IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-001311
[2012] NZHC 3592

BETWEEN	GIBBSTON DOWNS WINES LIMITED Applicant
AND	PROPERTY VENTURES LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Respondent

Hearing: 12 November 2012

Appearances: K W Clay for Applicant
K P Sullivan for Respondent

Judgment: 21 December 2012

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to setting aside a statutory demand]

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[1] Property Ventures (the respondent company) is in receivership and in liquidation. It was the central company of the property development ventures formerly controlled by David Henderson of Christchurch.

[2] Receivers of Property Ventures were appointed on 5 March 2010 by a charge-holder.

[3] An order was made putting Property Ventures into liquidation on 27 July 2010. Robert B Walker, a Wellington chartered accountant was appointed liquidator. The order was stayed pending an appeal by Property Ventures to the Court of Appeal. Property Ventures subsequently withdrew its appeal and the liquidation proceeded.

[4] A considerable number of other "Henderson companies" were also put in liquidation, before and after Property Ventures. Mr Walker is the liquidator of a number of them.

[5] Mr Walker deposes that after some resistance from those involved with the documents of Property Ventures and related companies he was able to obtain relevant records including the general ledgers and some bank statements. He was then able to track a number of payments which he considered Property Ventures should recover.

[6] He caused Property Ventures (in receivership and in liquidation) to issue statutory demands in relation to particular payments.

[7] This case concerns a demand for $1,520,123.03.

[8] Gibbston applies to set aside the demand. At the same time as hearing this application, I heard a parallel application by Spinach Design Ltd in relation to which I am contemporaneously delivering a separate judgment (*Spinach Design Ltd v Property Ventures Ltd* (in receivership and liquidation).[1]

The approach to the setting aside jurisdiction

[9] Section 290(4)(a) Companies Act 1993 provides:

> **290 Court may set aside statutory demand**
> ...
>
> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
>
> (a) There is a substantial dispute whether or not the debt is owing or is due; or
>
> ...
>
> (c) The demand ought to be set aside on other grounds.

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[1] *Spinach Design Ltd v Property Ventures Ltd* [2012] NZHC 3594.

[10] Section 291(1) provides:

> **291 Additional powers of Court on application to set aside statutory demand**
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> (1) If, on the hearing of an application under section 290 of this Act, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute, or is not subject to a counterclaim, set-off, or cross-demand, the Court may—
>
> (a) Order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or
>
> (b) Dismiss the application and forthwith make an order under section 241(4) of this Act putting the company into liquidation,—
>
> on the ground that the company is unable to pay its debts.

[11] For the purposes of this hearing I adopt as a general approach to the exercise of this jurisdiction these 5 principles –

- The applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt.

- The mere assertion that the dispute exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.

- If such material is available the dispute should normally be resolved other than by means of proceedings in the Court's Companies Act jurisdiction.

- An applicant must establish that any counterclaim, cross demand or set-off is reasonably arguable in all the circumstances.

- It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

[12] For this formulation of the applicable principles, I acknowledge the editors of Brookers Insolvency Law and Practice CA290.02(1).

Gibbston's grounds of application

[13] Gibbston in an amended application identifies three grounds upon which it says the statutory demand should be set aside, namely:

(a) There is a substantial dispute as to whether or not the debt specified in the demand is owing or due;

(b) The liquidator of Property Ventures has no authority to issue the statutory demand.

(c) There was misconduct on the part of the liquidator which constitutes "other grounds" under s 290(4)(c) for setting aside.

The statutory demand

[14] In electronic files of Property Ventures which the liquidator retrieved, he identified spreadsheets in which trial balances appeared. The trial balance of Property Ventures as at 31 March 2008 records an advance in the amount of $1,541,019 to Gibbston. The trial balance of Gibbston for the same period shows that it has a liability to Property Ventures in the same amount.

[15] The liquidator has produced copies of those records and also copies of the general ledgers for both Property Ventures and Gibbston for the years to 31 March 2007 and 31 March 2008. They indicate the detailed composition of the $1,541,019.

[16] The liquidator then reviewed additional payments and credits between the two entities after 31 March 2008, which gave an altered total of $1,520,123.03.

[17] In Property Ventures' statements, this is recorded as an advance repayable upon demand.

[18] The liquidator, after finally having obtained Property Ventures' records, was in a position to deal with the advance by June 2012.

[19] On 8 June 2012, he wrote to Ian Hyndman, a director of Gibbston, explaining his position and his role in investigating the affairs of Property Ventures. He made demand for payment of the sum of $1,520,123.03.

