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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 512/97

97/999

BETWEEN **GOODMAN PROPERTIES NO 9 LIMITED**

Plaintiff

AND **PROPRIUS HOLDINGS LIMITED**

Defendant

Hearing: 18 July 1997

Counsel: M Vickerman for plaintiff
M Benvie for defendant

Judgment: 25th July 1997

JUDGMENT OF MASTER FAIRE

Solicitors:
McVeagh Fleming, DX CP 21506 for plaintiff
Knight Coldicutt, DX CP 31034 for defendant

The defendant applies for an order restraining advertising of an application to this Court to wind it up and for an order staying the proceeding. The application is made pursuant to Rule 700K of the High Court Rules.

The plaintiff pleads that the defendant is indebted to it for $18,307.88. It is pleaded that the sum is the total of

> "$15,307.88 owed by the defendant to Mercury Energy and $3,000 owed by the defendant to Auckland City which said debts were incurred by the defendant as developer of The Heritage Park residential development, and which the defendant undertook to pay upon the purchase of the defendant's interest in the said development by the plaintiff by agreement dated 31 October 1996."

The plaintiff pleads that in respect of the debt the defendant has failed to comply with a statutory demand served on its office on 13 March 1997.

The plaintiff is a wholly owned subsidiary of Bridgecorp Holdings Ltd. Bellco No 7 Ltd had an agreement with Auckland City Council to purchase land known as Heritage Park Residential Development at Harrison Road, Ellerslie. The defendant, by an agreement with Bridgecorp Holdings Ltd dated 4 August 1995, was required to procure an assignment of Bellco's rights under the Auckland City Council contract to a newly formed company, the plaintiff. The August agreement required the defendant to enter into a joint venture agreement with the plaintiff on certain terms. The object of the joint venture agreement was to develop and subdivide the land at Harrison Road, Ellerslie and to build eleven houses on the land and to sell them. The plaintiff and the defendant have proceeded on the basis that a joint venture agreement was in fact entered into as called for under the 4 August 1995 agreement.

The agreement of 4 August 1995 gave the defendant a right to nominate one of three directors of the plaintiff on condition that the nomination is acceptable to Bridgecorp Holdings Ltd. Bridge Corp Holdings Ltd agreed under the August agreement to fund all outgoings of the plaintiff that are correctly approved by the plaintiff's board of directors.

The defendant, under the joint venture agreement, was required to manage the joint venture in accordance with the directions of the directors of the plaintiff company. The terms set forth in the August agreement stipulate that after payment of various allowances and costs, residual funds from the joint venture shall be divided equally between the defendant and Bridgecorp Holdings Ltd.

The development duly commenced. Problems occurred in early 1996 which led to Bridgecorp Holdings Ltd alleging that the defendant was in breach of the joint venture agreement. In February 1996, Mr RM Petricevic on behalf of the plaintiff, met with Mr P Alexander on behalf of the defendant. An agreement was reached and the terms of the agreement were recorded in a letter on the plaintiff's letterhead which was signed by Mr Petricevic on behalf of the plaintiff, on behalf of the defendant, and by Mr P Alexander. Unfortunately, that did not resolve differences between the parties. The plaintiff says it was concerned particularly about cost increases.

There is a dispute between plaintiff and defendant witnesses. A meeting took place in late October 1996. The defendant's witnesses say that the meeting occurred on 30 October 1996 and that those in attendance were a Mr John Grayson, Mrs Alexander and Mr PG Alexander. The defendant says that Mr Petricevic was not present at the meeting on 30 October and it denies that there was a meeting between Mr Petricevic and Mr Alexander and Mrs Alexander on 31 October 1996.

What the defendant says occurs is that there was some discussion on figures which were recorded in a document produced. The document produced to the Court is a photostat copy document. There are, however, additional entries which form a left column. The defendant asserts that in the right column, which would seem to have been the original of the document, are estimates prepared by Bridgecorp Holdings Ltd and the left column are cost estimates of the defendant. This document is important because it makes reference to

> "Mercury Energy etc."

The right-hand column figure pertaining to that heading is $5,000. The left-hand column as produced by the defendant's deponent is 10/5,000. It is significant that the left column,

that is the defendant's column, which had been totalled does not take account of the upper figure applying to Mercury Energy of 10,000. The left column on the document produced to the Court is written in blue ink in contrast to the balance of the document which would seem to be a black photostat copy of a document. There is a contest between the witnesses as to the state of that document at the time of the meeting.

Before leaving that document, I record that it makes no reference to the second part of the sum claimed, namely, the sum alleged due in respect of the Auckland City Council account. I will return to that issue shortly.

