

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-000826
[2021] NZHC 2135**

IN THE MATTER of a claim for repayment of a shareholder's
overdrawn current account

BETWEEN ANOTHER ORANGE SERVICE CENTRE
LIMITED (in liquidation)
Plaintiff

AND CLAIRE LOUISE VINCENT
Defendant

Hearing: 30 July 2021 (by AVL)

Appearances: H L Thompson for Applicant/Plaintiff
B J Norling and C Lin for Respondent/Defendant

Judgment: 16 August 2021

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 16 August 2021 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Background and the application

[1] The plaintiff operated a motor vehicle service centre at Airport Oaks, Auckland. The defendant (Mrs Vincent) is the sole director and shareholder of the plaintiff. The plaintiff was put into liquidation by shareholders resolution on 2 September 2019. Digby John Noyce (Mr Noyce) was appointed liquidator. The major creditor is the Commissioner of Inland Revenue who has made a preferential claim for \$262,696 in respect of PAYE and unpaid GST.

[2] By analysis of the plaintiff's last draft annual financial statements for the year ending 31 March 2017, the plaintiff's bank statements and details of transactions in Mrs Vincent's bank account, Mr Noyce calculated Mrs Vincent's shareholders current account was overdrawn in the amount of \$914,612.

[3] On 25 March 2021, Mr Noyce emailed a letter to Mrs Vincent along with copies of his Excel Workbooks (containing analysis of the bank accounts) and asked Mrs Vincent to review his workings and identify any transactions which she considered had been incorrectly allocated to her by Monday, 29 March 2021.

[4] Mrs Vincent instructed lawyers and sought time to review Mr Noyce's analysis. Concerned that Mrs Vincent would not commit to a firm timeframe for her response, on 30 April 2021 Mr Noyce, through his lawyers, demanded payment of the \$914,612. This proceeding was commenced shortly thereafter.

[5] The plaintiff seeks summary judgment against Mrs Vincent for the \$914,612 claimed as a debt owing in Mrs Vincent's overdrawn shareholders current account. Mrs Vincent opposes summary judgment arguing the plaintiff has failed to produce sufficient evidence to establish the claim and that she has an arguable defence.

Summary judgment principles

[6] The plaintiff's application is brought pursuant to r 12.2(1) of the High Court Rules 2016. It provides:

The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[7] The Court may give judgment in relation to a part of a claim only if the plaintiff cannot prove the whole of it. Further, the Court may give judgment on liability and order a trial on the issue of amount if the party applying for summary judgment satisfies the Court that the only issue to be tried is one of the amount claimed.¹

[8] An often cited summation of the correct approach to summary judgment applications is contained in *Krukziener v Hanover Finance Ltd* as follows:²

[26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[9] I emphasise the following:³

- (a) the plaintiff must satisfy the Court that the defendant has no arguable defence to its claim. The issue is whether there is a real question to be tried;
- (b) the onus remains on the plaintiff throughout, but where the plaintiff's unchallenged evidence is sufficient to convince the Court the defendant

¹ High Court Rules 2016, r 12.3.

² *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 and confirmed in *Mitchell v Trustees Executors Ltd* [2011] NZCA 519, (2011) 12 NZCPR 659 at [35].

³ See *Pemberton v Chappell* [1987] 1 NZLR 1 (CA); *Westpac Banking Corp v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA); *Krukziener v Hanover Finance Ltd*, above n 2, at [26]; *Bilbie Dymock Corp Ltd v Patel* (1987) 1 NZPC 84 (CA) and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205 (CA) at 209.

has no arguable defence, the defendant will have to respond with evidence of an arguable defence in order to defeat the application;

- (c) it is generally not possible to determine disputed issues of fact based on affidavit evidence alone, particularly when issues of credibility arise;
- (d) issues of law, even though they may be complex can, however, be determined in an application for summary judgment;
- (e) the Court is not required to accept possible defences which are not bona fide, credible or are lacking in detail. The Court should adopt a robust and realistic approach to the assessment of evidence but nevertheless summary judgment may be inappropriate where the ultimate determination turns on a judgment that can only properly be reached after a full hearing of all the evidence; and
- (f) the Court's power to enter summary judgment is discretionary, but the discretion is of a residual kind. There is also little scope for exercising the discretion not to grant summary judgment where there is no suggestion of injustice.