[20] Mr Hyndman responded to the liquidator's employee by email stating:

> I will have nothing to do with Walker, he is a crook and acts very unprofessionally in these matters. Having taken legal advice please do not send me any further correspondence.

[21] The liquidator then issued the statutory demand, which Gibbston met by this application.

[22] In his notice of opposition to the Gibbston application, the liquidator says that the application should be dismissed and that an order should be made under ss 291(1)(b) and 241(4) Companies Act placing Gibbston into liquidation.

[23] The issues in relation to the demand accordingly are:

1. Did the liquidator of Property Ventures have authority to issue the statutory demand?

2. Has Gibbston established that there is a substantial dispute whether or not the debt is owing or is due so that the demand should be set aside?

3. Has there been misconduct on the part of the liquidator which justifies setting aside?

4. If the demand is not set aside, should the company be placed into liquidation (rather than given time to pay)?

The issue of the liquidator's authority

The factual setting

[24] Property Ventures' receivers were appointed four months before the company was put into liquidation. Gibbston asserts that the relevant charge over the companies' assets covers (through a charge over accounts receivable and inventory) any debt owing to Property Ventures. That is not challenged by Property Ventures.

Gibbston's argument that the liquidator has no authority to make the demand

[25] Mr Clay's analysis of the legal position concerning assets of Property Ventures began (as did Mr Sullivan's for Property Ventures) with s 248 of the Act, which provides:

> **248 Effect of commencement of liquidation**
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> (1) With effect from the commencement of the liquidation of a company,—
>
> (a) The liquidator has custody and control of the company's assets:
>
> (b) The directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part of this Act:
>
> (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:
>
> (d) Unless the Court orders otherwise, a share in the company must not be transferred:
>
> (e) An alteration must not be made to the rights or liabilities of a shareholder of the company:
>
> (f) A shareholder must not exercise a power under the constitution of the company or this Act except for the purposes of this Part of this Act:

(g) The constitution of the company must not be altered.

(2) Subsection (1) of this section does not affect the right of a secured creditor, subject to section 305 of this Act, to take possession of, and realise or otherwise deal with, property of the company over which that creditor has a charge.

[26] Mr Clay placed emphasis upon the protection of the secured charge-holders' rights under s 248(2). From that starting point, Mr Clay submitted that in the context of a liquidation, the company's assets do not include assets of the company subject to a charge. A proposition of law to that exact effect is to be found in *Morison's Company Law.*[2]

[27] Again adopting the commentary from Brookers Insolvency Law and Practice, Mr Clay noted the contrast between the liquidation of a company on the one hand, in which the assets of the company are not vested in the liquidator, and adjudication of an individual in bankruptcy, in which the assets of the insolvent vest in the assignee.[3]

[28] Mr Clay referred to commentary (particularly Blanchard and Gedye's *The Law of Private Receivers of Companies in New Zealand*)[4] and case law supporting the proposition that a secured creditor is independent of the liquidator and enforces a right, not against a company, but to the secured creditor's own property: *Re David Lloyd & Co;*[5] and *Re Aro Co Ltd.*[6] Quoting from Blanchard & Gedye, Mr Clay observed that the secured creditor is entitled to stand outside the winding up and to rely upon his security – the property charged by the security agreement is not the absolute property of the company.[7] From the same source, Mr Clay submitted that the receiver's power to hold and dispose of the company's assets that are subject to the charge, using the company's name for that purpose, is undiminished, just as is the mortgagee's power of sale.[8] He observed that the receiver of a company in

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2 *Morison's Company Law* LexisNexis online edition at [53.35](b).
3 Brookers Insolvency Law and Practice at CA248.01.
4 P Blanchard & M Gedye, *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [12.05].
5 *Re David Lloyd & Co* (1877) 6 ChD 339.
6 *Re Aro Co Ltd* [1980] Ch 196 at 204.
7 Blanchard & Gedye at [12.05] pg 351.
8 Ibid.

liquidation is entitled to continued custody and control of the charged assets and is entitled to realise and apply the proceeds towards the secured debt.[9]

[29] Finally, in terms of commentaries, Mr Clay referred to a passage in *Morison's Company Law* for this proposition:[10]

> The scheme of Part 16 of the Companies Act is to exclude from the ambit of the liquidation property which is subject to a charge. The Act contemplates that secured creditors will operate independently of the liquidation, unless they decide to surrender their security in terms of section 305(1)(c).

[30] Mr Sullivan placed particular reliance on s 254 of the Act so I will commence with a discussion of that provision and of the case which led to its enactment.

