IN THE LOCAL COURT
LIVERPOOL

MAGISTRATE THOMAS

FRIDAY 2 JULY 2021

2020/00279260 - AMANDA ROMEO v TIGERLILY AUST PTY LIMITED TRADING AS TIGERLILY

PART HEARD

HIS HONOUR: Mr Donnelly, is your other side here?

DONNELLY: No, your Honour, unfortunately I'm not sure where--

HIS HONOUR: Are you expecting someone?

DONNELLY: I was expecting my friend to appear given your Honour's order on the last occasion.

HIS HONOUR: I think I said it was a matter for each party, I didn't expect - but someone is coming, aren't they?

DONNELLY: For the defendant, I'm not sure, your Honour. I'm in the Court's hands.

HIS HONOUR: Are you here on your own or have you got someone with you?

DONNELLY: Your Honour, no, my instructing solicitor is behind me.

HIS HONOUR: Perhaps Mr Romeo can make a phone call and just find out--

DONNELLY: Yes, your Honour--

HIS HONOUR: I would be surprised if no-one turns up. Yes, could you do that.

MATTER STOOD IN LIST

Mr Donnelly, Mr Romeo, did anything eventuate?

DONNELLY: Yes, your Honour, there's an update. I have instructions to mention the appearance for the defendant. There was a mistake on their end, they apologise to the Court. They thought because of COVID-19 that your Honour may have delayed the judgment and I indicated that I didn't think that was the case, but I said I was happy to mention--

HIS HONOUR: It did cross my mind, but if I was going to do that, Mr Donnelly, I would have got the Registry to advise the parties that's all so that's not a problem. Can I ask Mr Romeo again - so they just asked you to mention it. If they want to appear via AVL I'm happy for them to do that if they want to phone in but if they are happy for you to mention it not a problem.

DONNELLY: I got instructions from counsel for the defendant to mention it. I understand her solicitor is in a meeting.

MATTER STOOD IN LIST

HIS HONOUR: Returning to civil matter number 279260 of 2020 involving Amanda Romeo v Tigerlily Aust Pty Ltd, this is a judgment in relation to notice of motion brought by the defendant which was heard by me on 21 June. By statement of claim filed on 25 September 2020 the plaintiff in these proceedings sued the defendant for breach of an employment contract. By defence filed on 23 October 2020 the defendant denied the plaintiff's claim, and in preparation for a defended hearing on Monday 21 June the matter proceeded through the normal course for a matter in the general division including a number of mentions or call overs or directions before me and Abdul-Karim LCM on 17 May, 27 May and 8 June. The matter proceeded in that way including the exchange of evidence, being statements from a number of witnesses from both sides and the issue of subpoenas.

With the hearing date fast approaching the defendant on 11 June 2021, some ten days prior to the hearing date, being six working days prior to the hearing date, filed a notice of motion seeking orders that the plaintiff's statement of claim be dismissed pursuant to r 13.4 of the *Uniform Civil Procedure Rules*, or a permanent stay of proceedings pursuant to s 67 of the *Civil Procedure Act*, or leave to amend their defence. The defendant in the notice of motion also sought costs. Not surprisingly, and particularly having regard to its timing the plaintiff opposed the motion. Unfortunately, the Court did not have the time available to list the notice of motion prior to the allocated hearing date of 21 June and it was, whilst not formally, made returnable on the hearing date of 21 June.

The motion and the hearing came before me and it was agreed that having regard to the issues raised in the notice of motion that I should deal with the notice of motion initially as it had the possibility of affecting the substantive hearing. I proceeded to hear from Ms Bulut who appeared on behalf of the defendant, and Mr Donnelly who appeared on behalf of the plaintiff. The submissions made by counsel were complemented by written submissions, Mr Donnelly's being provided to me on 21 June and Ms Bulut's being received by me in response on 29 June, via the online registry, after she had the opportunity of considering those provided by Mr Donnelly.

In relation to her notice of motion Ms Bulut relied on two affidavits. An affidavit of Jenny Neckledon(?), affirmed on 20 June 2021 and an affidavit of John Farren-Price, affirmed 11 June 2021. Mr Donnelly relied on an affidavit of Anthony Romeo sworn on 18 June 2021. I should stress at this point that

this material or the affidavits relied upon by the parties in relation to this notice of motion but that the affidavit evidence for what I would describe as the substantive proceedings or the hearing proper had already been prepared, exchanged and filed. That arises in the unusual circumstances where the defendant, having done all those things that I have outlined in preparation for the hearing proper, now seeks to have the plaintiff's statement of claim dismissed or the proceedings stayed.