The evidence

Digby Noyce's first affidavit

[10] Mr Noyce was appointed liquidator of the plaintiff on 2 September 2019. Mrs Vincent is the plaintiff's sole director and shareholder.

[11] The plaintiff did not have good management accounting systems. The most recent financial statements are for the year ending 31 March 2017 with comparative figures for the year ending 31 March 2016. The financial statements were prepared by Lee Coutts & Syers Chartered Accountants Ltd and are unsigned. Mr Noyce treated these as drafts. They show positive shareholder current account balances of \$82,997 and \$14,268 in the 2016 and 2017 years respectively.

[12] The plaintiff operated two bank accounts with ASB Bank. Mr Noyce obtained bank statements for the period 1 April 2017 to 5 September 2019. He exported the bank statement entries to Excel Workbooks to analyse them. He identified payments to Mrs Vincent's bank account and payments of a personal nature made on her behalf. In addition, Mr Vincent provided Mr Noyce with a spreadsheet of transactions in Mrs Vincent's bank account for the period 1 April 2018 to 2 September 2019. Mr Noyce identified payments from that account that were made for business purposes. He allocated payments to Mrs Vincent's bank account and payments from the plaintiff's bank account of a personal nature as drawings. Payments from Mrs Vincent's bank account for business purposes were offset against drawings.

[13] Mr Noyce calculated Mrs Vincent's shareholders current account was overdrawn by \$914,612. His calculation is summarised in the statement of claim as follows:

Period from 01.04.2017 to 31.03.2018	\$
Shareholder current account 31 March 2017	(14,268)
Defendant's personal expenses paid by plaintiff	86,314
Payments by plaintiff to defendant's personal bank account	304,014
Plaintiff's expenses paid from defendant's bank account	0
Defendant's shareholder current account 31 March 2018	376,060
Period from 01.04.2018 to date of liquidation	\$
Defendant's personal expenses paid by plaintiff	159,784
Payments by plaintiff to defendant's personal bank account	464,798
Plaintiff's expenses paid from defendant's bank account	<u>(86,030)</u>
Shareholder current account 2 September 2019	<u>\$914,612</u>

[14] On 25 March 2021, Mr Noyce sent Mrs Vincent a letter by email attaching copies of his Excel Workbooks. He noted the amount owing was \$914,612 which was repayable on demand. He asked Mrs Vincent to identify any transactions which she thought were incorrectly allocated. He invited her to identify any expenditure that she may have made on behalf of the plaintiff in the period 1 April 2017 to 31 March 2018. He asked for a response by 29 March 2021. Mrs Vincent did not respond within that timeframe.

[15] Mr Noyce has produced the letter he sent to Mrs Vincent on 25 March 2021 but not his Excel Workbooks or the source documents upon which his analysis was based apart from the draft financial statements.

[16] Mr Noyce says the plaintiff's records do not contain any resolutions or other information which might indicate the amounts paid by the plaintiff to Mrs Vincent's bank account were anything other than drawings.

Mrs Vincent

[17] Mrs Vincent acknowledges that on 25 March 2021 Mr Noyce wrote requesting she review his workings but because of the large number of entries (approximately 15,000) and her personal circumstances the four days she was given to do so was unreasonably short. She attaches to her affidavit email correspondence that passed between the parties' lawyers prior to the commencement of the proceeding where she sought time to review Mr Noyce's analysis.

[18] She considers this proceeding is premature and denies she is liable for the full amount claimed. She says that she has obtained an independent analysis from an "independent liquidator" and it is clear, "I would not be liable for the Total Amount" and "Accordingly, I do not accept that I owe [the plaintiff] the sum of the Total Amount".

[19] Sometimes she would pay the plaintiff's expenses from her own bank account and she would occasionally transfer money from the plaintiff's bank accounts to her account to pay expenses and costs related to the plaintiff.

