IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2022-442-000018
[2022] NZHC 2283

UNDER	the Companies Act 1993
IN THE MATTER	of an application to set aside a Statutory Demand
BETWEEN	PRINCIPLE DEVELOPMENTS LIMITED Plaintiff
AND	DYLAN SLOTEMAKER Defendant

Hearing: 4 July 2022

Appearances: A G Stallard for Applicant
R J D Fitchett for Defendant

Judgment: 8 September 2022

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 8 September 2022 at 10.30 am
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Table of Contents

Introduction

[1] Principle Developments Ltd (PDL) entered into a written agreement to sell to the defendant, Dylan Slotemaker (Mr Slotemaker), a property in the Skylark Rise subdivision at Atawhai, Nelson. It is an elevated sloping property and offers rural and sea views from a building platform PDL created on the site.

[2] Mr Slotemaker has purported to cancel the agreement. He says that in breach of an essential term of the agreement PDL undertook earthworks in the vicinity of the building platform, and the building platform is not 800m² as approved, certified and defined by PDL's resource consent.

[3] Mr Slotemaker served a statutory demand upon PDL requiring repayment of his deposit of $100,000. PDL does not accept that it breached the agreement, that Mr Slotemaker has validly cancelled the agreement, or that Mr Slotemaker is entitled to repayment of the deposit. It applies to set aside Mr Slotemaker's statutory demand under s 290(4)(a) of the Companies Act 1993 on the ground there is a substantial dispute whether or not there is a debt owing or due to Mr Slotemaker.

[4] The issues that arise are the following:

(a) Has PDL shown it is fairly arguable that it did not breach the agreement in either of the respects alleged?

(b) If PDL did breach the agreement, did that entitle Mr Slotemaker to cancel the agreement?

(c) If Mr Slotemaker cancelled the agreement, did the deposit become a debt due and owing by PDL to Mr Slotemaker?

(d) Is PDL entitled to an order setting aside the statutory demand because it is solvent?

(e) If there is a substantial dispute as to the existence of the debt, should the Court nonetheless exercise its residual discretion to refuse to set aside the statutory demand?

Background

[5] PDL is a property developer at Nelson. One of its projects is the Skylark Rise subdivision. This dispute concerns Lot 55 in the subdivision.

[6] Mr Slotemaker lives in the United States.

[7] Lot 55 was marketed on behalf of PDL by a local real estate agent. The marketing material emphasised the privacy, north facing aspect and uninterrupted sea and mountain views, with an 800m² building platform that was "flat, certified and formed".

[8] Mr Slotemaker's father and stepmother inspected the property on his behalf on two occasions, first with the real estate agent and then with the director of PDL, James Harrington. Mr Slotemaker was able to see the property on an on-site video call during one of the inspections.

[9] Mr Slotemaker engaged the law firm Pitt & Moore to act for him to negotiate an agreement to purchase part of Lot 55. PDL was represented by Stallard Law. It appears the negotiations were conducted principally by email.

[10] On 12 March 2021, PDL and Mr Slotemaker entered into a written agreement for sale and purchase of part of Lot 55 using the Ninth Edition 2012(8) REINZ/ADLS form, with further terms of sale attached. The terms of the agreement include the following:

(a) The purchase price is $695,000 of which a deposit of $100,000 was paid.

(b) The property is an area of no less than 18,000m^2 (subject to survey) being part of Lot 55 DP 545726 and being part of Record of Title

953207 (Nelson Registry) (the Head Title), as shown on a preliminary plan attached to the agreement.

(c) PDL was to apply for a resource consent to subdivide the Head Title and to complete all physical and other works to obtain the issue of a new title for the property.

(d) The settlement date was to be ten working days after the issue of title. However, if PDL was unable or unwilling to obtain the resource consent or complete the work for the new title, or title was not available within two years of the date of the agreement, PDL would transfer the Head Title to Mr Slotemaker at the purchase price in the agreement.

[11] Clause 5 concerns risk and insurance. It provides that the property remains at the risk of PDL until possession is given and taken. Clause 5.2(2) provides that if prior to the giving and taking of possession, the property is destroyed or damaged, and such destruction or damage has not been made good by the settlement date:

> If the property is not untenantable on the settlement date the purchaser shall complete the purchase at the purchase price less a sum equal to the amount of the diminution in value of the property which, to the extent that the destruction or damage to the property can be made good, shall be deemed to be equivalent to the reasonable cost of reinstatement or repair.

