**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CIV 2014-004-001364**
**[2015] NZDC 19835**

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| BETWEEN | NZ NET INTERNET SERVICES LIMITED (IN LIQUIDATION)<br>Plaintiff |
| AND | ENGINI LIMITED<br>Defendant |

Hearing: 28 September 2015

Appearances: Mr BJ Norling and Ms A Cherkashina for the Plaintiff
Ms J Leenoh for the Defendant

Judgment: 2 October 2015

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**DECISION OF JUDGE G M HARRISON**

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**The claim**

[1] The plaintiff (NZ Net) was placed into liquidation on 17 November 2011 by special resolution of its shareholders and this claim is now advanced by the liquidators.

[2] Engini Limited (Engini) was involved in the development of software. It sublet premises from NZ Net. In 2008 and thereafter, NZ Net issued invoices to Engini for occupation of the premises and also for domain name hosting, those invoices totalling $77,568.25 for which NZ Net now seeks judgment plus interest and costs.

[3] In its statement of defence, conducted by Gerard Mackie, one of its directors, Engini claimed that the debt was forgiven by NZ Net.

[4] At the first case management conference held on 29 January 2015 the Judge conducting the conference noted that "the defendant is relying on an alleged

forgiveness of the debt but no such document appears from its list of documents". He ordered standard discovery to be completed within 20 working days. NZ Net complied with that order on 2 March 2015 but Engini failed to comply.

[5] On 31 March 2015 the second case management conference was held. Again there was no appearance on behalf of Engini. On NZ Net's application I made an "unless order" in the following terms:

> Unless the defendant files and serves an affidavit of documents within 10 working days of receipt of this direction, which discovers document(s) which support the defence of forgiveness of debt, the defence will be struck out and judgment entered for the plaintiff.

This order was served on Engini on 7 April 2015.

[6] On 16 April 2015 Engini served its affidavit of documents together with electronic discovery but this did not disclose any documentation as evidence of the alleged forgiveness.

[7] Prior to the making of this order, on 27 March 2015 NZ Net applied to strike out the statement of defence, essentially on the ground that although forgiveness of the debt was pleaded no particulars or documentary evidence had been produced to support that.

[8] On 30 April 2015 Engini filed notice of opposition to the strike out application in which it changed its position by alleging that, rather than being forgiven, the debt was satisfied by the transfer of shares in Engini to Mr Stephen Andrews who was a director of NZ Net. Annexed to the notice of opposition was a calculation entitled "Engini shareholder debt/share calculations 2010/2011". No explanation of the meaning of this document was given and I have not been able to decipher it. Suffice to say that it does not refer in any way to a transfer of shares in satisfaction of the debt owed to NZ Net.

[9] On 18 September 2015, apparently, in an effort to reconcile the conflicting defences raised, an amended statement of defence was filed. This alleged, essentially, that NZ Net had not suffered any loss as its director and shareholder,

Mr Stephen Andrews, received the benefit of the Engini shares as valuable consideration for the writing-off of the debt.

**Was the debt forgiven?**

[10] The Court of Appeal in *McCathie v McCathie* [1971] NZLR 58 stated (at [61]-[62]):

> There is of course no question that there is an ancient rule of law now too firmly established to be displaced other than by legislation, that in order to support an assertion by a debtor that a debt was released by the creditor it is necessary that the release be enshrined in a deed unless consideration has passed between the debtor and the creditor. It is not enough that there should be clear evidence of the release contained for example in a letter which passed between the two parties.

[11] Based upon that authority, in the absence of a deed forgiving the debt, and there is no deed, the debt can only be satisfied by the passing of valuable consideration.

[12] There is no evidence whatsoever of any consideration passing from Engini to NZ Net. The fact that Mr Andrews may have received shares cannot amount to satisfaction of the debt owed to NZ Net even though Mr Andrews may have been the sole director and shareholder of NZ Net at the time of the share transfer. A director and shareholder of a company is a separate legal identity from the company itself, one from the other, and a payment to a director cannot amount to the satisfaction of a debt owing to the company of which he is a director without acquiescence by the company in that course of action, of which there is no evidence whatsoever.

[13] In these circumstances I am of the view that the defence must be struck out as disclosing no tenable defence. *A-G v Prince* [1998] 1 NZLR 262; *Couch v A-G* [2008] NZSC 45.

**The "unless order"**

[14] I have preferred to determine the application to strike out the defence on its merits, rather than for non-compliance with the "unless order".

[15] I acknowledge Mr Norling's submissions that failure to comply with an "unless order" can lead to its automatic effect. In *SM v LFDB* [2014] NZCA 326 the Court of Appeal held:

> An unless order takes effect automatically if it is not complied with. In other words, a party need not apply to enforce the order.

[16] The situation here was complicated by the filing of the notice of opposition on 30 April 2015, after the "unless order" was made, and in which the allegation that the debt had been discharged for consideration was raised. In view of my decision that no tenable defence has been disclosed, it is unnecessary to consider further the apparent failure to comply with the "unless order".

**The Limitation Act**

[17] While not specifically pleaded, there had been raised in communications between the parties the possibility that the plaintiff's claim was statute-barred, however Ms Leenoh in paragraph 13 of her submissions made it clear that the limitation defence was no longer pursued.

**Conclusion**

[18] It was acknowledged in the course of argument that the invoices rendered to Engini for Internet Services were not in fact services supplied to it but to a separate entity called Renaissance Indemnity. The total amount of charges was $311.08 and NZ Net has elected not to pursue that. That leaves outstanding $77,257.17. The statement of defence is struck out and judgment is entered against Engini for that sum. Interest is payable on the judgment sum but from the date of the filing of the statement of claim, being 18 September 2014.

[19] The defendant is also ordered to pay the plaintiff's costs of this proceeding assessed on a 2B basis. In the event of any disagreement on the calculation of the appropriate figure, I will receive memoranda.

G M Harrison
District Court Judge