

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

**CIV 2012-443-000472  
[2013] NZHC 3128**

UNDER s 292 of the Companies Act 1993

IN THE MATTER OF the liquidation of TSSN Limited formerly  
known as KLN Limited and the Stepping  
Stones Nursery Limited (in liquidation)

BETWEEN DAVID MURRAY BLANCHETT AND  
GRANT DAVID MCQUOID  
Applicants

AND RBI LIMITED  
Respondent

Hearing: By memoranda

Appearances: K J Crossland for applicants  
S A Grant for respondent

Judgment: 26 November 2013

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**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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This judgment was delivered by me on 26 November 2013 at 2.45 pm,  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:  
Stace Hammond, Hamilton  
Sean Kelly Lawyers, Auckland

Counsel:  
Sandra Grant, Auckland

[1] In this proceeding, the liquidators of TSSN Limited (in liquidation) (“the company”) have applied to set aside voidable transactions. Witnesses have been cross-examined on their affidavits. The cross-examination has taken several days. The proceeding currently stands adjourned to 9 December 2013 for hearing of legal submissions. Counsel for the applicant liquidators has requested<sup>1</sup> recall of Peter John Darney, a witness for the respondent, for further cross-examination. He has also sought a direction enlarging the time for the liquidators to file their final submissions.

[2] The respondent opposes recall.<sup>2</sup> The essence of the opposition is that the applicants have closed their case and have not established a basis for exercise of the (accepted) discretion to recall.

[3] Mr Darney, at material times, was accountant for TSSN Limited (in liquidation). He was also a major shareholder in the company as a trustee for trusts that held beneficial interests in the shares. He has given an affidavit, filed by the respondent, in which he says that the company was solvent at all material times. He provided that affidavit after having received a subpoena to appear for the respondent. The affidavit was prepared by his own solicitors.

[4] Counsel for the respondent was permitted to examine Mr Darney orally prior to his cross-examination. She has advised the Court (and has since confirmed by memorandum) that she had no access to Mr Darney to allow briefing of his evidence, and no prior knowledge of what Mr Darney could say other than that he held the view that the company was solvent at the material time. Mr Darney was requested to provide an affidavit confirming his view and to provide information as to the company’s financial position.

[5] Counsel for the applicants objected to the further examination in chief, saying that no proper basis had been established. That objection was overruled (given the potential significance of the evidence) but leave was reserved to the applicants to

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<sup>1</sup> By memorandum dated 21 November 2013.

<sup>2</sup> By memorandum dated 24 November 2013.

seek recall if matters emerged from that examination which the applicants had not been in a position to address.

[6] In the course of his evidence, Mr Darney said that he had not had any knowledge of a demand made by the company's bank in May 2009, prior to receiving a demand in his capacity as shareholder and guarantor. Since the hearing, the applicants have reviewed the file obtained from Mr Darney's accountancy firm and located documents, including a letter to the Commissioner of Inland Revenue in March 2009 which they say is inconsistent with Mr Darney's evidence. They seek to recall Mr Darney to cross-examine him on this correspondence and the alleged inconsistency.

[7] The respondent accepts that the Court has a discretion to allow the recall, but says that it should not exercise that discretion as the evidence is not necessary (the letter to the Commissioner is not inconsistent with Mr Darney's earlier evidence), it has been in the liquidators' hands for a substantial period of time, and the liquidators have known of the evidence that Mr Darney was to give on this point (since the affidavit was filed several months ago).

[8] Both sides have had some difficulty in relation to Mr Darney's evidence. I accept that the respondent did not have access to his evidence (other than through Mr Darney's solicitors) and, in particular, had limited say on the content of his affidavit. Similarly, I accept that the applicants could not have anticipated Mr Darney's evidence that he had no knowledge of the bank demand until he was served as a guarantor. Although the further correspondence is not fresh in a conventional sense,<sup>3</sup> it still goes to the heart of the major issue in this case, namely the respondent's knowledge of the company's solvency. I am unable to assess the significance of the evidence in advance, but I accept that it is potentially cogent. I accept that there will be more cost and inconvenience in allowing recall, but that is a matter that can be addressed in due course.

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<sup>3</sup> A phrase used by Eichelbaum CJ in *New Zealand Rail Ltd v Accident Rehabilitation and Compensation Insurance Corporation* HC Wellington CP 473/93, 21 September 1995 at 6.

[9] I regard the point as a relatively narrow one. There should be ample time to deal with the matter ahead of hearing argument on 9 December 2013.

[10] I order that Peter John Darney be recalled for cross-examination on the further evidence at the start of the hearing on 9 December 2013.

[11] Counsel for the applicants should complete his final submissions by 5pm tomorrow, leaving open the possibility of amendment in light of any further evidence given by Mr Darney.

[12] Counsel are to confer on a revised timetable for the respondent to file and serve its submissions, and advise the Court by joint memorandum what has been agreed. This joint memorandum is to be filed and served by 4pm this Friday 29 November 2013. If there is any continuing difficulty over this, the Registrar is to arrange a brief telephone conference.

[13] Costs are reserved.

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**Associate Judge Abbott**