[20] She says Mr Noyce has not presented sufficient or complete evidence in support of his claim because he has not produced the plaintiff's bank statements, his Excel Workbooks, any reconstructed accounts and has not reviewed her bank statements for the year 1 April 2017 to 31 March 2018.

[21] She considers she has a reasonably arguable defence based on the report of the "independent liquidator" Michael Turner.

[22] She says Mr Noyce has also not taken into consideration the fair value of the services she and Mr Vincent provided to the plaintiff for a period of two years and five months prior to the liquidation without which it would not have been able to operate or earn a profit.

Michael Turner

[23] He has a Bachelor of Commerce Degree and is an Insolvency Officer at Waterstone Insolvency. He was asked to conduct a review of Mr Noyce's analysis. Mr Turner does not refer to the code of conduct for expert witnesses in sch 4 of the High Court Rules. He says he was to provide:

... high level, provisional analysis and independent review as to whether [Mrs Vincent] has any liability for the Total Amount and if so, whether there is a dispute regarding the quantum of the Total Amount claimed...

[24] As well as Mr Noyce's analysis, he was provided with Mrs Vincent's bank statements for the period 1 April 2017 to 31 March 2018.

[25] In relation to Mr Noyce's analysis of the plaintiff's bank accounts:

- (a) for the period 1 April 2017 to 31 March 2018 there are transactions allocated to Mrs Vincent as drawings that could be disputed and/or may require further investigation totalling \$26,022;⁴
- (b) for the period 1 April 2018 to 2 September 2019 there are transactions allocated to Mrs Vincent as drawings that could be disputed and/or may require further investigation amounting to \$75,260; and
- (c) there are further business expenses which were coded as drawings amounting to \$28,925.

⁴ Mr Turner has not included in this figure payments amounting to \$4,300 to Mr Vincent which he says may also be deducted from the drawings figure.

[26] As far as Mrs Vincent's bank account is concerned:

- (a) for the period 1 April 2017 to 31 March 2018 there may be payments that were business expenses that require further investigation totalling \$95,263; and
- (b) for the period 1 April 2018 to 2 September 2019 there are additional payments to those identified by Mr Noyce that may be business expenses or require further investigation amounting to \$54,293.

[27] Based on discussions with Mr Vincent and information obtained from the Hays Salary Guide, the fair value for services Mr and Mrs Vincent provided the plaintiff for the two years and five months prior to liquidation would be:

- (a) for Mrs Vincent, \$220,385.50 based on an annual shareholder's salary of \$91,194 (as shown in the draft financial statements to 31 March 2017); and
- (b) for Mr Vincent, a range of between \$169,166 to \$290,000 but typically \$205,416.

[28] Mr Turner concludes that on the information available, Mrs Vincent's actual current account debt could range between \$153,386 and \$274,220.

Reply of Mr Noyce

[29] Mr Noyce says Mr Vincent was asked more than once to provide access to Mrs Vincent's bank statements but he did not receive the information.

[30] He attaches to his affidavit email correspondence with Mr Vincent of 9 March 2021 and 15 March 2021 which provide the context for his email of 25 March 2021 and the relatively little time he gave Mrs Vincent to respond to his analysis.

[31] In response to Mr Turner's evidence concerning remuneration for Mr and Mrs Vincent's services, Mr Noyce says:

- (a) the company records contain no evidence of compliance with s 161 of the Companies Act 1993;
- (b) there is no evidence Mrs Vincent included any amount she drew from the company as income in her personal income tax return and the plaintiff's records show she did not pay income tax upon it; and
- (c) there is no evidence Mrs Vincent paid any part of her drawings over to Mr Vincent or that he returned any amount he received from her as income in his personal income tax returns.

[32] Mr Noyce says he thinks in some instances Mr Turner is double-counting amounts he has already allowed for and he has been generous in his allocation of business expenses in his own workings. Nothing in the affidavits of Mrs Vincent and Mr Turner cause him to revise his calculation of the amount Mrs Vincent owes the plaintiff.