[12] Clause 25 is at the heart of the dispute. It deals with the building platform. This clause was subject to change during the negotiation between the parties' solicitors. I will trace its evolution later in this judgment. As finally agreed, cl 25.1 reads as follows:

> The Vendor agrees that it will not prior to settlement date reposition or alter the existing building platform nor carry out any earth works in the vicinity of the building platform. The parties acknowledge that it is an essential term of the contract that there is no change to the existing building platform on the property as approved, certified and defined in RM145151V2 and/or RM145153 and/or Consent Notice 11941520.12.

[13] Clause 30 was headed "Disclaimer/Entire Agreement/No Reliance and provides as cls 30.1 and 30.2:

Clause 30.1

> The parties acknowledge that this agreement, and the schedules and attachments to this agreement, contain the entire agreement between the parties, notwithstanding any negotiations or discussions prior to the execution of the agreement or anything contained in any brochure, report or other document.

Clause 30.2

> The Purchaser acknowledges and agrees that it has not been induced to execute this agreement by any representation, ... or otherwise, made by or on behalf of the Vendor or its agents other than as expressly set out in this agreement.

[14] After the agreement was entered into Nelson experienced a significant amount of rainfall and difficulties with drainage and run-off caused some damage to the property. Mr Harrington says the damage was not to the building platform but if left unattended this could have placed the integrity of the building platform in issue.

[15] Mr Slotemaker was aware of the damage. The matter was raised by Pitt & Moore with Stallard Law in an email of 3 August 2021. In that email, Pitt & Moore said they understood recent rain events had caused significant visual damage by way of slips, slumps and washouts on the property and asked whether PDL had a report on the extent of the damage and remedial work required to reinstate the property.

[16] Stallard Law responded on 6 August 2021 advising as follows:

> Our client has advised that:
>
> - he is aware of the damage to the property and will be undertaking in early spring remediation work to ensure ground stability.
> - he will provide a letter from a geotechnical engineer to confirm that the works undertaken are approved and signed off.
> - The material that has slipped is the top layer of topsoil and there is no structural damage to the 3604 building platform.

[17] Pitt & Moore responded on 12 August 2021 as follows:

> Thanks Diane.
>
> That work is appreciated.

> Clause 25.1 is an essential term of the contract which deals with the original building platform. It is important to the Purchaser that the geo technical report is extended to provide reassurance that there has been no change to the structural integrity of the platform or the drainage works that protect it or are associated with it.
>
> Would you please ensure that these matters are included in the new report.

[18] On 4 October 2021, Pitt & Moore again wrote to Stallard Law, this time purporting to cancel the agreement as follows:

> Hello Diane.
>
> We understand that there has been further damage to the property since the damage referred to in our email of 3 August.
>
> We have attached a number of photographs showing the damage around the building platform.
>
> As a result we understand that there will be remedial work that brings into play clause 25.1 of the agreement.
>
> The agreement is therefore cancelled. Please return the deposit.
>
> Our trust account details are attached.
>
> Our reference is 382265-4.

[19] PDL did not accept the cancellation of the agreement. It engaged Elliott Sinclair, Engineers, who provided a letter on 4 October 2021 stating that having inspected the site on 16 September 2021 it observed slope instability within the original ground outside of the building platform following a prolonged wet weather period. It also stated:

> Remedial works are currently in progress, which are outside of the engineered cut/fill building platform. The resultant works will be supported by documentation outlining works completed and associated certification.

[20] Mr Slotemaker then engaged Rout Milner Fitchett to act for him. There was further correspondence between the parties' solicitors in October to December 2021, which is notable for the fact that Mr Slotemaker was said to be considering his right to cancel the agreement, notwithstanding he had purported to cancel months earlier. PDL agreed to provide access to the site for Mr Slotemaker's solicitors and surveyor.

[21] In a letter of 10 February 2022, Mr Slotemaker's solicitors again purported to cancel the agreement and required repayment of the deposit. This was on the basis PDL had breached cl 25.1 because, it was said, the subdivision consent RM145151V2 had attached to it a plan showing a building platform of 800m^{2,} but the building platform as measured by Mr Slotemaker's surveyor was actually 687m^2. It was also alleged that PDL had breached cl 25.1 by undertaking work on and in the vicinity of the building platform. Mr Slotemaker also asserted, as an alternative ground for cancellation, that PDL had misrepresented the size of the building platform.

