

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

**CIV-2015-404-002544
[2015] NZHC 2713**

UNDER the Companies Act 1993
AND
IN THE MATTER OF the liquidation of **ENGINI LIMITED**

BETWEEN **NZNET INTERNET SERVICES
LIMITED (IN LIQUIDATION)**
Plaintiff

AND **ENGINI LIMITED**
Defendant

Hearing: 30 October 2015 at 11:45am

Counsel: B J Norling for Plaintiff
A Nicholls for Defendant

Minute: 30 October 2015

ORAL JUDGMENT of ASSOCIATE JUDGE R M BELL

Solicitors:

B J Norling / A Cherkashina, Auckland, for Plaintiff
Edwards Clark Dickie (A Nicholls), Auckland, for Defendant

[1] This proceeding started yesterday. NZNet Internet Services Ltd (in liquidation) applies for the appointment of interim liquidators. It has begun a substantive proceeding seeking liquidation orders.

[2] The grounds in that application are that the company is unable to pay its debts, and that liquidation is just and equitable. NZNet Internet Services Ltd (in liquidation) says that it is a creditor of Engini Ltd in the sum of \$77,257.17 under an interlocutory order of the District Court at Auckland dated 2 October 2015. NZNet does not rely on non-compliance with a statutory demand under s 289 of the Companies Act.

[3] NZNet itself is in liquidation. It went into liquidation on 17 November 2011 by a special resolution of the sole shareholder, NZNet Holdings Ltd. That is an insolvent liquidation. The director of NZNet was a Mr Stephen Robert Andrews, apparently also a director of NZNet Holdings Ltd. He is one of the directors of Engini Ltd. He is associated with other companies referred to in this proceeding which I will refer to in this decision.

[4] The liquidators have pursued Mr Andrews for breaches of his duties as a director of NZNet Internet Services Ltd, and have obtained a substantial judgment against him for some \$1,089,000. Judgment was given against Mr Andrews by formal proof. The sum of \$1,089,000 is apparently the total amount for which creditors have claimed in the liquidation of NZNet Internet Services Ltd.

[5] NZNet Internet Services Ltd's liquidators believe that the only significant asset of Engini Ltd is its shareholding in Tier 6 Holdings Ltd. Engini Ltd is apparently the sole shareholder of that company.

[6] Mr Nicholls advises that Engini Ltd has not traded since 2011. His instructions are that the company is effectively assetless. Engini's subsidiary, Tier 6 Holdings Ltd, owns 8,500,000 of 20,000,000 shares in a company called Cyber Indemnity Solutions Ltd, which was formerly known as Data Insurance Holdings Ltd.

[7] The liquidators of NZNet Internet Services Ltd believe that there may be some value in the shares held in Cyber Indemnity Solutions Ltd. They have found out that in July this year Tier 6 Holdings Ltd transferred its shares in Cyber Indemnity Solutions Ltd to several third parties. Steps are now underway to have Tier 6 Holdings Ltd removed from the register. Those are the essential facts on which the liquidators rely to have interim liquidators appointed.

[8] It is necessary to refer to the judgment given in the District Court which provides NZNet Internet Services Ltd with standing as a creditor. NZNet Internet Services Ltd sued Engini Ltd for some \$77,000 in respect of invoices that had been issued relating to the occupation of premises and for domain name hosting.

[9] In the District Court an incorporated body is not required to instruct counsel, although it is entitled to do so. Instead, it may appear in Court through one of its officers.¹ In this case one of its officers, a director, undertook the defence on behalf of the company.

[10] Engini Ltd got into procedural difficulties with its defence. It delayed in making discovery. "Unless" orders were made. It was also attacked on its pleadings on the basis that they did not show an arguable defence to the claim by NZNet Internet Services Ltd.

[11] Initially Engini Ltd tried to defend the proceeding on the basis that the debt was no longer owing, as it had been forgiven. The discovery did not show any documents by way of a deed of forgiveness of debt. Engini Ltd tried to say that the debt was forgiven because of related share transactions under which shares held by Engini Ltd were transferred to Mr Andrews, its director.

