

IN THE SUPREME COURT OF NEW ZEALAND

SC 139/2013
[2014] NZSC 21

BETWEEN GIBBSTON DOWNS WINES LIMITED
Applicant

AND PROPERTY VENTURES LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)
Respondent

SC 140/2013

BETWEEN SPINACH DESIGN LIMITED
Applicant

AND PROPERTY VENTURES LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)
Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: K W Clay for Applicants
K P Sullivan for Respondent

Judgment: 17 March 2014

JUDGMENT OF THE COURT

A The applications for leave to appeal are dismissed.

B The applicants, jointly and severally, must pay the respondent costs in the amount of \$5,000 plus all reasonable disbursements to be fixed if necessary by the Registrar.

REASONS

[1] The proposed appeals arise out of the refusal by Associate Judge Osborne to set aside statutory demands issued by Property Ventures Ltd (in receivership and liquidation) (PVL) against Gibbston Downs Wines Ltd (GDWL) and Spinach Design

Ltd (SDL).¹ The statutory demands in question were issued on the instructions of the liquidator of PVL. The underlying debts were subject to a general security agreement (GSA) between PVL and Hanover Finance Ltd, which was later assigned to Allied Farmers Investments Ltd and under which receivers had been appointed.

[2] The primary issue in the proposed appeal is whether the liquidator was entitled to initiate proceedings to recover the debts owed by GDWL and SDL. The Associate Judge and the Court of Appeal² concluded that he was so entitled, albeit for different reasons. The arguments advanced in those courts very much focused on the relevant provisions of the Companies Act 1993, and in particular, ss 248, 253 and 254. In the submissions advanced in this Court, the applicant now also relies on the contention that by reason of the wording of the GSA and s 50 of the Property Law Act 2007, there had been an absolute assignment of the debts to the financier with the result that PVL had no entitlement to enforce them. This latter argument was not advanced in the High Court and although apparently mentioned in argument in the Court of Appeal, it was not addressed by that Court.

[3] A secondary and procedural issue relates to the decision of the Court of Appeal to admit on appeal an affidavit from one of the receivers which confirmed that the receivers did intend to take steps to recover the debt owed by GDWL and were content for the liquidator to do so (on the basis that there would be due accounting in respect of any recovery). GDWL maintains that the Court was wrong to admit the affidavit and also wrong in not allowing GDWL an appropriate opportunity to file rebutting evidence.

[4] There have been some developments since Associate Judge Osborne released his judgments on 21 December 2012. In particular:

- (a) As a condition of a stay granted by the Associate Judge, GDWL has lodged a statement with the High Court as to its financial position,

¹ *Gibbston Downs Wines Ltd v Property Ventures Ltd (in rec and liq)* [2012] NZHC 3592; *Spinach Design Ltd v Property Ventures Ltd (in rec and liq)* [2012] NZHC 3594.

² *Gibbston Downs Wines Ltd v Property Ventures Ltd (in rec and liq)* [2013] NZCA 546.

which makes it clear that it is insolvent (with an estimated deficiency of approximately \$2.8m);³

- (b) In March 2013, SDL settled with the receivers of PVL with the result that all that is in issue in the proposed appeal are costs made in the High Court and perhaps the Court of Appeal;
- (c) The debts and the GSA have been assigned by Allied Farmers Investments Ltd to SPF No.10 Ltd and the receivership has been terminated;
- (d) The liquidation application in respect of GDWL has been set down for hearing on 19 March 2014; and
- (e) SPF No.10 Ltd supports the actions of the liquidator.

[5] There was scope for genuine argument as to the entitlement of the liquidator to initiate recovery proceedings in relation to the debts. But the question whether leave should be granted to GDWL falls to be determined in a very particular context in which (a) there is no longer any challenge to the debt, (b) it is clear that GDWL is insolvent, and (c) the secured creditor supports the liquidation application. Given these considerations, we conclude that the proposed appeal does not relevantly involve matters of general or public importance or commercial significance. The position is generally similar in respect of SDL, albeit that our conclusion is reinforced by the consideration that it is only costs which are now in issue.

[6] We see no appearance of a miscarriage of justice in relation to either the conclusions reached or the procedural issues associated with the evidence admitted in the Court of Appeal.

[7] Accordingly, the applications for leave to appeal are dismissed.

Solicitors:
Canterbury Legal Services Limited, Christchurch for Applicants
Luke Cunningham & Clere, Wellington for Respondent

³ *Property Ventures Ltd (in rec and liq) v Gibbston Downs Wines Ltd* [2013] NZHC 781.