[22] There followed further correspondence between solicitors where PDL challenged Mr Slotemaker's right to cancel and Mr Slotemaker continued to assert his entitlement to a refund of the deposit.

[23] On 25 March 2022, Mr Slotemaker issued PDL with the statutory demand for repayment of the deposit on the basis it was "money due and owing for failure to refund the deposit on [Mr Slotemaker's] valid cancellation of an agreement for sale and purchase." PDL's application to set aside the statutory demand followed.

Setting aside statutory demands – the principles

[24] The relevant statutory provisions are ss 289 and 290 of the Companies Act 1993 which relevantly provide:

> **289 Statutory demand**
>
> (1) A statutory demand is a demand by a creditor in respect of a debt owing by a company made in accordance with this section.
>
> (2) A statutory demand must—
>
> (a) Be in respect of a debt that is due and is not less than the prescribed amount; and
>
> (b) Be in writing; and
>
> (c) Be served on the company; and
>
> (d) Require the company to pay the debt, or enter into a compromise under Part 14 of this Act, or otherwise compound with the creditor, or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the

creditor, within 15 working days of the date of service, or such longer period as the court may order.

290 Court may set aside statutory demand

(1) The Court may, on the application of the company, set aside a 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

…

[25] The principles that apply under s 290(4)(a) are as follows:[1]

(a) The onus is on the applicant seeking to set aside the statutory demand to show that there is arguably a genuine and substantial dispute as to the existence of the debt. The Court's task is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due.

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

(c) If such material is available, the dispute should normally be resolved first in ordinary civil proceedings before any statutory demand is issued.

(d) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise unless such evidence is contrary to the available documents or earlier statements made by the parties.

(e) Notwithstanding that grounds for setting aside a statutory demand have been made out, the Court retains a residual discretion to refuse to set

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1 *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 and Brookers *Insolvency Law & Practice*, (online ed, Thomson Reuters) at CA290.02.

aside a statutory demand, but it would only be a rare case where such a discretion was exercised.[2]

Principles of interpretation

[26] It is necessary for me to consider the meaning of cl 25.1, about which the parties maintain different points of view. Before doing so, I summarise the relevant principles to be applied in the interpretation of contracts.

[27] In the interpretation of contracts, an objective approach is taken to ascertain the meaning the document would convey to a reasonable person having all the background knowledge reasonably available to the parties at the time of the contract.[3] Contractual language must be interpreted within its overall context broadly viewed, and if the language used, construed in the context of the whole contract, has an ordinary and natural meaning, that will be a powerful, but not conclusive, indicator of what the parties meant.[4]

[28] The Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* was concerned to clarify the law as it related to the use of material extrinsic to the written contract as an aid to its interpretation. It noted that such material typically falls into three categories: the commercial context and the purpose of the contract, evidence of prior negotiations, and evidence of subsequent conduct.[5]

[29] The Supreme Court concluded that extrinsic evidence is prima facie admissible if it tends to prove or disprove anything of consequence to determining the meaning the contractual document would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation in which they were at the time of the contract.

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2 *Manchester Securities Ltd v Body Corporate 172108* [2018] NZCA 190, [2018] 3 NZLR 455 at [49].

3 *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann.

4 At [63].

5 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696, at [40].

The evolution of cl 25.1

[30] The evidence included email correspondence between the parties' solicitors negotiating the terms of the agreement. Neither party objected to the admissibility of that evidence and I set out the relevant aspects below.

[31] On 9 March 2021, Stallard Law forwarded to Pitt & Moore a proposed agreement for sale and purchase. It contained a cl 25.1 as follows:

> **25. Building Site**
>
> 25.1 The Vendor agrees to complete in a tradesmanlike manner, prior to settlement date and at the Vendor's cost, a building platform on the Property (including any batters or retaining walls required by the Vendor's engineer). Such building platform to be a minimum area of 800m^2 (including any building location restrictions imposed by the local authority) and to be certified by an engineer as suitable for development in accordance with NZS3604:2011 Timber Frame Buildings.

[32] Pitt & Moore responded on 9 March 2021 stating they would discuss several matters with their client. Two of those matters were:

> 1 the existing title has the building site and conditions our client wants and accepts. If the new Consent requires any changes to the terms and conditions of the existing Consent (for lot 55) then our client will want to review and approve the new Consent as it relates to 'their' lot.
>
> 2 clause 25 to be modified to refer to the existing building site on lot 55.