Re Your Size Fashions Ltd and Section 254 Companies Act

[31] In his response, Mr O'Sullivan for Property Ventures placed reliance upon s 254 of the Act which provides:

> **254 Liquidator not required to act in certain cases**
>
> Notwithstanding any other provisions of this Part of this Act,—
>
> (a) Except where the charge is surrendered or taken to be surrendered or redeemed under section 305 of this Act, a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge:
>
> (b) Where—
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> (i) A company is put into liquidation under section 241(2)(c) of this Act; and
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> (ii) The Official Assignee is the liquidator of the company; and
>
> (iii) The company has no assets available for distribution to creditors of the company,—
>
> the Official Assignee shall not be required, without the consent of the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act, to carry out any duty or exercise any power in connection with the liquidation if, to do so, would or would be likely to involve incurring any expense.

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9 Ibid at [12.08] pg 355.

10 *Morison's Company Law* at [53.35](b).

[32] Mr Sullivan submits that s 254 clearly states the liquidator has an election whether or not to take action in respect of assets that are the subject of a charge. This, he submits arises through the following sentence which may be extracted (shorn of qualifications) from s 254:

> ... a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge.

[33] It is clear that s 254 has as a central purpose the establishment or clarification of the liquidator's discretion not to act in certain cases of possible asset recovery. This is precisely what the heading to s 254 indicates. In considering the meaning of an enactment, the headings to sections are indications of the meaning: ss 5(2) and 5(3) Interpretation Act 1999.

[34] The purpose of an enactment, along with its text, is a principal source for ascertaining the meaning of the enactment: s 5(1). It is therefore appropriate to turn to the purpose of s 254.

[35] The enactment of s 254 was a consequence of the judgment of Williamson J in *Re Your Size Fashions Ltd.*[11] The way in which s 254 responded to that decision is fully discussed by the editors of Brooker's Insolvency Law and Practice at CA254.02, a summary which I adopt:

> **CA254.02 Liquidator's duties in relation to property subject to a charge**
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> Section 254(a) operates to reverse the result of *Re Your Size Fashions Ltd* [1990] 3 NZLR 727; (1990) 5 NZCLC 66,804. In that case the Official Assignee as liquidator considered that there was no realistic possibility of funds being available for unsecured creditors after satisfaction of the claims of the secured creditors. The Official Assignee therefore proposed to take no action in relation to the liquidation except as agent of the principal secured creditor, Westpac Banking Corp ("Westpac"), and pursuant to a suitable indemnity from Westpac. Westpac refused to appoint a receiver under its debenture (the costs of receivership being likely to outweigh any return to the bank), refused to appoint the Official Assignee as its agent, and sought a declaration from the Court that the Official Assignee as liquidator was obliged to act in the liquidation and to realise Westpac's security for its benefit.

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[11] *Re Your Size Fashions Ltd* [1990] 3 NZLR 727.

> The Court agreed with Westpac's submission. It held that the existence of a charge did not pass legal title or the possession of charged assets, and they remain company assets unless a receiver is appointed. If a secured creditor does not take steps in relation to assets that are subject to the security, the liquidator is obliged to collect those assets since they remain company assets. The ultimate duty of collecting and applying assets of the company remains with the Official Assignee as liquidator under r 58(1) Company (Winding Up) Rules 1956 (now repealed). The law did not allow the liquidator to relinquish these duties. The liquidator's powers were not necessarily restricted to acting in the interests of creditors who prove in a winding up.
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> Under s 254(a) the position is now quite different. The liquidator has the discretion to act in relation to a company's assets that are subject to a charge. This means secured creditors are under greater pressure to take steps to protect and realise their security, even if the return to them relative to the costs of the receivership is marginal. There is an exception to the new rule. Liquidators must still act in relation to company property that is subject to a charge where the charge has been surrendered or has been taken to be surrendered or redeemed under s 305.

[36] Thus, s 254 may properly be viewed as creating an exception to a liquidator's principal duty as defined by s 253. Section 254 clarifies, notwithstanding the principal duty as defined in the previous section, that the liquidator is not required to act in certain cases.

[37] Having regard to the context in which s 254 was enacted and having regard to the indication given by its heading, it would be an unusual result if Parliament were taken to have created in the liquidator a power or right of recovery which would not have existed but for s 254. The apparent purpose of s 254 is to create not an addition to the liquidator's powers but rather an exception to the liquidator's principal duty. Had it been necessary, I would almost certainly have decided that s 254 was not a distinct source of a liquidator's powers. In particular, that it is not a distinct source of a liquidator's right to pursue by statutory demand a debt owed to the company but the subject of a charge in favour of the chargeholder. As, for reasons I will come to, I will be finding that the liquidator has that power but for other reasons, it is not necessary that I decide the precise limits of s 254 and I do not do so. That said, s 254 may, through the express reference to a discretion to carry out any duty or exercise any power in relation to property that is subject to a charge, may be taken as recognising that powers may exist in relation to charged property, even where the charge has not been surrendered or taken to be surrendered or redeemed under s 305 of the Act. By s 254(a), the liquidator must act to pursue property which was

previously the subject of a charge where the chargeholder has surrendered the charge or the charge is taken to be surrendered or redeemed under s 305. The consequence of surrender under s 305 is that the property is now available for the general benefit of creditors, with the chargeholder able only to claim as an unsecured creditor for its whole debt.