The issue

[33] The issue is whether the plaintiff has satisfied its burden to show Mrs Vincent has no arguable defence to its claim. Mrs Vincent says the plaintiff has failed to do so as:

- (a) the plaintiff has not provided sufficient evidence to show she has no arguable defence because:
 - (i) the draft financial statements of the plaintiff should not be relied upon,
 - (ii) Mr Noyce did not examine Mrs Vincent's bank account transactions from 1 April 2017 to 31 March 2018 and business expenses were paid from her account;
 - (iii) Mr Noyce has not exhibited the bank statements or his Excel Workbooks or the detail of his methodology;

- (b) she has not been given sufficient time to respond to the claim and provide her explanations in response to Mr Noyce's analysis;
- (c) Mr Noyce has not detailed his experience or qualifications and the Court can have no comfort that he is qualified to undertake his analysis;
- (d) Mr Noyce has significant investigative powers as liquidator and there is no evidence he has exercised any of those powers to obtain relevant documents;
- (e) Mr Turner has concluded there is doubt as to the amounts allocated by Mr Noyce as drawings;
- (f) Mr and Mrs Vincent are entitled to fair remuneration for their labour and such amounts should not be allocated as drawings; and
- (g) she has a claim against Mr Noyce in respect of advice he gave that led to the liquidation of the plaintiff and the sale of its assets.

Shareholders current accounts

[34] A shareholder current account is maintained in a company's balance sheet to record transactions between the company and a shareholder.⁵ The legal onus to prove that a shareholder owes money to the company and in the amounts claimed is on the balance of probabilities. In the absence of evidence to the contrary, drawings in a shareholder's current account are a debt owed by the shareholder to the company which are repayable on demand.⁶

[35] In *Monnery v Convendium Ltd*,⁷ the Court of Appeal quoted with apparent approval the comments of Muir J in *Mizeen Painters Ltd (in liq) v Tapusoa* as follows:⁸

[25] In the absence of an explanation, drawings must be treated as advances from the company to the shareholders that are repayable on demand.

⁵ *Monnery v Convendium Ltd (in liq)* [2020] NZCA 345 at [22].

⁶ At [34] and *Kelstworural Ltd (in liq) v Mounsey-Ross* [2019] NZHC 752 at [10].

⁷ *Monnery v Convendium Ltd (in liq)*, above n 5.

⁸ *Mizeen Painters Ltd (in liq) v Tapusoa* [2015] NZHC 826, [2016] NZAR 423 (footnotes omitted).

They remain as repayable advances unless and until a company resolution classifies them otherwise. When the company's accounting records provide no explanation for the drawings in the shareholders current account, they must be treated as advances from the company to the shareholders. The onus is on the defendants as directors and fiduciaries of the company to account to it for funds and establish the legitimacy of any funds taken from the company; in other words, to explain what has become of company property in their hands.

Are there arguable defences?

The plaintiff's position

[36] The plaintiff relies upon Mr Noyce's analysis as justifying the full claim for \$914,612. In respect to that, there is no dispute that during the period 1 April 2017 to 2 September 2019 Mrs Vincent received direct payments from the plaintiff's bank account totalling \$768,812.

[37] Mr Thompson submits it is for Mrs Vincent to provide evidence that casts doubt on whether the amount claimed is in fact owing and she has had ample time to respond to Mr Noyce's analysis. Mrs Vincent was responsible for ensuring the plaintiff correctly recorded the transactions of the plaintiff⁹ and she was also the person best able to provide information about the transactions.

[38] While Mr Turner has raised "queries" they do not amount, Mr Thompson argues, to evidence casting doubt on whether the amount claimed is owing. Furthermore, Mr Turner has not given his evidence in compliance with r 9.43(2) High Court Rules and the code of conduct for expert witnesses and has relied upon hearsay statements of Mr Vincent.

[39] Mr Thompson submits the claims by Mrs Vincent to remuneration for herself and Mr Vincent are unsustainable. In the case of Mrs Vincent she is not now able to reclassify advances as remuneration. He submits her reliance upon s 161 of the Companies Act is misconceived and there was no compliance with s 161 in any event.