I should also note that whilst the defendants rely on an affidavit from John Farren-Price in relation to their notice of motion the same person has affirmed an affidavit as a witness in the substantive proceedings; see his affidavit sworn 3 May 2021 which is referred to in para 2 of his affidavit in relation to the notice of motion of 11 June 2021. In his affidavit of 3 May 2021 I note the witness sets out his background and experience in relation to his role at Crescent Capital as general counsel, and in particular since 2017 as it related to Tigerlily.

I note also that in para 10 he makes reference to how it became necessary to implement restructuring to prevent Tigerlily from entering into voluntary administration, and in para 11 says that Tigerlily went into voluntary administration in March 2020. The reason I highlight this evidence is because in his affidavit of 11 June 2021, at para 12, he says that it has only recently come to his attention that the plaintiff's claim is caught by the operation of the deed of company arrangement.

I have limited the use of this paragraph to evidence of what came to his attention recently and not to whether the *DOCA* operates in the way that he says that it does, but it is the reference to him only recently becoming aware that the *DOCA* may operate in a particular way, so as to substantially affect the progress of the plaintiff's claim, that causes this Court some concern. I find it difficult to accept that a person with the background, qualifications and experience of this witness, with his level of involvement in Tigerlily, would not have realised or understood or even maybe thought that the *DOCA* may or may not have had some role to play in these proceedings, or more importantly, possibly act in such a way so as to virtually prevent the plaintiff from even bringing this action.

I should make it clear that I am not suggesting that the witness has done this deliberately or that it is only raised now for some technical reason. There is nothing to suggest that this has occurred, but if it has been an oversight, which is what I understand is being suggested, then it is a major one and one that I would not have expected to occur in circumstances where the witness has had such a close involvement with Tigerlily and its 2020 voluntary administration. It is also not an oversight that is remedied or properly explained by the almost passing reference to it recently coming to his attention as he set out in para 12 of his affidavit of 11 June 2021. In my view whilst not crucial or critical it is an important factor for my consideration of the defendant's notice of motion which, as I have highlighted, effectively seeks to bring the plaintiff's claim to an early end, albeit not at an early stage of the proceedings and on the eve of the hearing proper.

In relation to the notice of motion the defendant obviously seeks to rely on the *DOCA* and says that its effect is to bar the plaintiff from bringing these proceedings. The evidence relied upon establishes that Tigerlily went into voluntary administration in March 2020 and the voluntary administration continued through the process of various creditors' meetings before the *DOCA* was entered into with the appointed administrators on 30 April 2020. The evidence also establishes that the plaintiff submitted a letter of demand to the defendant on 15 June 2020 and was responded to on 24 June 2020, though importantly without any reference to the voluntary administration, the failure to submit any proof of debt or to the *DOCA* itself, which at that time had been in place for nearly two months.

The defendant's response via its solicitors though made clear that the plaintiff's claim was being rejected. As has been pointed out the plaintiff did not contact or notify the administrator of her claim though I note that the defendant did not suggest that that occur or even indicate to the plaintiff that the defendant was at that time in voluntary administration, and that it may have been more appropriate or necessary for any claim to be made to someone else.

In summary, the defendant says that the procedure provided for in the *DOCA* that the plaintiff should have followed was not followed, and in those circumstances the defendant is entitled to rely on the *DOCA* pursuant to cl .4 which relates to release upon effectuation which, pursuant to s 444H of the *Corporation Act*, operates as a form of statutory release. The defendant says that the release in cl 8.4 was similar to a release found in a deed of release and in circumstances where a release has been executed in favour of Tigerlily the proceedings would have no reasonable prospect of success and the continuation of the proceedings would be an abuse of process.

In relation to the orders sought by the defendant they rely on r 13.41 or s 67. Rule 13.41 provides that proceedings can be dismissed if no reasonable cause of action is disclosed or the proceedings are an abuse of process. It is generally recognised that summary dismissal ought not to be entered and a party ought not to be deprived of the chance to have a full hearing of their case unless the Court is satisfied that the claim in question is so obviously untenable or groundless that there is a high degree of certainty that they will fail if allowed to go to trial, and whether this is one of the clearest cases in which the Court may intervene to prevent the claim being litigated.