[33] Stallard Law replied to Pitt & Moore at 11.48 am on 10 March 2021, and relevantly wrote:

> Our client does not agree to the agreement being conditional upon the Purchaser approving the conditions of the new Consent to be obtained.
>
> The existing building platform has already been constructed and inspected by an engineer and accepted by Council under our clients earlier subdivision consent. The Vendor is not expecting there to be any further earthworks in the vicinity of the existing building platform. Clause 25 could be replaced with the following:-
>
> > *The Purchasers acknowledge and accept that the building platform on the Property has been constructed and approved by the Nelson City Council and certified by an engineer as suitable for development in accordance with NZS3604:2011 Timber Frame Buildings. The Vendor agrees that it will not prior to settlement date reposition or*

> *alter the existing building platform nor carry out any earthworks in the vicinity of the building platform.*

[34] At 12.03 pm on 10 March 2022 Pitt & Moore sent Stallard Law an email, but they had apparently not then seen Stallard Law's email of 11.48 am. Pitt & Moore confirmed they had discussed the draft agreement with their client and:

> So long as there is no change to the existing Consent as it affects the part of lot 55 (especially including the building platform) that they are purchasing, then title is accepted. Clause 26 can be amended accordingly, or the agreement should be subject to their approval of the Resource Consent for Subdivision (insofar as the Consent directly affects "their land").

[35] Then it appears Pitt & Moore saw Stallard Law's 11.48 am email and wrote again to Stallard Law:

> Thanks Diane. Our emails have crossed.
>
> I think we are on the same page with this.
>
> I would like to add to your clause:
>
> *The parties acknowledge that it is an essential term of the contract that there is no change to the existing building platform on the property as approved, certified and defined in RM145151V2 and/or RM145153 and/or DP545726*.

[36] At 1.32 pm Stallard Law wrote to Pitt & Moore with an updated agreement. The attachment to that email is not in evidence. It appears it must have included cl 25.1 in its final form as Pitt & Moore responded at 1.32 pm saying "The changes look fine", and although there were later changes made to the draft, it does not appear that they concerned cl 25.1.

Issue 1 - Has PDL shown it is fairly arguable that it did not breach cl 25.1 in either of the respects alleged?

Size of the building platform

[37] Mr Slotemaker's contention that he was entitled to cancel the agreement because the building platform was not 800m² relies primarily upon the second sentence of cl 25.1, which for ease I set out again as follows:

> The parties acknowledge that it is an essential term of the contract that there is no change to the existing building platform on the property as approved, certified and defined in RM145151V2 and/or RM145153 and/or Consent Notice 11941520.12.

[38] Mr Slotemaker does not suggest that RM145153 and/or Consent Notice 11941520.12 support his argument. His focus is RM145151V2. He says that he and his lawyers reviewed documentation including RM145151V2, which has in it a plan showing an 800m² building platform on the property and that, "knowing" the building platform was 800m² he did not want it changed. Because the building platform is in fact only 687m², he says it has "undeniably changed" from what was "approved, certified and defined in RM145151v2".

[39] This argument proceeds on three premises, all of which I consider to be, at least arguably, incorrect. These are that:

(a) the term "existing building platform" in cl 25.1 refers to the building platform shown on the plan in RM145151V2 and not the building platform created by PDL and inspected by Mr Slotemaker;

(b) that the building platform "approved, certified and defined in RM145151V2" means an 800m^2 building platform; and

(c) that the building platform has "changed" from what was approved, certified and defined in RM145151V2.

[40] In respect to the first matter, the term "existing building platform" was required to be included in cl 25.1 by Mr Slotemaker's solicitors. In the original draft agreement, PDL had proposed a term that it would complete a building platform of a minimum of 800m². Mr Slotemaker's solicitors replied that "the existing title has the building site and conditions our client wants and accepts" and that "clause 25 to be modified to refer to the existing building site". Their concern was the maintenance of the building platform and resource consent conditions as they existed at that time. Importantly, they did not stipulate for an 800m^2 building platform and the removal of reference to a minimum platform size of 800m^2 undermines any argument the parties intended the building platform to be that size and no other.

[41] It is self-evident that the only building platform that was "existing" (that is, already in place) was the one that had been created and that Mr Slotemaker had inspected. Any other interpretation would be nonsensical. I do not therefore accept Mr Slotemaker's first premise.

