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

CIV 2006-404-6687

UNDER the Companies Act 1993 and under Part IV
High Court Rules

IN THE MATTER OF the liquidation of WILLIAMS
INVESTMENT GROUP LIMITED (IN
LIQUIDATION)

BETWEEN ESOON LIMITED
Plaintiff

AND RORY IAIN GRIEVE AND PETER
REGINALD JOLLANDS
First Defendants

AND WILLIAMS INVESTMENT GROUP
LIMITED (IN LIQUIDATION)
Second Defendant

Hearing: 7 February 2007

Counsel: W A McCartney for Plaintiff
P Collins for Defendants

Judgment: 7 February 2007

(ORAL) JUDGMENT OF HEATH J

Solicitors:

Thinn & Co, Auckland
Glaister Ennor, Auckland

Counsel:

W A McCartney, Auckland

Introduction

[1] Williams Investment Group Ltd (the company) carried on business as a tiling and water proofing supplier and contractor. Since 2004, it undertook a good deal of business with Esoon Ltd. Problems arose when, in early 2006, the company failed to pay the whole of invoiced amounts for January and February 2006 to Esoon.

[2] An Adjudication was held, under the provisions of the Construction Contracts Act 2002. The Adjudicator, Mr R J Green, found that the company was liable to pay to Esoon a total sum of \$90,395.86, together with any further amounts that may need to be brought to account to deal with the costs of adjudication.

[3] No steps were taken by the company, subsequent to the Adjudicator's determination of 18 August 2006, to challenge that decision.

[4] On 11 September 2006, at 3pm, the shareholders of the company passed a resolution appointing Messrs Jollands and Grieve as joint and several liquidators of the company. The liquidation commenced at that time.

The set off issue

[5] Esoon Ltd provided a proof of debt to the liquidators (dated 25 September 2006) in which a debt for the sum of \$90,395.86 was claimed, based on the adjudication determination dated 18 August 2006.

[6] Apparently on the same day, 25 September 2006, the liquidators wrote to the solicitors for Esoon referring to its claims. The liquidators declined to accept the claim made by Esoon, apparently taking the view that they were entitled to review all aspects of the claims and cross claims irrespective of the adjudication that had occurred under the Construction Contracts Act.

[7] The liquidators concluded that there was a right to set off in respect of invoices rendered by the company allegedly to Esoon. As a result, on 11 October

2006, the liquidators took the view that the net amount due to Esoon by the company totalled \$849.25. That conclusion was notified to the solicitors for Esoon that day. The liquidators said:

We acknowledge receipt of your facsimile dated 2nd October 2006. We respond as follows:

1. We note your comments that you are receiving instructions from the director of Esoon Limited, Mr Alex Soon.
2. We again point out that you have conflict of interest and therefore are unable to be appointed liquidator of the company that is already in liquidation.
3. Your request for a creditors meeting is vexatious and therefore rejected.
4. Esoon Limited is indebted to the company in the amount \$89,546.61.
5. Pursuant to s304(3) we hereby advise you that your claim for \$90,395.86 has been rejected.
6. Pursuant to s310(b) we hereby advise that the amount owing by Esoon Limited in the amount of \$89,546.61 has been set off against the claim of \$90,395.86.
7. Your client's debt in the liquidation has been entered at \$849.25.

[8] Esoon issued proceedings challenging the liquidator's decision to admit its debt only to the extent of the set off sum.

[9] In order to justify set off in a liquidation it is necessary to establish "mutual credits, mutual debts or other mutual dealings between a company and a person who works" to have a claim admitted in a liquidation: see s310(1) Companies Act 1993. The liquidators now accept as a matter of fact that there was no mutuality.

[10] In those circumstances, I am satisfied that the claim for an order reversing the decision of the liquidators and directing them to admit the claim in the sum determined by the Adjudicator must succeed.

Consequential issues

[11] Consequential orders have been sought.