[40] In the case of Mr Vincent, Mr Thompson submits there is no evidence that any of the advances were paid to him as remuneration. In any event, he contends, if

⁹ Companies Act 1993, s 194.

Mr Vincent is entitled to remuneration that entitlement cannot be set-off against the plaintiff's claim against Mrs Vincent. Mr Vincent must file a claim in the liquidation in the ordinary way.

Analysis of Mrs Vincent's position

[41] Contrary to the plaintiff's position, there is merit in Mrs Vincent's submission that Mr Noyce has provided insufficient evidence to satisfy the Court that Mrs Vincent is indebted to it in the amount claimed for several reasons.

[42] The plaintiff's last financial statements are the baseline for Mr Noyce's analysis. It is trite that if there is uncertainty as to the correct opening balance in Mrs Vincent's shareholders current account there must be uncertainty also as to Mr Noyce's conclusion there is now \$914,612 owing. Mr Noyce says he considered the financial statements to be drafts. He does not say what steps he took to satisfy himself that they were accurate and safe to rely upon. He did not say, for instance, that the draft financial statements are consistent with the plaintiff's tax returns or bank records for the relevant periods. Mrs Vincent has not disputed the content of the draft financial statements but I do not see that it was incumbent upon her to do so when Mr Noyce acknowledges they were drafts. The legal onus is on the plaintiff to show that it has calculated the sum claimed correctly. In the absence of some further explanation from Mr Noyce, I am not satisfied that is the case.

[43] I find support for my view in *Kiwibilt Engineering Ltd (in liq) v Pavlovich* which concerned a claim against the sole director and shareholder for a debt due as advances in his current account.¹⁰ The liquidators of the company could not produce annual accounts and had reconstructed the current account through source records. Relevantly Judge McElrea said:¹¹

If the liquidators had sued on a current account shown in a set of accounts approved by the directors (or at least, prepared prior to the date of liquidation), there would be a strong inference from the accounts of a debt owing to the company. But even in that case it must be open to a director to show that the account was not correct ...

¹⁰ *Kiwibilt Engineering Ltd (in liq) v Pavlovich* [2004] DCR 193. The approach taken in this case was endorsed by Heath J in *EBR Holdings Ltd (in liq) v Van Duyn* [2017] NZHC 1698 at [77].

¹¹ At [12] and [13].

[13] However, this case is not in the category just discussed as there were no accounts prepared by the directors (or anyone, so far as this Court has been told) showing a directors current account. Instead the liquidators have had to create such an account, and so the onus must be on them to show that they have done so correctly ...

[44] Also, Mr Noyce did not exhibit to his first affidavit his Excel Workbooks (containing his analysis), the source documents upon which the analysis was based (except the draft accounts) and provided very little detail of the methodology he adopted to distinguish personal and business expenses. In circumstances where the plaintiff's claim is founded upon Mr Noyce's analysis it is to be expected all of that would be provided.

[45] Further, Mr Noyce did not in reply to Mr Turner's affidavit provide the source documents or his analysis either. This is surprising when Mr Turner challenges his assessment of Mrs Vincent's liability on several bases. Mr Noyce's response to Mr Turner's evidence was superficial. As an example, Mr Noyce asserts Mr Turner may be double-counting deductions without providing examples.

[46] This takes me to a further matter that Mr Noyce did not have Mrs Vincent's bank statements for the period 1 April 2017 to 31 March 2018. He cannot be criticised for that as he asked for the bank statements or details of business expenses paid from the account during the period and they were not provided. However, Mr Turner has now identified further transactions in Mrs Vincent's bank account during the period totalling \$95,263 which he says may be deductible from the claimed current account debt. As Mr Noyce has not had the bank statements and it could plainly be expected Mrs Vincent paid business expenses from the account during the period, his evidence there is nothing in the affidavit of Mr Turner that causes him to revise his calculation of the amount owing is surprising.