[42] Mr Slotemaker's second premise, that the building platform "approved, certified and defined in RM145151V2" referred to an 800m^2 building platform is unsound. It runs into an immediate difficulty as cl 25.1 refers to "the existing building platform on the property". There has never been a building platform of 800m^2 "on the property" as shown on the plan in RM145151V2.

[43] Also inimical to Mr Slotemaker's argument are the words "approved, certified and defined in RM145151V2". This phrase must be considered in the context of the resource consent as a whole. Mr Slotemaker's approach overlooks that the resource consent stipulates the steps that were to be taken to have the building platform certified by the Council. Clause 31 of RM145151V2 reads as follows:

> Certification that each lot contains an accessible site suitable for the erection of a residential building shall be submitted to Council by a chartered professional engineer practising geotechnical engineering or from an experienced engineering geologist.
>
> a) The certification shall define the area within each lot that is suitable for building on, and shall list development conditions pertaining to the site and the lot generally.
>
> *Note: The building site shall be defined with respect to boundary pegs and/or survey co-ordinates, the latter to be provided by a registered surveyor*
>
> b) Should any mitigation measures be required as part of the building site certification then these shall be designed and constructed under the supervision of the certifier of the building site. Any mitigation measures requiring ongoing monitoring and/or maintenance shall be subject to a consent notice on the title of the lot.
>
> c) A section 224(c) Certificate will not be granted if a suitable building site is not defined.
>
> d) Any lots upon which a certified building site has not been identified shall be amalgamated with an adjacent lot containing a certified building site.

[44] In an email of 10 March 2021, during the negotiation of cl 25.1, PDL's solicitors advised Mr Slotemaker's solicitors that the building platform had been certified by the Council in these terms:

> The existing building platform has already been constructed and inspected by an engineer and accepted by Council under our clients earlier subdivision consent.

[45] In the same email PDL's solicitors proposed a clause that read:

> The Purchasers acknowledge and accept that the building platform on the Property has been constructed and approved by the Nelson City Council and certified by an engineer as suitable for development in accordance with NZS3604: 2011 Timber Frame Buildings ...

[46] It was subsequent to this email that Mr Slotemaker's solicitors suggested the inclusion of the clause requiring there to be "no change to the existing building platform on the property as approved, certified and defined in RM145151V2".

[47] It follows that Mr Slotemaker and his solicitors were aware before the agreement was signed that the building platform that was inspected by Mr Slotemaker was the building platform certified by the Council.

[48] There is no challenge to Mr Harrington's evidence that the building platform Mr Slotemaker inspected has been certified by the Council. There is support for this in the survey plans prepared by Mr Slotemaker's surveyor, which refer to the building site certification prepared by Elliott Sinclair dated 3 December 2020.

[49] It is therefore arguable that insofar as cl 25.1 refers to "the building platform on the property as approved, certified and defined in RM145151V2", it means the building platform as built.

[50] As to the third premise, it follows from my rejection of the first two premises that it is arguable there has been no change from what was approved, certified and defined by RM145151V2.

[51] Mr Fitchett argued that it is not necessary that Mr Slotemaker show there has been a physical change in the building platform. He submits that if cl 25.1 is

concerned only with physical changes to the building platform, the second sentence of the clause is rendered superfluous. I do not accept this submission.

[52] The first sentence of cl 25.1 is plainly concerned with physical changes to or in the vicinity of the building platform. The second sentence is concerned with the certification of the building platform and the possibility that this might be affected by terms of the further resource consent PDL was seeking to subdivide Lot 55. This explains the advice of Mr Slotemaker's solicitors in their emails of 9 and 10 March 2021 that:

> … If the new Consent requires any changes to the terms and conditions of the existing Consent (for lot 55) then our client will want to review and approve the new Consent as it relates to 'their' lot
>
> and
>
> so long as there is no change to the existing Consent as it affects the part of lot 55 (especially including the building platform) that they are purchasing, then title is accepted…

[53] Viewed in this light, the first and second sentences of cl 25.1 deal with different matters.

[54] The real tenor of Mr Slotemaker's evidence is that he was induced to enter into the agreement by a misrepresentation the building platform was 800m², but he has abandoned any reliance upon that argument on this application. Furthermore, Mr Slotemaker's evidence is illogical to the extent he suggests he intended to ensure he was getting an 800m^2 building platform by removing from cl 25.1 any reference to an 800m^2 building platform and instead referring to the resource consent. PDL had originally proposed a clause that would have required it to provide an 800m² building platform but that was removed in the course of the negotiation. If it was indeed a matter of importance to Mr Slotemaker that the building platform was to be 800m², he could easily have stipulated for it.