[38] On the other hand, s 254 recognises in the liquidator a discretion to carry out any duty or exercise any power in relation to property which is the subject of the charge which is not covered by the "surrender" aspect of s 254(a).

[39] In other words, the residual situation referred to in s 254 is one in which the chargeholder continues to have its charge over the property and continues to have its right to realise the property, but has not yet realised the property.

[40] The fact that Parliament has legislatively recognised the possibility of the liquidator having in that situation a power in relation to the property that remains subject to the charge is some reinforcement at least of the likelihood that the liquidator has such a power in the first place.[12] So, too, is the observation of this Court in *Sintel-Com (in liq) v Telecom New Zealand Ltd* in which Rodney Hansen J stated (albeit in a different context, namely a liquidator's steps to retrieve a mortgaged property):[13]

> If a secured creditor has no interest in realising or surrendering a charged asset, the liquidator may take action provided the interests of the security holder are not prejudiced.

The balance of the liquidator's argument that he has authority to make the demand – s 254 Companies Act

[41] Mr Sullivan's central submission was that, as a matter of first principle flowing from the statutory regime (particularly ss 248 and 253 of the Act) and from the general law of contract with regard to debts, the liquidator has the right to have Property Ventures (in receivership and liquidation) issue a statutory demand.

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12 Parliament is presumed not to use words unnecessarily: *Laws of New Zealand, Statutes: Statutory Interpretation*, at 178.

13 *Sintel-Com (in liq) v Telecom New Zealand Ltd* (2006) 9 NZCLC 264,040 at [45].

Discussion as to authority

[42] The emphasis placed by Mr Clay upon an analysis of custody and control of the company assets is understandable but I find it not ultimately determinative of the rights involved in this case.

[43] This case concerns a demand by which Property Ventures requires payment of a debt due to it.

[44] The directors who might normally exercise the governance powers to cause a statutory demand to be issued have no power, following the liquidation, to have such a demand issued: s 248(1)(b) of the Act.

[45] It is made clear by s 248(1)(c)(i) of the Act that it is the liquidator (or the Court by order) who may authorise the commencement or continuation of legal proceedings in relation to the company's property and (by s 248(1)(c)(ii)) may enforce rights or remedies over property of the company.

[46] The fact that a secured creditor may have a charge over particular property of the company does not alter its status as "property of the company". This is made clear by, for instance, s 248(2) upon which Mr Clay placed substantial emphasis.[14] The charged property of the company does not form part of the assets of the liquidation but it remains the property of the company – this is the precise characterisation it is given in s 248(2).

[47] There may be many reasons why a secured creditor will delay or give up on pursuing a particular debt or other item of property. The Court has no evidence in this case of the secured creditor's thinking and it is not for the Court to speculate. On the other hand, the liquidator, with control of the company, has a broad responsibility to creditors; this includes an asset such as a debt. The secured creditor has its rights ahead of unsecured creditors. But the rights of the secured creditor in relation to this debt do not place it ahead of those with preferential claims under Schedule 7. Certain claims by employees and by the Commissioner of Inland

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[14] Above at [26].

Revenue, for instance, are preferential. Just as the liquidator has obligations to meet preferential claims (under s 312 of the Act), so too do receivers (see s 30 Receiverships Act 1993). Receivers may decide not to pursue a debt from which preferential creditors who have proved in the liquidation might be paid. In such circumstances, in the absence of a receiver's initiative, the company is entitled to pursue the claim. Of course, when a liquidator causes legal proceedings or similar recovery steps to be commenced, he or she does so in the name of the company and not of the liquidator: *Re Tongariro Hemp Co Ltd.*[15]

[48] Mr Clay relied on provisions and commentaries which emphasise the custody and control which receivers (as against liquidators) have over a charged asset. Such emphasis may mask the company's right to pursue its debts (subject to accounting to the receivers). Mr Clay did not identify any authority which takes away from the company, upon liquidation and receivership, the power to demand debts owing to it.

[49] I find that the company's power to pursue its debts has not been removed and that the statutory demand which the liquidator has caused to be issued is an effective statutory demand.