[12] One related to the convening of a meeting of creditors. I do not discuss that as the issue is moot. No good purpose would be served by considering the circumstances in which that claim arose, particularly as it may be relevant to a subsequent factual determination that may need to be made on another aspect of the claim.

[13] It is accepted that the present liquidators intend to resign. They have evidenced an intention to do so and not to oppose the appointment of Mr Thinn as liquidator in their place.

[14] However, the concerns expressed by Esoon as to the present liquidators' conduct arises primarily from the closeness of association between the shareholders appointing the liquidators and their role as independent stewards of company assets. The speed with which the liquidators acted to reject the bulk of the Esoon claim, coupled with alleged lack of investigation of the alleged cross claim gave cause for Esoon to consider that the liquidators acted partially.

[15] Similarly, given Mr McCartney's indication for Esoon that an alternative liquidator is sought to investigate the conduct of the principals of the company in liquidation and the conduct of the liquidation itself, it may be inappropriate to appoint anyone as liquidator who has a close association with Esoon. Mr Thinn is the solicitor for Esoon. The same perception of partiality might arise.

[16] It is important that any liquidator appointed by shareholders (or for that matter any liquidator appointed) be seen to have the impartiality required to carry out his or her duties under the Companies Act 1993.

Costs

[17] Mr McCartney pursued a claim for indemnity costs against the liquidators personally, based on their alleged partial actions. Although the liquidators have responded in part to those allegations they have done so in the context of it arising as tangential to the substantive issues on the claim.

[18] I am not prepared to make adverse findings against the liquidators without them having a proper opportunity to explain their conduct. For, however the claim may be formulated, it amounts to an allegation that the liquidators have acted in bad faith and partially.

[19] I am satisfied, however, that there is *prima facie* evidence that needs to be investigated further as to partiality. For that reason, I grant leave to Esoon (as a creditor of the company) to make an application (through an Amended Statement of Claim) under either s 284(1)(e) or (f) of the Companies Act 1993.

[20] Mr McCartney sensibly recognises that a replacement liquidator may be capable of addressing the issues that might otherwise arise under s 284(e) or (f). In those circumstances, I do not intend to put the parties to the cost of filing additional papers at this stage. Instead, I will grant leave and deal with timetabling directions at a further case management conference should those issues be pursued.

[21] I would envisage requiring an Amended Statement of Claim dealing with the particulars of any s 284(1)(e) and/or (f) application and an affidavit in support specifically addressing those issues and the indemnity costs issues which are raised by the existing pleadings. That would provide an opportunity for the liquidators to respond fully by stating what they did and why.

[22] Only in that way, can the Court make a proper determination on whether the liquidators acted appropriately or not. Nothing I have said in this judgment should be taken as conveying a view either way as to the propriety of their actions.

Result

[23] For the reasons given, I make the following orders:

- a) The liquidators decision of 11 October 2006 rejecting the claim of Esoon in part and admitting it in the sum of \$849.25 is set aside. The liquidators are directed to admit Esoon's claim in the sum of \$90,395.86.
- b) Costs are awarded against the company on a 2B basis together with reasonable disbursements. Those costs become a debt provable in the company liquidation.
- c) Leave is granted to Esoon to make an application under s 284(1)(e) and/or (f) of the Companies Act 1993. If either application is to be pursued I will make timetabling directions at a case management conference to be convened by the Registrar at 9am, one day during the week of 12 March 2007. Once that date has been allocated counsel should be advised forthwith.
- d) On or before 23 February 2007, a notice of resignation by the existing liquidators should be filed and a consent to act on behalf of a replacement liquidator should be filed. On those papers being referred to me I shall make an order appointing new liquidators.

I record my comments to counsel that the proposed liquidator should be independent and, if possible, relatively senior given the tasks that will need to be undertaken in reviewing the actions of the present liquidators.

- e) The claim for indemnity costs made in the existing Amended Statement of Claim is expressly reserved. Timetabling directions will be made at the same conference should that claim be pursued.

P R Heath J