[55] I therefore consider it fairly arguable that PDL has not breached cl 25.1 by virtue of the size of the building platform.

The earthworks

[56] Mr Slotemaker takes a literal approach to cl 25.1 and says as PDL carried out earthworks on or in the vicinity of the building platform it breached cl 25.1 and this entitled him to cancel the agreement. On this basis there is no need for the Court to concern itself with the reasons for the earthworks or their effects on the building platform.

[57] PDL says the purpose of cl 25.1 was to ensure the building platform was not repositioned or altered and to preserve the outlook from it. It accepts earthworks have been carried out to protect the building platform's integrity due to unprecedented rainfall but, it says, there have been no earthworks which alter or reposition the building platform or affect the outlook from it and, therefore, no breach of cl 25.1 has occurred.

[58] As to what earthworks have been done, Mr Harrington's evidence is that all work is to sloping areas adjacent to the building platform rather than to the building platform itself and that there has been no change to the physical form of the building platform as it was inspected. Mr Harrington does say that the building platform was raised by 2 metres, but it is not clear when this work was done, though I am satisfied it can only have been prior to the date of the agreement because Mr Harrington also says:

> … there has been no change at all in the physical attributes of the building platform from inspection time before the Defendant entered into the contract and what is available for sale now.

[59] Mr Slotemaker has relied upon evidence from his surveyor, John Heaphy-Postle. In his submissions, Mr Fitchett submitted that Mr Heaphy-Postle's evidence is that "the Building Platform is up to 1.4 metres lower than was certified to Nelson City Council in December 2020 and that material seems to have been removed from the vicinity of the building platform." That is not what I take from Mr Heaphy-Postle's evidence. His evidence is that there is a difference in levels of up to 1 metre and 1.4 metres in two areas that lie outside the building platform and that vegetation in those areas appears visually different from surrounding areas. That appears to be consistent with Mr Harrington's evidence as to the work that was done.

[60] I therefore accept it is arguable that since the agreement was entered into earthworks have been carried out around, but not directly to, the building platform to protect its integrity due to the high rainfall. I also accept it is arguable that the earthworks have not affected the physical attributes of, or outlook from, the building platform.

[61] Turning to whether such work breached cl 25.1, as the cases *Firm PI*[6] and *Bathurst Resource Ltd*[7] make clear, while the plain meaning of words in a contract will be a strong indicator of meaning, that plain meaning may be displaced. The plain meaning will be displaced where the parties attached a different meaning to the words or a reasonable person with knowledge of the background available to the parties at the time the contract was entered into would conclude that the parties did not intend the words to have that meaning. There are several factors that lead me to the view that it is fairly arguable cl 25.1 is only concerned with earthworks which affect the physical attributes or amenity of the building platform.

[62] The property was marketed as having rural and sea views and that it had a generous building platform which was "flat, certified and formed". Its steeply sloping nature gives rise to practical and technical challenges during construction of a residential property. Despite the property being large, Mr Slotemaker says the building platform was the only truly useable land and what he was concerned to prevent was earthworks that would change the building platform. He said he required a clause "ensuring that the Building Platform would not be changed from what I understood it to be".

[63] The words "reposition or alter the existing building platform" in cl 25.1 involve physical changes to the building platform. Given Mr Slotemaker's concern was to preserve the platform from "change", the requirement that there were to be no earthworks in the vicinity of the building platform arguably also connotes physical change affecting the amenity of the building platform.

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6 *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand*, above n 3, at [63].
7 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 5, at [43]

[64] This is consistent with what Mr Slotemaker's solicitors said in their correspondence to PDL's solicitor in a letter of 14 March 2022 where they identified Mr Slotemaker's concern as being to preserve the outlook from the building platform as follows:

> Again, put simply, our client was eager to preserve the outlook which they had observed when viewing the property. The cancellation pursuant to this clause has nothing to do with the geotechnical soundness of the building platform.
>
> Our client viewed the property from the United States via video calls. He never physically inspected the property. This being the case he wished to preserve the outlook and so was adamant that the agreement contain a clause that there would be no works in the vicinity of the building platform as these could be reasonably expected to impact on the outlook from and amenity of the future dwelling.

