

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

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

**CIV 2016-044-0239
[2019] NZHC 376**

UNDER the Patents Act 1953, the Patents Act 2013,
the Trade Marks Act 2002, the Fair Trading
Act 1986

IN THE MATTER of a claim for breach of contract

BETWEEN JK TRADING LIMITED
Plaintiff and first counterclaim defendant

AND RIMPRO-TEC LIMITED
(IN LIQUIDATION)
Defendant and counterclaim plaintiff

KENNETH JOHN QUIGLEY
Second counterclaim defendant

Hearing: 8 March 2019

Appearances: E St John for the plaintiff
S D Campbell and J R Halligan for the defendant and
counterclaim plaintiff

Judgment: 8 March 2019

JUDGMENT OF JAGOSE J

*This judgment is delivered by me on 8 March 2019 at 4.00 pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

Counsel/Solicitors:
Eugene St John, Barrister, Auckland
Wynn Williams, Auckland
Ewart & Ewart, Auckland

Background

[1] In October 2009, JK Trading Limited was licensed to manufacture and sell RimPro-Tec Limited's product in Australia and New Zealand. The product is a plastic composite fitting to protect car wheel rims from damage by contact with, typically, road curbs.

[2] By amended statement of claim dated 14 July 2016, JK Trading sought damages in the amount of \$200,000, arising from RimPro-Tec's alleged wrongful or unlawful repudiation of the licence on 27 October 2015. RimPro-Tec's eventual response, denying liability, raised a number of counterclaims claiming damages under diverse heads, including breaches of contract, patent, trademark, confidentiality and the Fair Trading Act 1986, and alleging injurious falsehoods by JK Trading's director, Kenneth Quigley. Those in turn are denied by JK Trading and Mr Quigley.

[3] The proceeding was set down for a 7-day trial, commencing 30 April 2018. But RimPro-Tec's directors put it into voluntary liquidation on 21 March 2018, the liquidators being Phillip Craig Macey and James Gregory Eden of New Plymouth. The liquidators describe a "solvent liquidation", RimPro-Tec's shareholders advancing funds to meet all creditors (excluding JK Trading), with a small book value (but unrealisable) surplus of assets over liabilities.

[4] Of note is the liquidators' first report's advice "the principal business of the company was licencing of manufacturing rights for wheel protection devices", and "licencing rights issued to the company were terminated in the year preceding liquidation". JK Trading's counsel, Eugene St John, draws the inference such transfer was a defensive move in the pre-existing litigation, and the liquidators' blasé reference to such dispatch of the company's primary asset raises serious questions.

[5] JK Trading is the only unrelated creditor to file in the liquidation. The other creditor filing a claim is Flostone Trust, being one of RimPro-Tec's shareholders. It is unclear if the Trust's claim relies on the shareholder advances, of which Mr Macey advises "the shareholders are not presently seeking repayment". In any event, there is no suggestion its claim remains outstanding.

Effect of liquidation

[6] Section 248(1)(c) of the Companies Act 1993 then has application, such that:

248 Effect of commencement of liquidation

(1) With effect from the commencement of the liquidation of a company,—

...

(c) unless the liquidator agrees or the court orders otherwise, a person must not—

(i) commence or continue legal proceedings against the company or in relation to its property; or

(ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company:

....

[7] In *Steel & Tube Co of New Zealand Ltd v Barker & Pollock Ltd & JBL-Sargent Construction Ltd*, Henry J said of a predecessor to s 248 “[t]he cardinal principle is that there is to be equality among the various creditors”,¹ and adopted the English Court of Appeal’s rationalisation of the comparable provision as being:²

... to ensure that when a company goes into liquidation the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company.

But there is some doubt about the ‘no advantage’ proposition, for no advantage in itself is obtained by bringing proceedings, or indeed obtaining judgment. Rather, the statutory process for liquidation of a company would be undermined if creditors nonetheless could launch or maintain proceedings against it. A careful review of decisions under the analogous Australian provision concluded the object was to prefer the expediency of the statutory proof of debt procedure, unless there was some good

¹ *Steel & Tube Co of New Zealand Ltd v Barker & Pollock Ltd & JBL-Sargent Construction Ltd* [1973] 2 NZLR 30 (SC) at 32.

² *Langley Constructions (Brixham) Ltd v Wells* [1969] 1 WLR 503 (CA); [1969] 2 All ER 46 at 47.

reason to depart from it.³ That approach now is endorsed in New Zealand, and serves to inform the Court's considerations on applications for leave.⁴

The present application

[8] JK Trading made its claim for damages as an unsecured creditor in the liquidation. That was rejected by the liquidators. By application of 21 September 2018, JK Trading now applies for leave under s 248(1)(c) to continue its proceeding against RimPro-Tec.