Does Property Ventures have a genuine and substantiated dispute as to the existence of the debt?

The competing positions

[50] Robert Walker, the liquidator of Property Ventures, says that the electronic files of Property Ventures show, in the trial balance as at 31 March 2008, an advance of $1,541,019 to Gibbston. The trial balance of Gibbston at the same date also records the advance as a liability. The general ledgers for the years ending 31 March 2007 and 31 March 2008 show the detailed composition of this sum. Additional payments and credits subsequent to 31 March 2008 reduced the total debt owing to

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15 *Re Tongariro Hemp Co Ltd* (1909) 12 GLR 7; *Laws of New Zealand: Companies* at [382] n 3. See also *Re Winterbottom, ex p Winterbottom* (1886) 18 QBD 446. Similarly the receiver, properly authorised by the security instrument, may commence winding-up proceeding in the name of the company: *Re Yates, National Mutual Life Association v Catco Developments Pty Ltd* (1989) 88 ALR 583.

Property Ventures by Gibbston at the date of liquidation (27 July 2010) to $1,520,123.03, the sum stated in the statutory demand.

[51] David Henderson, as a director of Gibbston and Property Ventures between November 2002 and November 2010, deposes that until about 2004 Property Ventures owned shares in a company now called Anthem Vineyards Limited, which owned the shares in Gibbston. Anthem Vineyards Ltd began life as Gibbston Ventures Ltd in 1998; changed its name to Anthem Ventures Ltd in 2004 and changed its name again to Anthem Vineyards Ltd in 2008 (for convenience I will generally refer to the company by the name "Anthem Ventures" regardless of the period being discussed). It was decided that a different entity, associated with Mr Henderson, should acquire the shares in Gibbston and the shares in Anthem Ventures. He says that about July or August 2007 a director of Property Ventures, Gordon Hansen, prepared and circulated a share purchase agreement for the shares in Gibbston. Mr Henderson produced a paper which he describes as a copy of the share purchase agreement. Under clause 2.2 it is provided, in this paper, that the consideration for the purchase of the shares "is the amount of all advances at any time made by or on behalf of the Vendor to the Company". The vendor is named in this paper as Anthem Ventures Limited (the name of Anthem Ltd as it was in 2007). Mr Henderson says that at that time there were not in fact any sums owing by Gibbston to Anthem Ventures.

[52] Mr Henderson then produced an email from the solicitor for members of the Property Ventures group, Grant Smith, to Austin Forbes QC (then also a director of Property Ventures), in which he advised that his firm had reviewed the agreement and from the vendor's perspective it appeared "fine". However, he anticipated that the purchaser would wish clause 2.2 to be amended to read thus:

> The consideration for the purchase of the shares shall be the amount of any monies owing by the company to the vendor, or any company, person or entity related to the vendor, at the settlement date ("the vendor advances"), and the said vendor advances shall be assigned to the purchaser or its nominee on the settlement date and the consideration for such assignment is included in the purchase price. The vendor shall execute a deed of assignment of the vendor advances to the purchaser, on such reasonable terms as the purchaser may require, if requested to do so by the purchaser.

[53] Mr Henderson deposed that the shares in Gibbston were transferred to a company of his called Anthem Limited ("Anthem") on 26 June 2009. Mr Henderson was the sole director of Gibbston and of Anthem at that time. He deposed that the Gibbston shares were acquired in accordance with the terms of the drafted agreement including the modification suggested by Mr Smith. He said this transfer was undertaken although the agreement was not signed, and the effect of those terms on transfer of the shares was that all sums owed to Property Ventures and its related companies were assigned to Anthem: therefore any debt claimed to be owed by Gibbston to Property Ventures is in fact a debt now owed by Gibbston to Anthem. He says that no accounts have been prepared for Property Ventures or the Property Ventures group of companies since the 2007 financial year.

[54] Mr Henderson says that, in terms of inter-company indebtedness, Anthem Ventures actually owed Gibbston in excess of $1.8 million. It appears that he considers that the consideration for Anthem Limited's purchase of the shares in Gibbston from Anthem Ventures was a debt of "$1.5m" which he says Gibbston owed to Property Ventures. As that was less than a debt which Anthem Ventures owed to Gibbston ($1.8m), Mr Henderson says that no cash needed to change hands. He explains the situation in this way –

> Based on Mr Walker's calculations this purchase price would be approximately $1,500,000.00, but as I have noted previously, AVL (the vendor company) in fact owed GDW in excess of $1,800,000.00 so no cash would need to change hands.