Insufficient time to respond

[47] I do not accept Mrs Vincent has not had time to review Mr Noyce's analysis. Mr Noyce first provided an analysis of the plaintiff's bank accounts for the period 1 April 2018 to 2 September 2019 on 9 March 2021 drawing attention to the fact that in the period payments were made to her of \$464,798. He asked for a response as

soon as possible but no response was forthcoming. On 25 March 2021, he sent Mrs Vincent his full analysis. While I accept it was not reasonable to expect a response from Mrs Vincent within four days as Mr Noyce required, a further four months passed before the hearing. In that time, Mrs Vincent has instructed lawyers to represent her and Mr Turner to prepare his report. She has had sufficient time to respond to this claim.

Mr Noyce's experience and qualifications

[48] I do not accept the challenge to Mr Noyce's experience or qualifications. He is a Chartered Accountant and Licensed Insolvency Practitioner. I accept he is capable of undertaking the largely mechanical process of identifying payments made by the plaintiff to or for the benefit of Mrs Vincent and assessing whether they are drawings.

Exercise of investigative powers

[49] I do not accept the criticism of Mr Noyce for not exercising his investigative powers as liquidator to obtain further records of the plaintiff prior to the commencement of this proceeding. He sought responses from Mrs Vincent to his analysis. It was Mrs Vincent's obligation to maintain accurate company records¹² and she is the person best able to respond to Mr Noyce's analysis. She had the analysis from 25 March 2021 and had made no meaningful response to it by 3 May 2021 when this proceeding was filed.

Challenges to amounts allocated as drawings

[50] Leaving aside the question of remuneration for Mr and Mrs Vincent, Mr Turner has challenged Mr Noyce's allocation of payments as drawings in a total sum of \$250,839.¹³

[51] A question arises as to whether the Court may have regard to Mr Turner's evidence in light of the objection he has not complied with r 9.43(2)(a) of the High Court Rules which provides:

¹² Companies Act, s 194.

¹³ This is inclusive of the \$95,263.57 referred to at [46] above.

- (2) An expert witness must —
- (a) state in any written statement of the proposed evidence of the witness served under rule 9.2 or 9.3, or at the time of giving any oral evidence, or in any affidavit containing the evidence of the expert witness, that the expert witness has read the code of conduct and agrees to comply with it:

[52] Under r 9.43(3) the evidence of an expert that has not complied with r 9.43(2)(a) may be offered only with the leave of the Court.

[53] I consider it is appropriate to have regard to Mr Turner's evidence as it relates to the review of transactions and their allocation as drawings. This is for three reasons. First, while no submissions were made on the matter, I am not satisfied that determining whether particular transactions are personal or business related requires the application of specialised knowledge or expertise. Second, in my exchange with Mr Thompson I understood that he was not arguing Mr Turner's evidence should not be read and the objection was directed to the weight to be given to the evidence. Third, Mr Turner has simply undertaken a review of the analysis completed by Mr Noyce. In giving his evidence, Mr Noyce has also not complied with r 9.43(2)(a). I cannot see that Mr Turner's evidence could be excluded but Mr Noyce's not.

[54] That then leads to the question whether I am able to resolve the differences in the evidence of Mr Noyce and Mr Turner. Mr Noyce has said Mr Turner's affidavit has not caused him to revise his calculation of the amount owed by Mrs Vincent but, as I have said, he has not responded in a meaningful way to Mr Turner's evidence. He has not put before me his analysis or source documents from which I can make any assessment. I am unable to resolve the differences.

Mr and Mrs Vincent's remuneration

Mrs Vincent

[55] Mr Thompson submits Mrs Vincent has no entitlement to remuneration. When accounting to a liquidator for company funds a director cannot be heard to say that

advances made as drawings were a substitute for a salary. In *Madsen-Ries v Petera*, Lang J said:¹⁴

[45] It is not now possible for Mr and Mrs Petera to attempt to reclassify the funds that they withdrew or spent from the company's bank accounts as wages or salary when neither they nor the company have ever classified them in that way before. They may well have caused the payments to be made in the belief or expectation that they would ultimately be classified as salary or wages. Unfortunately, however, that step was never taken. The payments therefore retain their status as advances or drawings that are repayable on demand.