[9] JK Trading originally applied also in this proceeding under s 284 to review the liquidators' rejection. That was opposed on grounds including the application was out of time, and could not establish any constituent debt or default by the liquidators. Objection also was taken to the form of the application, as being brought in the present proceeding, which this Court (by consent) directed be regularised. In the event, JK Trading abandoned its review application.

[10] The liquidators oppose JK Trading's application for leave to continue its proceeding. They say JK Trading would obtain a comparative advantage in the liquidation from the granting of leave; as a solvent liquidation, litigation would be wasteful; and the more appropriate procedure was for JK Trading to prove its claim in the liquidation (including by review, if pursued). They observe RimPro-Tec lacks funds to defend the proceeding or to satisfy any judgment debt, which is disproportionate to the time and expense of securing it, and note the shareholders have "agreed to advance limited funds to resist the application now made", which "continued support cannot be guaranteed". Further they say JK Trading has delayed in bringing its application, and the liquidation has concluded, but for the liquidators'

³ *Commonwealth of Australia v Davis Samuel Pty Ltd (No 5)* [2008] ACTSC 124, (2008) 68 ACSR 336 at [16], citing *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314 at 317.

⁴ *Hook v Gulf Harbour Development Ltd (in liq)* HC Auckland CIV 2002-404-1931, 23 November 2005 at [60], in reliance on *Clarence Holdings Ltd v Mount Albert TVs (1993) Ltd & Ors* (1999) 8 NZCLC 262,072, and *Century Mercantile Company v Auckland Provincial Fruitgrowers' Society Ltd* [1921] NZLR 272 at 276; *Commissioner of Inland Revenue (CIR) v Robertson* [2017] NZHC 31 (HC) at [114]. See also the collation of considerations for leave to be granted under s 248(1)(c) in *Satara Co-operative Group Ltd v Fus Ltd (in liq)* HC Napier CIV 2008-441-0856, 28 January 2010 at [5], especially *Fisher v Isbey* (1999) 13 PRNZ 182 at [19]. Some commentaries incorrectly assert the test is for leave is of "exceptional circumstances": *Company Law* (online looseleaf ed, Thomson Reuters) and *Insolvency Law and Practice* (looseleaf ed, Thomson Reuters) at CA248.03.

final report and removal of the company from the companies' register. Last, they say "the merits do not favour the granting of leave".

Discussion

[11] RimPro-Tec also raises a technical complaint about JK Trading's application itself, as inadequately asserting the grounds for the order sought and omitting entirely to refer to the empowering provision, and proposes in reliance on ancient authority the application be dismissed as irregular.⁵ While the application focuses on the discontinued review, it clearly identifies leave to continue is sought, as was foreshadowed in preceding memoranda. The grounds for such leave are sufficiently well-understood not to justify dismissal for irregularity, particularly when the contemporary approach is to regularise rather than to reject applications for exercise of the Court's discretion, as more closely meeting the Rules' objective of "just, speedy and inexpensive determination".⁶

[12] Turning to the application itself, this is not a case in which the putative creditor can be said to be avoiding the statutory process. JK Trading's claim was brought well in advance of RimPro-Tec's liquidation. There is at least a sense of convenient timing to the directors' actions, RimPro-Tec having unsuccessfully sought only days before to adjourn the 30 April 2018 trial, in reliance on JK Trading's delayed provision of evidence. An alternative fixture was not available until late February/mid-March 2019. Instead Justice Wylie directed RimPro-Tec's evidence be served by 30 March 2018. But RimPro-Tec went into voluntary liquidation on 21 March 2018.

[13] JK Trading then raised its claim in the liquidation. The liquidators' initial 29 May 2018 rejection of the claim was on grounds of "inadequate evidence". That scarcely is credible, given RimPro-Tec by that time had JK Trading's pleadings, discovery, and draft briefs of evidence for trial (including identification of documents for the common bundle), as well as its own responses. By letter of 6 August 2018, revisiting the issue on JK Trading's protest (and its solicitors' further supply of JK Trading's statement of claim and written statements), the liquidators' rejection now

⁵ *Reid v Bishop* (1885) 4 NZLR 222 (SC).

⁶ High Court Rules 2016 (HCR), r 1.2.

was on grounds “[c]omplex legal issues are raised but there is no definitive indication as to [RimPro-Tec’s] liability ... for any amount”. No mention is made of the liquidators’ assessment of the asset represented by RimPro-Tec’s counterclaim, which seems a relevant consideration.