[55] Mr Walker, by reference to the general ledger of Gibbston as at 31 March 2007 says there were receivables of only $1,438,075, owed by nine debtors and this shows that Anthem Ventures did not owe Gibbston in excess of $1.8m, or, as he put it, anything remotely resembling such a sum. Anthem Ventures is shown as owing $147,030. Even if this figure is adjusted to include the subsequent financial year, in accordance with records produced by Mr Henderson, the total sum owing would have risen to $175,190. On that basis, Mr Walker says there is a further sum due from Anthem Ventures to Gibbston of $1,642,410. If so, he says that Gibbston's accounting records are seriously misstated and could not comply with s 194 of the Act, and that it is difficult to see what Anthem Ventures could have received in return for incurring a liability of this magnitude.

[56] Mr Walker then refers to Mr Henderson's assertion that the indebtedness of Gibbston has been assigned to Anthem Ventures. He says that this suggestion involves Property Ventures losing all of its claim against Gibbston for nothing in return. If that were the case, Property Ventures would have been oppressed and accordingly, pursuant to s 141 Companies Act, he has exercised the right of the company to void this purported transaction on the basis that it should have been reported to the shareholders, but was not.

[57] Mr Walker then says that in his view the clause suggested by Mr Smith in his email is at variance with basic economics, because the consideration for a purchase which is determined according to the value of the debt of the company being bought does not amount to an objectively determined price. He says that the price for shares should be determined by their value, dictated by the company's capacity to earn income. The price has nothing to do with the amount of the company's indebtedness.

[58] In summary, therefore, Mr Walker says that there is not a valid dispute in respect of the debt he maintains is owed by Gibbston to Property Ventures, for two reasons. First, the claim that Anthem Ventures owed in excess of $1.8m is supported neither by its own accounting records nor those of Gibbston. If there was any sum due then according to Gibbston's records it was under $0.2m.[16] Secondly, he expresses the view that a transaction which did not occur in accordance with the documents proffered, between Anthem Ventures and some other unnamed party, cannot bind Property Ventures so as to extinguish its right to collect the debt. Even if it were binding, this would be an act wholly oppressive of Property Ventures for the direct benefit of Mr Henderson personally, who owned Anthem Ventures, the ultimate purchaser of the shares and any such transaction would be void by any liquidator appointed to Property Ventures.

Discussion as to substantial dispute

[59] I turn to ask myself whether the matters raised by the applicant amount to a substantial dispute as to whether or not the debt is owing or is due. In doing so,

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[16] Precisely $175,190: see [55] above.

Gibbston is required to show a "fairly arguable basis" on which it is not liable on the demands: *United Homes (1988) Ltd v Workman.*[17] In examining this question I remind myself that, on the evidence provided, the balance of power in relation to understanding exactly how any transaction between companies related to Mr Henderson was consummated lies with Mr Henderson and those who were close to him and prepared to give evidence for him. By this I mean not only in relation to knowledge of the transaction but also particularly in relation to retrieving relevant records including the correspondence, emails, notes and formal documentation in which they would have participated.

[60] Mr Henderson, who was centrally involved in all these transactions, would have to accept that the parties involved in what was a major transaction perpetrated in 2009 an egregious failure of recording. Without cross-examination of those involved, it is not possible to reach a finding that those involved deliberately set out to fail to record the transaction between Gibbston and Mr Henderson's company, Anthem Limited, in 2009. But there is a difficulty in accepting that people involved in business of the nature and extent in this case accidentally failed to document the transaction. There are consequently very serious questions as to the reliability of what is now asserted for Gibbston.

[61] That reliability is able to be tested, even with the records that do exist, through Mr Walker's analysis of the general ledgers.[18] On the basis of the documents referred to and analysed by Mr Walker, the assertion by Mr Henderson (unsupported by financial statements or the like) that Gibbston's "$1.5m" debt to Property Ventures was effectively cancelled out (with no cash needing to change hands) by Anthem's $1.8 million debt to Gibbston is not satisfactorily supported by any evidence short of proof. To the contrary, Mr Walker's evidence and analysis indicates that the assertion of such a cancelling out is not a substantial argument on the evidence adduced.

[62] There is a further and arguably more fundamental weakness in Gibbston's case. This stems from the nature of the undocumented 2009 agreement as between

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17 *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447 at 451 (CA) per McGechan J delivering the judgment of the Court at 451-452.

18 Above at [50] and [55].

Gibbston and Anthem. There is no suggestion by those giving evidence for Gibbston that any person (corporate or individual) other than Gibbston and Anthem was a party to the agreement. As drafted (and this is the basis upon which Gibbston said the transaction proceeded), there was no provision for execution by anyone other than the vendor company and the purchaser company. The debt owed by Gibbston to Property Ventures (as established through both their respective ledgers and financial recording) was not a matter for assignment by Gibbston as debtor. The debt was an asset of Property Ventures. In the absence of any contractual commitment entered into by Property Ventures, it remained an asset of Property Ventures. So it remained when Property Ventures was placed in receivership and subsequently put into liquidation.