In relation to those principles see *General Steel Industries v Commissioner for Railways* [1964] 112 CLR 125, *Spencer v The Commonwealth* [2010] HCA 28 and *O'Brien v Bank of Western Australia* [2013] NSWCA at [71].

It is further recognised that the power to dismiss proceedings on the basis that they disclose no reasonable cause of action or are an abuse of process requires a high degree of caution and certainty, see *Spellson v George* [1992] 26 NSWLR at [666], in other words, the bar is not low and it is a high threshold that a party must meet to be successful. Section 67 of the *Civil Procedure Act* provides that a Court may at any time stay proceedings. As recent as March of this year the High Court in *Wigmans v AMP Limited* [2021] HCA at [7]

acknowledged that s 67 does not provide for any particular criteria relevant to the exercise of the power but the power is not unconstrained.

In considering the defendant's motion it is also important to bear in mind pt 6 of the *Civil Procedure Act* and the guiding principles in ss 56, 57 and 58. Section 56 requires the Court to facilitate the just, quick and cheap resolution of the real issues in the proceedings and must give effect to these principles when exercising any power and when interpreting any provision. Section 57 requires the Court to manage proceedings having regard to those objects listed in the section including the just determination of proceedings, the efficient disposal of the business of the Court, the efficient use of available judicial resources and the timely disposal of the proceedings at a cost affordable by the parties.

In dealing with the orders sought by the defendant in its notice of motion I am also required pursuant to s 58 to act in accordance with the dictates of justice. Section 58(2) requires me in determining the dictates of justice to have regard to ss 56 and 57, and also have regard to those matters listed in s 58(2)(b) including but not limited to para (ii) that a degree of expedition with which the parties have approached the proceedings including the degree to which they have been timely in their interlocutory activities, para (v) the use that any party has made or could have made of any opportunity that has been available to the party in the course of proceedings, and para (vi) the degree of injustice that would be oft suffered by the respective parties as a consequence of any order.

In relation to the orders sought by the defendant, as I have already observed, the plaintiff is obviously opposed. The plaintiff says that their claim is for damages for a breach of an employment contract and there is seriously disputed questions of fact. On the current statement of claim and current defence that is obviously correct. The effect of the *DOCA* on the statement of claim may, however, be another question. The plaintiff says in relation to the *DOCA* that they are not caught by cl 7.6 of the *DOCA* on the basis that:

1. In order for cl 7.6 to apply there needs to be evidence as to the date of the declaration of a dividend payment, and there is no such evidence.

2. The plaintiff's demand of 15 June 2020 constitutes a claim as required by cl 7.6 as opposed to a formal proof of debt.

3. The demand of 15 June 2020 particularised the nature of her claim and she was the subject of constructive dismissal.

4. Clause 1.1 of the *DOCA* refers to all claims against the company, and as that envisages future and contingent claims for damages the demand of 15 June 2020 meets the description of claim for cl 7.6 of the *DOCA*.

5. Every claim which might have been enforced against the company is provable and it is not necessary that the breach or other event giving rise to a claim must have occurred before the relevant date.

6. A reference to future debts or claims is intended to describe demands in liquidated form which have not become due and payable.

7. The definition of a contingent claim is very wide and exists when there is an existing right or obligation out of which there will arise a right to be paid a sum of money and is admissible as proof of something which might ripen into a right ..(not transcribable).. for present payment.

In response to the plaintiff's position the defendant says that the *DOCA* is clear and unambiguous and that creditors are required to submit a proof of debt and those that do are taken to have formally proven their claims with the deed administrators on the basis of that proof of debt, or if not the deed administrators may ask each creditor to formally prove their claims within a certain timeframe if required to do so.

The defendant says that the evidence demonstrates that no such thing occurred within the timeframes provided for and, therefore, cl 7.6 of the *DOCA* applies. In addition, the defendant says that the demand of 15 June 2020 cannot constitute a proof of debt or claim as it does nothing more than set out allegations of damages payable for a breach of contract where such breach was denied, and fails to comply with the *DOCA* notice requirements.

In relation to the lack of evidence in relation to the date of the declaration of a dividend payment the defendant says that having regard to the terms of the *DOCA* it can be reasonably inferred that the declaration of dividend payments and the payments to be made would have occurred before the effectuation date because the effectuation date does not occur until all steps have been taken under the *DOCA*, and the payment of dividends is one such step.