[14] Given the liquidators’ recognition of ‘complex legal issues’ they are unable ‘definitively’ to determine, the opposition to JK Trading’s application is itself worthy of comment. It is opposition funded by RimPro-Tec’s shareholders, and sits uneasily with the liquidators’ obligations of independence and impartiality as between the two companies.⁷ Their urging JK Trading’s claim has no merit is incomplete and inaccurate,⁸ and irrelevant in any event.⁹

[15] From that perspective, the liquidators’ suggestion JK Trading now is obliged to follow the statutory process for review (on which they also say JK Trading is irrecoverably out of time), rather than to revert to its pre-existing proceeding, smacks of technicality. The liquidators’ original rejection of JK Trading’s claim was unsound, and their subsequent acknowledgement the issues for determination are beyond their capabilities means even timely review is pointless.¹⁰

[16] It may be a creditor’s failure to see the statutory process through to its conclusion, by seeking the Court’s review of liquidators’ rejection of a claim as wrong or unreasonable,¹¹ disentitles leave to commence or continue other proceedings against the company.¹² That particularly would be the case when leave is sought while

⁷ *Leucadia National Corp v Wilson Neill Ltd* HC Auckland CP365/94, 12 July 1996 at 18.

⁸ Mr Macey’s affidavit in opposition states “All I can say is I have reviewed the statement of claim, the statement of defence and the documents provided to me by . Neither liability nor quantum are clear to me from those d” [*sic*]. Presumably Mr Macey was intended at least to identify the final pleadings for trial – an amended statement of claim, a statement of defence and counterclaim, and the defence to the counterclaim – and the discovered documents and proposed briefs of evidence. Or it may be Mr Macey only had the documents supplied by JK Trading’s solicitors. But the absence of direct reference to those documents’ content as foundation for the liquidators’ conclusion is unhelpful.

⁹ *Satara Co-operative Group Ltd*, above n 4, at [5], citing *Brookers Company & Securities Law* at CA248.03(2)(d).

¹⁰ *Bastin Enterprises Limited v Graham* HC Auckland CIV 2008-404-4443, 4 November 2009 at [40].

¹¹ *Trinity Foundation (Services No 1) Ltd v Downey* CA193/05, 15 November 2016 (2006) 3 NZCCLR 401 at [23] and [31].

¹² *Sharnick Holdings Ltd (in liq) v Sharnick Investments Ltd (in liq)* HC Auckland M457-IM03, 4 August 2003 (2003) 9 NZCLC 263,294 at [24].

substantive steps remain to be taken in the liquidation. Expedience then should require the creditor's continued pursuit of the statutory process.¹³

[17] But the liquidators here say the liquidation essentially is concluded, and they provide me with no foundation to assess the prospective correctness or reasonableness of their rejection. In the face of JK Trading's clear amended claim, and RimPro-Tec's defence and counterclaim, I may infer – from Mr Macey's conclusory advice the liquidators “have undertaken a thorough investigation and could not, and cannot, discern a basis for the alleged debt” – the liquidators have no better evidence their rejection was correct and reasonable.¹⁴ Requiring JK Trading to pursue the statutory process to its end in those circumstances is only to put additional procedural hurdles to what was to be determined in the present proceeding.

[18] The responsible approach in such circumstances is illustrated by the liquidators in *Satara Co-operative Group Ltd*: “not in a position to decide the correctness or otherwise of the claim”, they took the view “it would be wrong to pre-empt the decision of the Court as to liability and quantum”.¹⁵ That is correlative to courts' acknowledgment liquidators should be left to fulfil their proper functions, unless wrong or unreasonable.

[19] In *Satara*, the Court granted leave to continue proceedings against a company in liquidation as “[the] more convenient method in this case to determine the plaintiff's claim to be an unsecured creditor of the company”.¹⁶ I find that also to be the case here.

[20] Given RimPro-Tec's surplus is only of minor and unrealisable book-value, I see no risk granting leave unfairly may dissipate its assets. Mr Macey confirms shareholder funds so far have supported the company. As in other cases, the proceeding may further be undefended, to go to formal proof, or the shareholders may advance further funds for RimPro-Tec's defence (and counterclaim).¹⁷

¹³ At [25].

¹⁴ *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153].

¹⁵ *Satara Co-operative Group Ltd*, above n 4, at [8].

¹⁶ At [9].

¹⁷ At [11], citing *McPhail v Durbridge Developments Ltd (in liq)* (1998) 8 NZCLC 261,610.

[21] Neither do I see JK Trading to obtain any improper advantage in pursuing its claim. By ‘improper advantage’, even if continuing to be a relevant consideration, usually is meant advantage over other creditors.¹⁸ Here, there are no other creditors; even if there were, any reduction in sums recoverable by them on account of JK Trading’s proven claim is not ‘disadvantageous’ in any meaningful sense.

