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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1870/97

**NOT
RECOMMENDED**

NZLR

IN THE MATTER of s 290 of the Companies Act 1993

BETWEEN **GENERAL CAPITAL & COMMERCE
LIMITED**

Applicant

AND **JL VAGUE and GG McDONALD**

Respondents

Hearing: 10 December 1997

Counsel: S Greer for applicant
D France for respondent

Judgment: 16 December 1997

JUDGMENT OF MASTER FAIRE

Solicitors:

Anthony R Thomas, PO Box 105 466, Auckland for applicant
Jackson Russell, DX CP 20520 for respondent

The applicant seeks an order setting aside a statutory demand.

The application was given a first call date of Wednesday, 10 December 1997 at 11.45am. The respondent filed a notice of opposition. It is acknowledged that the respondents served the notice of opposition at 2.30pm on 9 December 1997. Mr Greer, for the applicant, opposed the granting of leave to be heard to the respondent pursuant to Rule 243 of the High Court Rules. He properly acknowledged that the delay in filing the notice of opposition did not cause any specific delay in the preparation of the case, nor did it cause any specific prejudice to the applicant. He submitted, however, that as no reasonable explanation for the failure to comply with Rule 243 had been given, then there was no basis for the grant of such leave.

The note in McGechan on Procedure to High Court Rule 243 records the following

“Courts are reluctant to deny hearing to a party who has failed to file notice of opposition through inadvertence or some reasonable cause. However, when leave takes the applicant by surprise and prejudice may result, an adjournment under r 261 on terms that notice of opposition be filed, and with consequences as to costs, is the likely result.”

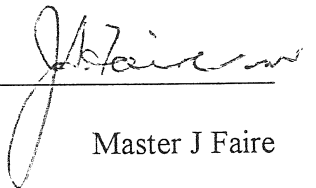
A similar comment is made in Sims Court Practice in the notes to Rule 243 where the learned authors record

“The usual practice of the Court, facing an application for leave, is to grant leave on terms as to costs. If there is likely to be prejudice to the applicant an adjournment (again with costs) is likely to be ordered.”

The delay in this case is a reasonably minor one. It in fact has caused no further delay in the disposal of the case than would otherwise have occurred. There has been in fact no actual prejudice suffered. There is undoubtedly an irritation factor and some inconvenience to counsel with consequential costs to the client where a specified time in the High Court Rules is not complied with. In most instances, the specific problem can be addressed, as I believe it can in this case, by an order for costs. In this case, I believe it appropriate that the question of costs, however, be finally determined when the application is determined on the merits.....

Having reached that conclusion, I now make the following orders and directions relative to the application to set aside a statutory demand:

- 1) leave is granted to the respondents to file their notice of opposition pursuant to Rule 243 of the High Court Rules
- 2) affidavits in support of the notice of opposition shall be filed and served by 20 January 1998
- 3) affidavits in reply may be filed and served no later than 3 February 1998
- 4) the proceeding shall be listed at 11.45am on 11 February 1998
- 5) costs are reserved.



Master J Faire