

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA51/2008
[2008] NZCA 551**

BETWEEN ANGUS PROPERTIES (HB) LTD
Applicant

AND ROBERT BRUCE WALKER
Respondent

Hearing: 2 December 2008

Court: Glazebrook, Robertson and Arnold JJ

Counsel: J G Krebs for Applicant
K P Sullivan and D A Bleier for Respondent

Judgment: 11 December 2008 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to continue the appeal is declined.

**B The applicant is to pay the respondent costs for a standard application
on a band A basis and usual disbursements.**

REASONS OF THE COURT

(Given by Glazebrook J)

Introduction

[1] In April 2006, Angus Properties (HB) Ltd made a payment of \$60,000 to Rothschild Properties Limited (now in liquidation) as a “rental top-up”. Mr Walker,

who is the liquidator of Rothschild Properties, gave notice setting aside the payment on the basis that it was a voidable preference. Associate Judge Gendall on 21 December 2007 declined to order that the payment not be set aside.

[2] On 8 February 2008, Angus Properties filed a notice of appeal against the Associate Judge's decision. Angus Properties did not, however, apply for the allocation of a hearing date and did not file the case on appeal within six months (ie by 8 August 2008), meaning that its appeal is treated as having been abandoned under r 43(1) of the Court of Appeal (Civil) Rules 2005. Angus Properties applies for leave to extend the six month period. The application for the extension of time was filed within the three month period provided for in r 43.

Angus Properties' position

[3] The basis of the appeal that will be advanced if the application is successful is that the Associate Judge erred in two respects. First it is submitted that he was wrong to find that Rothschild Properties was insolvent at the relevant time. Secondly he was wrong in concluding that the payment was not made in the ordinary course of business. Angus Properties will seek to adduce new evidence with regard to these grounds but Mr Krebs conceded that the evidence would have been available to place before the Associate Judge. Mr Krebs also accepted that the solvency ground of appeal was not strong (even if the new evidence were admitted).

[4] With regard to the ordinary course of business ground of appeal, Angus Properties' position is that the Associate Judge failed to give proper weight to the fact that similar payments had been made to Angus Properties in the previous two years. Further, Rothschild Properties had not ceased trading three weeks before the payment at issue was made but had merely suspended trading to concentrate its efforts on arguing an appeal against a decision that it pay approximately \$250,000 in excise duty. Mr Krebs submitted that this ground of appeal is still arguable without the new evidence being admitted.

[5] Angus Properties says that its failure to comply with the six month time limit was due in part to its legal advisors having to gather further evidence for the appeal.

It also had to deal with the respondent's attempts to enforce the High Court judgment. In Mr Krebs' submission, it would be manifestly unjust for Angus Properties to be denied the opportunity to advance its appeal on the basis of the oversight of its representatives.

Mr Walker's position

[6] Mr Sullivan, for the liquidator, Mr Walker, recognised that a matter of administrative oversight, in particular by solicitors, will usually give rise to leave being given for a meritorious appeal to be continued. However, he submitted that this is not a case of simple oversight. He further submitted that the appeal has little prospect of success.

[7] Mr Sullivan submitted that the inevitable inference is that Angus Properties has indulged in delaying tactics to avoid the appeal being heard. Angus Properties must have been aware of the requirement to seek a hearing date within six months. In addition to the notice from this Court subsequent to filing advising it of the requirement to apply for a fixture within six months, as early as 8 April 2008 the liquidator's solicitors requested that this timeframe be truncated and the appeal be filed by 8 May 2008.

[8] On 30 May 2008 the liquidator's solicitors also asked that the appeal be prosecuted on a timely basis. On 11 July 2008 a demand was made to request the date for the hearing of the appeal, in response to Angus Properties' counsel's e-mail advising that a request for an appeal hearing would be filed in the following month. A further e-mail was sent on 22 July 2008 referring to the six months period almost having lapsed.

[9] The six month period expired on 11 August 2008 without any application for extension being made. A letter demanding the judgment sum and referring to the abandonment of the appeal was sent out on 21 August 2008. It was not for a further two months that the liquidator was notified of the application for leave, eight and a half months after the appeal was filed. Mr Sullivan pointed out that, even now, the

application for leave does not specify when the request for a fixture will be made. Instead, a further application is to be made for the filing of further evidence.

[10] As to the merits of the appeal, Mr Sullivan submitted that this is one of those rare cases where the arguments put forward by Angus Properties are so untenable that it should not be granted the indulgence of pursuing an appeal, with or without the new evidence which was available at the time and which, in Mr Sullivan's submission, does not significantly advance its position.

[11] The liquidator's position is that Rothschild Properties had ceased trading and had transferred or was to transfer all of its assets to related parties to avoid paying the debt duly owed to Customs. Rothschild Properties was clearly insolvent as a result of that debt. Mr Sullivan submitted that a payment to a related party in such circumstances cannot be in the ordinary course of business.

Evaluation

[12] We accept the liquidator's submission that there has not been an adequate explanation for the failure to file the case on appeal and to apply for a fixture within the six month period. There was also an unexplained delay in filing this application once the "oversight" had been pointed out.

[13] Angus Properties is now seeking an indulgence and the merits of the appeal are therefore relevant. We accept the liquidator's submission that the proposed appeal is wholly without merit. We can see no basis on which the new evidence, which would clearly have been available at trial, would be admissible on appeal. However, even assuming that evidence is admissible, the conclusion that Rothschild Properties was insolvent at the time of the payment is inevitable, given the debt due to Customs.

[14] As to the contention that the payment was in the ordinary course of business, it was made at a time when all of Rothschild Properties' trading assets had been transferred or were to be transferred out of the company. It was made to a company with identical shareholding after trading by Rothschild Properties had ceased (even if

allegedly temporarily). In addition, Angus Properties as a related party was fully aware of the debt owed to Customs by Rothschild Properties. In these circumstances the argument that the payment was in the ordinary course of business is unsustainable, whatever the circumstances of similar payments in the two previous years.

Result

[15] The application for leave to continue the appeal is declined.

[16] The applicant is to pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
McKay Hill, Napier for Appellant
DLA Phillips Fox, Wellington for Respondent