I am of the view that as regards the latter, that is the lack of evidence in relation to the date of the declaration of a dividend payment, that the defendant's position is correct. It appears clear to me that the payment of dividends is required to be done before the effectuation date as one of the many steps required to be done before the effectuation date. However, in my view the defendant's position in relation to the plaintiff's claim of 15 June 2020 and/or the lack of proof of debt is not nearly as clear or straightforward. In my view there is a real issue as to whether the *DOCA* acts to operate as a bar to the plaintiff's proceedings when I have regard to the factual matrix that played out last year when Tigerlily was in voluntary administration and the plaintiff, via her lawyers, made a claim for breach of contract.

There is in my view an argument as to whether the demand of 15 June 2020 constitutes a claim for the purposes of the *DOCA* or whether as the defendant contends there has been no formal proof of debt by the plaintiff in accordance with the *DOCA*. I say this having regard to the nature of the plaintiff's claim regarding breach of contract, what was said by the plaintiff's lawyer in their demand of 15 June 2020, what was said by Tigerlily's lawyer in response to the demand, the failure by Tigerlily's lawyers to point out that the demand was being made to accompany involuntary administration and that it may have been better to direct their claim to the administrators, especially when it was so

obviously in the middle of the period of administration, and that even if a proof of debt had been lodged in accordance with the relevant timeframes whether it would have been even possible for a claim to be proven within 14 days of a request notice if that was even the process that needed to be followed.

But as I have observed that is the real issue that needs to be determined, that is the status of both the plaintiff's claim of 15 June 2020 via the letter from her lawyer to Tigerlily, and the operation of the *DOCA* that was in effect at the time that both directly and indirectly affected the operation and administration of the defendant company.

Having regard to that real issue it follows in my view that it could not be said that the plaintiff's claim is so obviously untenable or groundless that they would fail if allowed to go to trial. Applying the high degree of caution and certainty that I am required to apply I am not satisfied on balance that the statement of claim discloses no reasonable cause of action or is an abuse of process.

IN THOSE CIRCUMSTANCES THE FIRST ORDER SOUGHT IN THE NOTICE OF MOTION BY THE DEFENDANT IS REFUSED.

I am of a similar view when it comes to the second order sought relating to the stay of proceedings pursuant to s 67. Having regard to the issue to be determined that I have outlined and the balance of the plaintiff's claim I am of the view that the plaintiff's claim should be allowed to proceed and, therefore, a stay of proceedings would not on balance be appropriate.

THE SECOND ORDER SOUGHT BY THE DEFENDANT IN ITS NOTICE OF MOTION IS ALSO REFUSED.

However, that is not the end of the matter as the defendant in its notice of motion also seeks in the absence of orders 1 or 2 in the alternative leave to file an amended defence so as to properly plead the *DOCA* as a bar to the plaintiff's claim which would then, of course, involve a determination of the issue of whether the *DOCA* is able to used in the way contended for by the defendant. The plaintiff opposes the defendant being given the opportunity to amend its defence. They submit:

1. The late application to amend is inconsistent with giving effect to s 56.

2. It is not just to allow the defendant to introduce a new defence on the eve of a trial.

3. The reason for the delay in now seeking to rely on the *DOCA* is without substance.

4. The amendment will place a further strain on the plaintiff.

5. If the *DOCA* had been pleaded earlier the plaintiff might have conducted the proceedings differently.

6. The parties to date have fought the case on other grounds.

There is no issue the Court is able to allow the defendant to amend its defence. A draft amended defence has been provided to both the plaintiff and the Court.

As I have already observed the question of the effect of the *DOCA* is a real issue that needs to be determined between the parties but can only be done now if the defendant is given the opportunity to amend its defence. I have already expressed some disquiet of the failure of the defendant to raise the issue of the *DOCA* until the eve of what was going to be the hearing proper, especially having regard to the witnesses' level of involvement in the company and its voluntary ..(not transcribable).. administration last year, but I also note the following:

1. The parties have already prepared, exchange and filed their evidence to be relied upon based on the current pleadings.

2. The hearing proper may have commenced on 21 June but would not have finished having regard to the number of witnesses to be called and the evidence obviously in dispute.

3. Any future hearing date or dates will be unfortunately probably not this year, caused not by the parties but by the Court's ability or inability to accommodate the time needed and the delays caused by the COVID pandemic, giving the parties plenty of opportunity to seek to resolve the matter as between themselves.