[63] There is no substantial argument against that conclusion.

[64] For these reasons I conclude that there is no substantial dispute whether or not the debt claimed by Property Ventures is owing and due.

The liquidator's conduct

[65] In its amended notice of application, Gibbston submitted that (even were it to fail on its initial grounds of application as to a substantial dispute as to the existence of the debt and as to a lack of authority on the part of the liquidator) the demand ought to be set aside on the basis of "other grounds" as permitted by s 290(4)(c) of the Act.

[66] That ground of application was particularised as relating to:

> [T]he manner in which Mr Walker has performed his duties as a liquidator which is to be the subject of an application to have Mr Walker removed as liquidator, and the legality of how evidence was obtained.

Gibbston's submissions and evidence

[67] Mr Clay commenced his submissions in relation to the conduct of the liquidator with the following passage which was cited in the judgment of Williamson

J in *Re Your Size Fashions Ltd.*[19] His Honour adopted with approval the following passage from *Gooch's case*,[20] in which the liquidator's role was described as follows:

> In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever. It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court.

[68] Mr Clay went on to submit that a liquidator owes a fiduciary duty to act in good faith towards its corporate principal, which duty encompasses the duty to act impartially. Support for that submission may be found in the judgment of Rodney Hansen J in *Consolidated Technologies Development (NZ) Ltd v McCullagh.*[21]

[69] Mr Clay then referred to evidence given by Mr Hyndman as to alleged conduct of the liquidator which has evidently aggrieved Mr Hyndman and others. The conduct is said to have led to a letter sent by the solicitors for two Henderson companies to Crown Law in February 2012. The context of that letter was the decision by the directors of Property Ventures (and another) to abandon appeals to the Court of Appeal which had been outstanding for more than a year (and had given rise to an extended stay of the implementation of Mr Walker's appointment as liquidator of Property Ventures (and another)). The letter recorded that it was the clients' intention to bring an application to have Mr Walker removed as liquidator and to have a replacement liquidator appointed.

[70] At the date of the hearing of Gibbston's application (12 November 2012) there was no evidence that such an application had been commenced.

[71] The concluding submission made by Mr Clay upon the basis of this evidence was that the liquidator's conduct established a fairly arguable basis that the statutory demand was being pursued for an ulterior motive and not one in accord with the functions and duties of a liquidator. The motive alleged was that the liquidator was

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19 Above, n 12 at 734.
20 *Gooch's case* (1872) 7 Ch App 207 at 211.
21 *Consolidated Technologies Development (NZ) Ltd v McCullagh* (2006) 3 NZCCLR 424 at [46].

in some way seeking through Property Ventures' statutory demand to interfere with a dispute between Gibbston and a person named Guthrey.

The liquidator's position

[72] The liquidator, understandably, elected not to engage in contested evidence as to allegations of misconduct and ulterior motive. This setting aside jurisdiction, primarily concerned with the arguability of a dispute in relation to the statutory demand, is not a context which lends itself to the resolution of disputes concerning parties' intentions and motives, except in the very clearest of cases.

Alternative consideration of liquidator's conduct – seizure of financial accounts

[73] As an alternative to reliance upon an allegation of collateral motives, Mr Clay submitted that it was an appropriate consideration for the Court in this case that:

> [T]here has been a substantial dispute as to whether material seized, (including financial accounts produced in this proceeding) fell within the authority of the search warrants. This is an issue which has been the subject of correspondence with the Police since June 2011. The Police have filed an application for an order as to the disposal of property in their possession to avoid any doubt as to the proper recipient of the documents.

Discussion - conduct

[74] This case is primarily concerned with the right (or otherwise) of a person which says it is a creditor to make demand of the debtor for payment. A due debt remains a due debt, whatever the creditor's motives in collecting it.

[75] The liquidator, with responsibility for establishing the accurate financial position of the company in liquidation, makes the best of the documents he or she is able to obtain, particularly where those involved in the governance and administration of the company failed in their responsibilities of record keeping. It is an argument without merit for the debtor to suggest that such genuine records as actually came into existence in relation to the financial affairs of the various

companies involved in the key transactions and within the group should not be relied upon in the statutory demand context.

[76] It is also an argument without merit to suggest, once Gibbston failed to establish a substantial argument that it was not indebted as claimed, that the liquidator ought not to have had Property Ventures issue the statutory demand by reason of alleged involvement with the person called Guthrey and Gibbston in other regards.