[56] Mr Thompson also referred to *Monnery v Convendium Ltd (In liq)* where the Court of Appeal considered that in the context of a claim to recover a shareholder current account reliance upon s 161 of the Companies Act, which deals with the circumstances under which the board of a company may, amongst other things, authorise the payment of remuneration by the company to a director, was a distraction.¹⁵ The Court said:

[32] However in the particular circumstances of the present case the focus on s 161 is something of a distraction. The claim by the liquidators was not against Mr Monnery alleging a personal liability to Convendium for payments made in contravention of s 161. The claim was against Mr Monnery (together with his co-trustees) in his capacity as one of the trustees of the Family Trust, a shareholder with an overdrawn current account. The fairness or otherwise of payments made to Mr Monnery in his personal capacity was not in point so far as the shareholder's liability to repay was concerned.

[57] Mr Norling accepts, on the state of the authorities, Mrs Vincent will not be permitted to claim remuneration without having followed the procedure set out in s 161 of the Companies Act. His submission was there is insufficient evidence before the Court that s 161 was not complied with in this case.

[58] Section 161 relevantly provides:

161 Remuneration and other benefits

- (1) the board of a company may, subject to any restrictions contained in the constitution of the company, authorise —
 - (a) The payment of remuneration or the provision of other benefits by the company to a director for services as a director or in any other capacity:

...

¹⁴ *Madsen-Ries v Petera* [2015] NZHC 538. (footnote omitted).

¹⁵ *Monnery v Convendium Ltd (In liq)*, above n 5.

if the board is satisfied that to do so is fair to the company.

- (2) The board must ensure that forthwith after authorising the making of the payment or the provision of the benefit or the making of the loan or the giving of the guarantee or the entering into of the contract, as the case may be, particulars of the payment or benefit or loan or guarantee or contract are entered in the interests register.

...

- (4) Directors who vote in favour of authorising a payment, benefit, loan, guarantee, or contract under subsection (1) must sign a certificate stating that, in their opinion, the making of the payment or the provision of the benefit, or the making of the loan, or the giving of the guarantee, or the entering into of the contract is fair to the company, and the grounds for that opinion.

- (5) Where a payment is made or other benefit provided or a guarantee is given to which subsection (1) applies and either —

- (a) the provisions of subsections (1) and (4) have not been complied with; or
(b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4) of this section —

the director or former director to whom the payment is made or the benefit is provided, or in respect of whom the guarantee is given, as the case may be, is personally liable to the company for the amount of the payment, or the monetary value of the benefit, or any amount paid by the company under the guarantee, except to the extent to which he or she proves that the payment or benefit or guarantee was fair to the company at the time it was made, provided, or given.

...

[59] I do not accept Mr Norling's submission concerning s 161. First, I consider s 161 is not in issue as there is no evidence the payments to Mrs Vincent were made as anything other than drawings. Mrs Vincent cannot be heard to now re-categorise them as something else. Second, there is clear evidence that s 161 was not complied with to authorise payment of remuneration to Mrs Vincent. In his first affidavit Mr Noyce says the plaintiff's records do not contain any resolution or other information to suggest the amounts paid to Mrs Vincent's bank accounts were anything other than drawings. In her affidavit Mrs Vincent makes no mention of s 161. She does not suggest there was or may have been compliance with its requirements. In his reply affidavit, Mr Noyce says the plaintiff's records contain no evidence that Mrs Vincent complied with s 161 of the Companies Act. It follows Mrs Vincent has no entitlement to remuneration.

Mr Vincent

[60] It is submitted Mr Vincent has an entitlement to remuneration on a quantum meruit basis and that his entitlement, “would off-set and reduce Mrs Vincent’s liability for the Amount Claimed”. In support of this submission I was referred to *Shadbolt v Creative Concrete and Landscaping Ltd* which was an appeal from the entry of summary judgment in the District Court against a company director and shareholder (Mr Shadbolt).¹⁶ The claim was that regular payments received by Mr Shadbolt were shareholder advances, whereas Mr Shadbolt’s evidence was that the payments were an agreed salary for his labour. Asher J allowed the appeal on the basis a defence that the payments were received as an agreed salary was arguable. He also considered Mr Shadbolt had an arguable quantum meruit claim which could be raised by way of set-off.