[12] That pleaded defence did not stand up to the scrutiny of the District Court Judge. He considered that if Engini Ltd were to provide consideration for a forgiveness of debt, the consideration had to pass to NZNet. It was not sufficient for it to pass to Mr Andrews, a director of the company. See para [12] of the District Court judgment.

¹ District Courts Act 1947, s 57(2).

[13] I refer to that aspect because it appears to me that while consideration may properly be given so that a deed of forgiveness of debt is not required, it is not necessary that the consideration should pass to NZNet Internet Services Ltd. As a matter of pleading at any rate it may be sufficient if the consideration passes to a third party.

[14] Engini Ltd has appealed. It relies on that issue as one of its grounds to appeal. There are also related issues. In the District Court, NZNet Internet Services Ltd relied on an “unless” order having operated. The District Court Judge did not consider whether he should give relief in terms of the Court of Appeal’s decision of *SM v LFDB*² against the operation of the “unless” order. He did not address that question because he had already dealt with the matter by finding that there was no tenable defence.

[15] I have referred to those matters because it seems to me that there is an arguable ground of appeal in this case. Often when an appeal is lodged in response to enforcement action one approaches the matter with some scepticism as to whether there is any merit in the appeal. I have put that scepticism to one side. The fact that an appeal has been lodged against the decision of the District Court is relevant to the question whether interim liquidators ought to be appointed. If ordinary orders for appointment of interim liquidators were made, control of Engini Ltd would pass to the interim liquidators. It is proposed that Messrs Grant and Khov, the present liquidators of NZNet Internet Services Ltd, be the interim liquidators of Engini Ltd. If they were appointed without any conditions they could immediately snuff out the appeal, because they would have control of proceedings in the name of the company.³

[16] I am satisfied that there are grounds for the appointment of an interim liquidator under s 246 Companies Act. That section says:

246 Interim Liquidator

- (1) If an application has been made to the court for an order that a company be put into liquidation, the court may, if it is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a named person, or an Official Assignee for a named district, as interim liquidator.

² *SM v LFDB* [2014] 3 NZLR 494, [2014] NZCA 326.

³ Companies Act 1993, Schedule 6, cl (a).

- (2) Subject to subsection (3), an interim liquidator has the rights and powers of a liquidator to the extent necessary or desirable to maintain the value of assets owned or managed by the company.
- (3) The court may limit the rights and powers of an interim liquidator in such manner as it thinks fit.
- (4) The appointment of an interim liquidator takes effect on the date on which, and at the time at which, the order appointing that interim liquidator is made.
- (5) The court must record in the order appointing the interim liquidator the date on which, and the time at which, the order was made.
- (6) If any question arises as to whether on the date on which an interim liquidator was appointed an act was done or a transaction was entered into or effected before or after the time at which the interim liquidator was appointed, that act or transaction is, in the absence of proof to the contrary, deemed to have been done or entered into or effected, as the case may be, after that time.

[17] The area of risk here is that Tier 6 Holdings Ltd is about to be removed from the Register. I am not saying that the removal of the company from the Register cannot be remedied (potentially steps might be taken to have the company restored to the Register later under s 329 of the Companies Act), but the removal of Tier 6 Holdings Ltd is a step consistent with making it harder for creditors to trace and claw back assets formerly held by Tier 6 Holdings Ltd which may be of value to its shareholder, Engini Ltd. Potentially this disposal of shares has been carried out to frustrate NZNet Internet Services Ltd, a creditor of Engini Ltd.

[18] Mr Nicholls presented a 'horse has bolted' submission, that the shares had already gone, so there is no point in dealing with the matter. While interim liquidation orders are made protectively, it is not an adequate answer to say that the assets have already gone and therefore there is no point in appointing an interim liquidator. It may be useful to appoint an interim liquidator so that steps may be taken to recover back any assets that have been disposed of. That is a way by which the value of assets owned or managed by the company may be maintained in terms of s 246.