[77] The passages relied upon by Mr Clay in cases such as *Re Your Size Fashions Ltd* do not support some general proposition that Property Ventures (in receivership and liquidation) had to act with a degree of fairness or some sense of "fiduciary duty" toward a creditor such as Gibbston. Rather, the passages emphasise the importance and extent of the liquidator's responsibilities to the company in liquidation, as to its members and to its creditors. When the liquidator has Property Ventures issue a statutory demand for an undisputable debt, that can in no sense involve a dereliction of duty. The passage from *Gooch's* case, invoked by Mr Clay, is notable for the fact that it focussed on duties not to the company's debtors but rather to the company itself and to its members and creditors. But for a provision such as s 254 of the Companies Act and in the light of the common law position as enunciated by Williamson J in *Re Your Size Fashions Ltd,* there may previously have been a sustainable argument that a liquidator who failed to have such a demand issued may have been in dereliction of his or her fiduciary duty to the company and its members and creditors. As it is, s 254 of the Act makes it clear that the liquidator in this area has a discretion and is not obliged to act.

[78] If Gibbston has some issue with the liquidator in relation to what the liquidator himself has done, it is open to Gibbston to pursue that through appropriate application or complaint appropriate forums. If it transpires that the liquidator has in some way engaged in misconduct, the remedies available for that do not cut across the right of Property Ventures to recover debts owed to it. As it is, Gibbston, apart from exhibiting one letter threatening such steps, has given no evidence of any formal steps taken by Gibbston in relation to liquidator misconduct.

Section 291 of the Act – should Gibbston be wound up now?

[79] Mr Sullivan submitted that, in the event the Court dismissed Gibbston's application, Gibbston ought to be immediately placed into liquidation.

[80] Mr Sullivan referred to evidence given by Mr Hyndman (who filed both the original evidence in support of the application and supplementary evidence) that the debt owed to Gibbston's first-registered secured creditor alone amounts to $1,800,000. Mr Hyndman has provided no evidence of any income generated by Gibbston.

[81] Mr Sullivan asked the Court to accept that with Gibbston's debt to its secured creditor all Gibbston's assets will be thereby consumed leaving nothing to satisfy Property Ventures' claim.

[82] Mr Clay opposed the making of an order under s 291. He relied on three matters in particular:

(a) Other creditors ought to have the opportunity to oppose or support the winding up of Gibbston as the case may be;

(b) The debt in question is not a trade debt in the normal sense in that it arises as an inter-company debt within a group of companies;

(c) Mr Hyndman has deposed that so long as he remains the director in control of Gibbston, Gibbston will continue to have the support of its secured creditors.

[83] As was the case when Associate Judge Bell gave his judgment in *Aotearoa Kiwifruit Export Ltd v ANZ National Bank Ltd*,[22] I am not aware of any authoritative decision giving guidance on how the powers under s 291(1) of the Act should be exercised. As with his Honour, I would not generally make an immediate order

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[22] *Aotearoa Kiwifruit Export Ltd v ANZ National Bank Ltd* HC Tauranga CIV-2011-470-000697, 3 February 2012.

unless I regarded the company which is the subject of the application as effectively moribund.

[84] While I have little evidence as to the current circumstances and trading of Gibbston, it appears that it continues to have the support of its secured creditors and it has certainly not to this point been placed in receivership.

[85] Property Ventures will now have its right to issue a winding up application if Gibbston does not meet the statutory demand within the extended period I will allow. I do not consider this an appropriate case to cut across the usual procedure.

Costs

[86] At the conclusion of submissions, counsel both accepted that this is a case where costs ought to follow the event and that a 2B award would be appropriate.

[87] Counsel's view accords with my own view of the appropriate costs outcome.

Orders

[88] I order:

(a) The application (as amended) for an order setting aside the statutory demand dated 14 June 2012 is dismissed;

(b) Gibbston Downs Wines Ltd is to pay the debt referred to in the demand by 15 January 2013 and, in default of such payment, Property Ventures Limited (in receivership and in liquidation) may make an application to put Gibbston Downs Wines Ltd into liquidation;

(c) The applicant is to pay the respondent's costs in relation to this application on a 2B basis together with disbursements to be fixed by the Registrar, upon the basis of a one-half day hearing, (there being no certificate for counsel's reasonable costs of travel and accommodation

as those are to be allowed for and fixed in relation to CIV-2012-409-1605, the subject of the judgment in *Spinach Design Ltd v Property Ventures Ltd* [2012] NZHC 3594).

Associate Judge Osborne

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