4. Any further evidence to be prepared, exchanged and filed so as to encompass any amended defence would not be extensive.

5. The defendant, via any amendment to its defence, would not be denied an opportunity to argue what could be seen as a vital defence to the plaintiff's claim which may have some substance.

6. The proceedings were only commenced in September 2020, only nine months ago, and whilst they will not be heard and determined perhaps within 12 months, they should be heard and determined within 18 months which when regard is had to the delays caused in the Local Court because of the COVID pandemic is not unduly lengthy.

7. An order for costs can normally overcome any prejudice occasioned by any amendment.

In relation to the order sought by the defendant to amend its defence, when I have regard to ss 56, 57 and 58 of the *Civil Procedure Act*, and in particular s 58(2) and the need to act in accordance with the dictates of justice, and having regard to those matters listed in s 58(2)(b) I am of the view that on balance it is appropriate for me to make an order that will allow the defendant to amend its defence.

ACCORDINGLY, THE THIRD ORDER SOUGHT IN THE NOTICE OF MOTION WILL BE MADE.

In relation to costs I understand from the defendant's written submissions, para 32, that they concede that if they are allowed to amend their defence, as they will be, then the usual costs order will follow that the defendant pay the plaintiff's costs thrown away by the amendment.

IN THOSE CIRCUMSTANCES ORDERS 1 AND 2 SOUGHT IN THE DEFENDANT'S NOTICE OF MOTION ARE REFUSED. ORDER 3 SOUGHT IN THE DEFENDANT'S NOTICE OF MOTION IS GRANTED.

The appropriate order for costs, Mr Donnelly, I will come back to that.

I INTEND TO MAKE A FURTHER DIRECTION THAT THE DEFENDANT FILE ITS AMENDED DEFENCE BY 23 JULY 2021.

In relation to the further progress of the matter, Mr Donnelly, can I explain this to you and if need be you can explain it to your other side. In view of the current status of the proceedings, the need to file an amended defence, I do not intend to make any directions for the filing of further evidence, I think that can be done in due course.

As a result of the Court not doing any hearings this week or next week in accordance with the Chief Magistrate's direction because of the lockdown, a number of matters from this week and next week together with other lengthy matters here at Liverpool between now and Christmas are all going into what I think is being described as a special call over on Thursday 5 August. I have spoken to Abdul-Karim LCM who is the coordinator here at Liverpool and he will be conducting that call over, and he has some familiarity with this matter because of his previous involvement and I suggested to him that in the circumstances what would be appropriate for this matter to be placed in that call over because it may be that as a result of what occurs with the special call over of other lengthy special fixtures between now and Christmas, that Abdul-Karim might LCM be able to accommodate the parties with a hearing date before Christmas. I make no promises but I think there is that possibility is what I am saying, and he has agreed that that would be the appropriate thing to do.

Just in relation to that costs order, Mr Donnelly, so if I make an order that in relation to the notice of motion the defendant pay the plaintiff's costs thrown away by the amendment. Does that cover it?

DONNELLY: Yes. Your Honour might also want to add the words "As assessed or as agreed".

HIS HONOUR: THE ORDERS I MAKE IN RELATION TO THE NOTICE OF MOTION, O 1 AND 2 REFUSED. NOTICE OF MOTION ORDER 3 GRANTED.

DEFENDANT TO FILE AND SERVE ITS AMENDED DEFENCE BY 23 JULY 2021.

REGARDING THE NOTICE OF MOTION THE DEFENDANT PAY THE PLAINTIFF'S COSTS THROWN AWAY BY THE AMENDMENT AS AGREED OR ASSESSED, AND THE MATTER TO BE LISTED IN THE SPECIAL CALL OVER ON 5 AUGUST BEFORE ABDUL-KARIM LCM.

Mr Donnelly, if the other side want any more information about 5 August that they want to ask about they can just get in contact with the Registry and they can go through it with them. Anything else?

One final matter, my instructing solicitor has asked for a copy of your Honour's judgment, is that possible?

HIS HONOUR: It is possible but I will have to order a transcript which I was going to do anyway just to have on the file if the matter proceeds obviously to a fuller hearing at some later stage because that probably will not be me.

A TRANSCRIPT OF TODAY'S PROCEEDINGS. I WILL ORDER THAT AND THAT WILL BE AVAILABLE IN DUE COURSE THROUGH THE REGISTRY.

ADJOURNED TO THURSDAY 5 AUGUST 2021