[22] But the liquidators contend for JK Trading’s “comparative advantage” over RimPro-Tec, in undefended proceedings on which RimPro-Tec’s counterclaim is not available for set-off. That is unsustainable in circumstances in which the liquidators have a duty to act impartially in the interests of both companies. The liquidators cannot disclaim the counterclaim as a recoverable asset (as they must be taken to have done in the liquidation), while also asserting it against a prospective creditor’s recovery.

[23] So far as I can tell from the pleadings, JK Trading’s claim is “not clearly unsustainable”.¹⁹ It appears a reasonably orthodox claim for damages, in reliance on RimPro-Tec’s alleged repudiation of the licence. Beyond that is impermissibly to enquire into the merits.²⁰

[24] I am not prepared to be drawn into RimPro-Tec’s argument the licence only permitted JK Trading’s exploitation of RimPro-Tec’s intellectual property rights, such that JK Trading’s claims the product was not of merchantable quality or fit for purpose lack any foundation. This is not the place to conduct a strike out or defendant’s summary judgment examination of JK Trading’s claim. As in other cases, refusing JK Trading leave would be to prevent it establishing its claim (if it can), and to endorse the liquidators’ rejection of it without further enquiry.²¹ That is not “wasteful litigation” in the sense of superfluity meant by the cases.²² Instead, on the liquidators’

¹⁸ At [12], and see [7] above. See also *Fisher v Isbey*, above n 4, at [19(b)], citing *Langley Constructions*, above n 2.

¹⁹ *Fisher v Isbey*, above n 4, at [23], citing *Saimei v McKay* (1998) 6 NZBLC 102,611.

²⁰ *Satara Co-operative Group Ltd*, above n 4, at [5], citing *Brookers Company & Securities Law* at CA248.03(2)(d).

²¹ At [12], citing *Pacific Produce Co Ltd v Franklin Co-op Growers Ltd (in liq)* [1969] NZLR 65 (CA).

²² *Fisher v Isbey*, above n 4, at [19(c)], citing *McPhail v Durbridge Developments Ltd (in liq)*, above n 17.

rejection of JK Trading’s claim, it is ensuring the issues may be determined in the forum best suited to their disposition.²³

[25] JK Trading is entitled to risk its own non-recovery against RimPro-Tec. Although fruitlessness of the endeavour previously was seen as a disqualifying factor,²⁴ the better view is – once liquidators have rejected a claim and substantially concluded the liquidation, and absent prejudice to other creditors, and/or without otherwise unduly dissipating such funds as the company may have – the fact of an arguable case for relief is a sufficient threshold for leave to be granted to commence or continue proceedings against a company in liquidation.²⁵

[26] Last, I do not see any disqualifying delay.²⁶ By ‘delay’ is meant as having “a significant impact on the orderly winding up of the company”.²⁷ On the liquidators’ own account, there is nothing left to do but to make their final report and seek RimPro-Tec’s removal from the register. Even if removed from the register, a grant of leave to JK Trading would justify RimPro-Tec’s restoration. In all but form, and subject to JK Trading’s proceeding, RimPro-Tec has been wound up.

[27] Particularly in the context of the pre-existing proceeding and the all but concluded liquidation, seven weeks between the liquidators’ ultimate rejection of JK Trading’s claim, and its bringing the present application, is not material. That only four weeks is allowed for seeking review of liquidators’ decisions is not significant; that is to assist with the orderly dispatch of liquidations. Again, nothing here substantively affects the liquidation.

Result

[28] JK Trading has leave to continue this proceeding against RimPro-Tec.

²³ *Pacific Produce Co Ltd*, above n 21, at 68; see also *Bastin Enterprises Ltd*, above n 10, at [40].

²⁴ *Johnson v CBD Real Estate Ltd (in liq)* (1999) 14 PRNZ 320 at 322.

²⁵ *DHC Assets Ltd v Toon* [2016] NZHC 140 at [9] and [14]. See also *Hsu v Moore Stephens Markhams Ltd* [2014] NZHC 961 at [26].

²⁶ *Birchall v Project Works Construction Ltd (in liq)* (2004) 9 NZCLC 263,547 at [24], citing *McPhail v Durbridge Developments Ltd (in liq)*, above n 17.

²⁷ *McPhail v Durbridge Developments Ltd (in liq)*, above n 17, at 261,614.

Costs

[29] As the successful party, JK Trading is in principle entitled to its costs from RimPro-Tec.²⁸ Mr St John initially sought costs against the liquidators personally, but accepted on reflection JK Trading here required the Court's leave, and bore the onus of satisfying the Court such should be granted, which threshold was not materially increased by active opposition. The corollary of that concession is JK Trading should bear its own costs, as I hold.²⁹

—Jagose J

²⁸ HCR 14.2(1)(a).

²⁹ HCR 14.7(g).