareholders have taken drawings in the hope that when the company would prosper they would be able to repay out of further distributions from the company. But the company has failed. The fact that the shareholders, or that one of them wishes to pursue complaints against other shareholders, is not by itself a reason why the liquidator, acting in the interests of creditors, should not be able to enforce the company's remedies to realise assets and to distribute them to the creditors. I decline to exercise the residual discretion not to enter summary judgment.

[31] Accordingly, I give judgment to Convendium Ltd for $512,346.73. Interest under the Interest on Money Claims Act 2016 will run from the date of the liquidators' demand of 17 June 2019.

[32] I am confident that counsel will be able to agree on costs, but if they cannot, leave is granted to apply for costs to be fixed.

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Associate Judge R M Bell