[65] It is also consistent with Mr Harrington's evidence that cl 25.1 had nothing to do with the size of the building platform but was about protecting views, aspect and also privacy as there were stands of trees that gave privacy from adjacent lots.

[66] Other terms of the agreement and established principles concerning the sale and transfer of land support PDL's interpretation of cl 25.1. This was an agreement for the sale and purchase of land involving the subdivision of Lot 55. It was contemplated that settlement could be up to two years following the date of the agreement. It could reasonably be expected that during those two years PDL would have to undertake works to maintain or preserve the property.

[67] Further, as a matter of law, pending settlement PDL had an obligation to protect the property and take reasonable steps to preserve the property from deterioration. The rationale for the duty is to preserve the property in the state that it was in at the time of the agreement.[8] Related to this, the insurance clause in the agreement contemplates that the vendor might undertake repairs due to damage to the property prior to settlement.

[68] Further support for PDL's approach can be found in the response of Mr Slotemaker and his solicitors following the heavy rains. It appears that, at least initially, Mr Slotemaker considered PDL was obliged to undertake repairs. Once slips

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8 DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at 417.

had occurred, his solicitors asked what work was to be done to deal with the slips. When advised of what was intended, the solicitors said the work was appreciated, not that it could not be done. Further, they required that a geotechnical report provide "reassurance that there has been no change to the structural integrity of the platform or the drainage work that protect it or are associated with it".

[69] I also consider the position Mr Slotemaker takes, that ignores the reasons for earthworks and the effects of such earthworks, to be illogical. If accepted, it would mean that rather than take steps to maintain the integrity of the building platform (and thereby risk cancellation of the agreement) PDL would have been better off to have done nothing to repair the property or to avoid further damage in the face of engineering advice that there was slope instability.

[70] I therefore consider it is fairly arguable that a literal interpretation of the agreement should be departed from and that, in undertaking the earthworks, PDL did not breach cl 25.1.

Issue 2 - If PDL did breach the agreement as alleged, did that entitle Mr Slotemaker to cancel the agreement?

[71] Given my findings above, it is strictly not necessary to deal with this issue. However, had there not been a reasonably arguable case PDL did not breach the agreement, I would have found, in accordance with the principles in *Mana Property Trustee Ltd v James Developments Ltd*,[9] that cl 25.1 was an essential term entitling Mr Slotemaker to cancel.

Issue 3 - If Mr Slotemaker cancelled the agreement did the deposit become a debt due and owing by PDL for the purposes of s 289 of the Companies Act?

[72] PDL argued that even if Mr Slotemaker could show he was entitled to cancel the agreement, that did not automatically establish that he was entitled to a return of the deposit. It relies on ss 42 and 43 of the Contracts and Commercial Law Act 2017 and the discretionary nature of the power that the Court has to award relief following

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9 *Mana Property Trustee Ltd v James Developments Ltd* [2010] 3 NZLR 805; [2010] NZSC 90.

cancellation. PDL argues that at most Mr Slotemaker has a right to seek discretionary relief but there is no debt that is due or owed to him.

[73] In *OPC Managed Rehab Ltd v Accident Compensation Corporation*, the Court of Appeal discussed the meaning of the word "debt" in the context of s 289 of the Companies Act 1993 and said:[10]

> In the result, we conclude that, if a payment is received in circumstances where the recipient is obliged to repay it, whether because of a contractual or statutory provision to that effect or because the circumstances give rise to an obligation to repay on the basis of money had and received, the amount can be treated as a "debt due" for the purposes of s 289(2)(a) …

[74] *OPC Managed Rehab Ltd v Accident Compensation Corporation* has received positive treatment in subsequent decisions of the Court.[11]

[75] PDL's argument overlooks that had I been satisfied Mr Slotemaker had validly cancelled the agreement for breach by PDL of an essential term, seeking discretionary relief under the Contracts and Commercial Law Act 2017 was not the only avenue open to him to recover the deposit. He would otherwise have been entitled to do so on the basis of a total failure of consideration. The cases show that the concept of a due debt can encompass an immediate obligation to make restitution.

Issue 4 - Is PDL entitled to an order setting aside statutory demand because it is solvent?

[76] PDL submits that it is solvent. There is a very brief affidavit from its accountant to this effect. The evidence is unsatisfactory in several respects. The accountant has not referred to the Code of Conduct for Expert Witnesses[12] and there are no financial accounts or other information to verify his evidence.