[19] The question here is one of balancing. It is important to preserve Engini Ltd's right of appeal. If it is successful in its appeal, Engini Ltd will have an effective defence to the substantive liquidation application. The appeal will set aside the order of the

District Court. In the absence of any judgment, NZNet Internet Services Ltd may no longer have standing as a creditor of Engini Ltd.

[20] If I were not to arrange matters so that the appeal can be run, the risk is that NZNet Internet Services Ltd could pre-empt the appeal process, because control of the company would pass to the liquidators. If Messrs Grant and Khov are appointed interim liquidators they could protect their position by withdrawing the appeal.

[21] Subject to that consideration I accept that it is appropriate to appoint Messrs Grant and Khov as interim liquidators. I say that because they have obviously built up significant background knowledge and information as to various companies with which Mr Andrews was involved. They have built up that knowledge primarily through their work as liquidators of NZNet Internet Services Ltd. That information is likely to be valuable in dealing with liquidation of a related company, Engini Ltd. It can be convenient for related companies all to be under a common administration for liquidation purposes.

[22] I am reinforced in my confidence. Messrs Grant and Khov were appointed by shareholders' resolution. Unlike some vanilla liquidations, they have pursued the interests of creditors of NZNet Internet Services Ltd vigorously. I appoint them interim liquidators.

[23] Ordinarily on interim liquidators being appointed they are given a wide suite of powers under Schedule 6 of the Companies Act. Justice Wylie's decision in *Ralph Engle Concepts Ltd v SCL Industries Ltd* [2013] NZHC 2732 at para 43 is typical of the orders made on the appointment of an interim liquidator. In this case to preserve the rights of appeal it is necessary to limit the powers normally granted. I describe the limits as follows:

[a] The directors of Engini Ltd will continue to have the right to oppose the present proceeding, including to instruct lawyers.

[b] The defence of the proceeding will include the right to apply for a review of this decision, which is being heard on an ex parte application,⁴ and also to defend the substantive proceeding on its merits. It will also include the power to continue the appeal to the High Court against the decision of the District Court of 2 October 2015.

[c] For the purpose of that defence, and for running the appeal, they may retain in their control documents of Engini Ltd required for the purpose of the defence and the appeal.

[d] To the extent that Engini Ltd has any funds, they may have recourse to those funds to pay for the defence.

[24] That aside, and with those limitations, the liquidators will have the standard powers to the extent necessary or desirable to maintain the value of assets owned or managed by Engini Ltd. That includes the power to exercise the rights of Engini Ltd as a shareholder of Tier 6 Holdings Ltd to requisition and attend meetings of shareholders, remove directors of that company and appoint fresh directors, investigate dealings in shares held by Tier 6 Holdings Ltd in Cyber Indemnity Solutions Ltd, and to take any proceedings arising out of that.

[25] For completeness, subject to these limitations the powers of the directors are to include those set out in para 43 of Wylie J's decision in the *Ralph Engle* case at (a), (b), (c), (d), (e), (f) of that decision.

[26] A question of priority arises as to funds being used for the defence of the proceeding and the promotion of the appeal, and the liquidators' rights of remuneration. I direct that the company's rights to run the appeal will come ahead of the liquidators' rights of remuneration.

[27] I direct that this proceeding is to stand over until the appeal by Engini Ltd against the District Court decision has been heard. I expect that appeal to be prosecuted expeditiously.

⁴ I have heard it on a *Pickwick* basis.

[28] I direct that this proceeding is to be called in front of me at **11.45 am on Friday 5 February 2016**. The purpose of that call is to check progress. In particular I hope that when that matter is called I will be told of the date for the hearing of the appeal.

[29] I also direct that Engini Ltd and any shareholders and directors may file and serve a statement of defence to the substantive proceeding. That is to be filed and served by **20 November 2015**.

[30] Leave is reserved to apply for further directions. The time of the order is 1.10 pm.



Associate Judge R M Bell