[61] I do not need to decide whether Mr Vincent has an arguable claim for remuneration on a quantum meruit or any other basis. There is no evidence from Mr Vincent. He has not asserted an entitlement to remuneration nor has he asserted that amounts paid into Mrs Vincent’s account were passed on to him as remuneration which he is entitled to retain. Even if there had been evidence that payments made into Mrs Vincent’s account were ultimately received by Mr Vincent as remuneration (which there is not) the source of those payments was the plaintiff’s funds extracted from the company by way of advances to Mrs Vincent. Regardless of any entitlement Mr Vincent might have to retain those funds, Mrs Vincent remains liable to repay her shareholders current account.¹⁷

[62] *Shadbolt v Creative Concrete and Landscaping Ltd* is distinguishable.¹⁸ There, it was the director and shareholder Mr Shadbolt who received payments from the company. In an action to recover those payments from him he sought to raise a set-off. Here, Mr Vincent is not a director of the plaintiff, he did not receive the payments, there is no claim against him and nothing against which he is raising a set-off.

¹⁶ *Shadbolt v Creative Concrete and Landscaping Ltd* HC Hamilton CIV-2007-419-1476, 16 May 2008.

¹⁷ *Monnery v Convendium Ltd (in liq)*, above n 5, at [42]-[43].

¹⁸ *Shadbolt v Creative Concrete and Landscaping Ltd*, above n 15.

Claim against Mr Noyce

[63] The possibility of Mr Vincent making a claim against Mr Noyce was not abandoned but not actively pursued. In her affidavit, Mrs Vincent makes an opaque reference to seeking advice as to Mr Noyce's "dealings" but she does not explain how such dealings might give rise to a claim. There is no evidence to support the existence of such a claim.

My assessment

[64] I accept Mrs Vincent is indebted to the plaintiff on her current account in a substantial sum. During the period 1 April 2017 to 2 September 2019 she received direct payments from the plaintiff's bank account totalling \$768,812 and on the evidence a large part of this sum must be regarded as drawings. Mr Norling concedes that if I reject the remuneration claims it follows the plaintiff has established Mrs Vincent has a liability to the plaintiff. There can be no suggestion, in those circumstances, that the other matters raised by Mrs Vincent will extinguish all liability that she has to the plaintiff. This is consistent with Mrs Vincent's evidence that she is not liable for the "Total Amount Claimed". She also relies upon Mr Turner's evidence who, notwithstanding the matters identified in his report, finds Mrs Vincent has a current account liability.

[65] However, there is uncertainty about the amount owing by Mrs Vincent arising from several factors I have identified. First, Mr Noyce has not put before the Court his Excel Workbooks containing his analysis or the source documents upon which it is based. Second, Mr Noyce's analysis relies upon the draft financial statements and he has not provided any evidence as to the steps taken to confirm they are reliable. Third, Mr Turner has called into question transactions amounting to \$250,839 and without a substantive response from Mr Noyce I accept Mrs Vincent's liability for that amount has not been established.

[66] The amount owing by Mrs Vincent can only be determined following a further hearing. The proper course is for judgment to be entered for the plaintiff and against Mrs Vincent as to liability only and an order be made for a trial as to the amount.

Result

[67] Judgment is entered for the plaintiff as to liability. This proceeding is to be set down for trial to determine the issue of amount.

[68] I direct the Registrar to set the case down for a teleconference before an Associate Judge on the first available date so that directions can be made for the hearing. Counsel shall confer and file at least three working days prior to the teleconference a joint memorandum with proposed directions.

[69] My preliminary view is the plaintiff has been successful and is entitled to costs. The plaintiff has not been wholly successful but limited success is still success.¹⁹ However, counsel shall confer and attempt to reach agreement on costs. If they cannot agree they may file memoranda within 14 days and I shall determine costs on the papers. In the interim, costs are reserved.

O G Paulsen
Associate Judge

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¹⁹ *Weaver v Auckland Council* [2017] NZCA 330; (2017) 24 PRNZ 379 (CA) at [20].