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10 *OPC Managed Rehab Ltd v Accident Compensation Corporation* [2006] 1 NZLR 778 at [54].

11 *Grant v Lotus Gardens Ltd* [2014] NZCA 127, [2014] 2 NZLR 726; *Dromgool v Domo Luxury Furniture Concepts Ltd* [2020] NZHC 1259; *Jellicoe North Ltd v Smith & Davies Ltd* [2018] NZHC 1215; *SHT Holdings Ltd v Rowberry* [2015] NZHC 3281, *Ecotech Homes (New Zealand) Ltd v Baumann* [2016] NZHC 1444.

12 Evidence Act 2006, s 26.

[77] In any event, the solvency of a party applying to set aside a statutory demand is unlikely to be a stand-alone ground for setting aside the demand. The issue was addressed by the Court of Appeal in *AMC Construction Ltd v Frews Contracting Ltd*.[13] The Court recognised that the solvency of a company may be a relevant consideration in an assessment of whether an amount is being disputed as a means of buying time to pay or whether the grounds of the dispute are genuine. However, it went on to say:[14]

> … If there is no dispute as to the company's liability, so that para (a) or (b) [of s 290(4)] cannot be invoked, it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid. If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed. If it is not met, and an application for liquidation is filed, in reliance on the presumption in s 287(a) that the company is unable to pay its debts, then the company will have an opportunity on the liquidation application to rebut the statutory presumption, which applies "unless the contrary is proved". There might be circumstances in which it is appropriate to advance the inquiry as to solvency to the s 290 stage, but that would require some particular circumstance not present in this case.

[78] PDL has not put before the Court satisfactory evidence of its solvency, but even if it had done so it would not have been a sufficient basis to set aside the statutory demand.

Issue 5 - The residual discretion

[79] Mr Slotemaker argues that if I were to determine (as I have) that there is a substantial dispute as to the existence of the debt, I should nonetheless exercise my discretion and refuse to set aside the statutory demand because PDL failed to provide details of any reasonably arguable dispute prior to the filing of its submissions and the Court has previously indicated that it would exercise its residual discretion not to set aside a demand in such cases.[15]

[80] This is not a case where it would be appropriate to exercise my discretion. I do not accept that PDL did not raise a dispute prior to filing its submissions. I consider

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13 *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, (2008) 19 PRNZ 13.

14 At [7].

15 *Sunglass Hut New Zealand Ltd v Amtrust Pacific Properties Ltd* HC Auckland M1710/02, 24 June 2003 and *Luxe One Ltd v Body Corporate 68792* [2017] NZHC 2672 at [169] and [172].

the matters which I have found give rise to an arguable defence were raised in correspondence between the parties' solicitors and, in particular, in Stallard Law's letter to Rout Milner Fitchett of 10 March 2022.

A final matter

[81] After the hearing, but shortly before the issue of this judgment, Mr Slotemaker's counsel filed a memorandum concerning the significant rainfall in the Nelson area on 17-19 August 2022. Attached to the memorandum were photographs of damage to the property that is said to have occurred during that event. It was submitted that the building platform will likely be reduced further in size from 800m² and that earthworks have or will be undertaken on or in the vicinity of the building platform in breach of cl 25.1. There was reference also to a retaining wall that has been built on the property which it is said is a further breach of cl 25.1. Concern was also expressed as to the solvency of PDL.

[82] PDL objected to this memorandum on the basis that it is new information and irrelevant to the application I have to determine.

[83] I have not had regard to this memorandum, the further submissions or the photographs in arriving at my decision. A memorandum of counsel is not evidence. While Mr Fitchett advised the photographs could be provided by way of affidavit, if I was to accept such an affidavit I would have to call for further evidence from both parties, further submissions and then reconvene the hearing. Not only would the parties incur large additional costs and experience substantial delay in getting a decision, it would serve no purpose. Mr Slotemaker's statutory demand is founded on the assertion he validly cancelled the agreement. Any further damage that may have been suffered by the property since the statutory demand was issued cannot have any bearing on the issue whether he did so.

Result

[84] The application to set aside the statutory demand is successful. The statutory demand is set aside under s 290(4)(a) of the Companies Act 1993.

[85] The parties should confer on costs. If they cannot reach agreement, then they may file memoranda of no longer than five pages within 21 days and I will deal with the issue on the papers.

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O G Paulsen
Associate Judge

Solicitors:
Stallard Law Limited, Nelson
Rout Milner Fitchett, Nelson