The defendant's contention is that the Mercury Energy account was already in the hands of the plaintiff at the time of the meeting. By constrast, Mr Petricevic, for the plaintiff, said

> "As early as July 1996 the amount for Mercury Energy was known to the plaintiff which had received Mercury's account for $2,822.63 which had been included in the plaintiff's summaries forwarded to the defendant. Out of an excess of caution the plaintiff had made an allowance for additional costs and included those under the heading 'Mercury Energy etc'."

The October meeting was followed by a letter dated 31 October which was sent by the plaintiff to the defendant. It was signed by Mr Petricevic on behalf of the plaintiff. Amendments were made to the letter by the defendant and it was returned to the plaintiff. A signature on the amended letter alongside the words "accepted" appears. It is the signature of Mrs Alexander, a director of the defendant company. The letter was varied in relation to the settlement of certain accounts which are not relevant to the current dispute and in relation to the figure due for payment by deleting the words "$75,714.65 and replacing by $85,000". The relevant parts of the letter after amendments in relation to this dispute seem to be the following two sentences

> "Not waiving our rights under the joint venture agreement we are now offering to settle today, based on actual numbers to date for $85,000.
>
> ... If settlement is effected we will also require agreement from you:
> (1) that with the exception of the TSE Group for $10,000 plus GST for land costs, all other accounts incurred by you in relation to the project are for your account;

The Auckland City Council account is dated 14 February 1997, some three-and-a-half months after the letter of 31 October. It is addressed to the plaintiff. There is nothing in the papers to suggest that it is an account for work specifically ordered by the defendant. Mr Vickerman, for the plaintiff, seemed to acknowledge when I put to him that in terms of the letter of 31 October this particular account literally was not incurred by the defendant in relation to the project. What Mr Vickerman argued is that the account was for work which should have been completed at the direction of the defendant as part of the project. That, of course, is not the issue that is raised by the demand. The issue raised by the demand itself, is whether or not there is a liability on the part of the defendant to pay the account arising out of the 31 October settlement letter.

The defendant's application lists seven grounds in support. The fifth ground, that is, agreement to refer any dispute arising out of the joint venture agreement to arbitration was expressly abandoned in argument by counsel for the defendant. The remaining grounds in essence are:

1) the debt is the subject of a genuine dispute, because
2) the agreement of 31 October places the obligation by implication on the plaintiff to pay both accounts and not the defendant, or
3) that the accounts were invoiced to the plaintiff and there is no basis for the plaintiff seeking recovery of same from the defendant.

The general principles applicable in respect of an application for an order restraining advertising and staying a winding up application were referred to by the Court of Appeal in *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297. That decision referred to the earlier Court of Appeal decision of *Exchange Finance Co Ltd v Lemington Holdings Ltd* [1984] 2 NZLR 242 and to the Court of Appeal and Privy Council decisions in *Bateman Television Ltd (in liq) & Anor v Coleridge Finance Co Ltd* [1969] NZLR 794 (CA), [1971] NZLR 929 (PC).

From those authorities I extract the following general principles which are applicable to such applications:

1) in general a winding up order will not be made where there is a disputed debt

2) the applicant must show:

   (i) a genuine and substantial dispute as to the existence of the debt;

   (ii) that it would be unfair to allow the dispute to be resolved by the Companies Court rather than through action commenced in the ordinary way

3) assessment is made on material before the Court at the time and not on the hypothesis that some other material which has not been produced might nonetheless be available

4) the governing consideration can only be whether presenting or proceeding with an application savours of unfairness or undue pressure

5) Rule 700K directs the Court to deal with the application as if it were an application for an interim injunction

6) Rule 700K enables the Court to impose terms on any order it makes

7) such applications are interlocutory in nature and accordingly it would be wrong to express any concluded view on the merits of the dispute.

The demand and the statement of claim require the interpretation of what is an accord and satisfaction. In *National Provident Fund v Shortland Securities* [1996] 1 NZLR 45 at 50, the Court of Appeal referred to specific principles of construction and said

> "Those principles of construction are well established as is the primary rule that the starting point is the words used by the parties in their contract. The parties, particularly knowledgeable and experienced parties, legally advised, are to be taken to have intended what they have said. It is where there is ambiguity or inconsistency that the stated principles are invoked in order

> that these may be resolved by reference to such matters as the background and the object and purpose of the transaction.
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> In *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189, 196 Casey J reviewed the authorities. He cited the unreported decision of this Court in *Masport Ltd v Morrison Industries Ltd* (Court of Appeal, Wellington, CA 362/92, 31 August 1993) and referred to the statement of Robertson J at p 18:
>
> > 'When parties contract their obligations, rights and responsibilities are to be determined from a reading of the contract. If there is uncertainty or ambiguity then the surrounding factual matrix will be taken into account.'
>
> And that of Cooke P in the same case at p 2:
>
> > 'Businessmen and their lawyers are often loud in their stress on the need for certainty in commercial law. When it seems expedient, however, many are ready to destroy certainty by contending that an apparently complete written bargain was not what it seemed.'
>
> In the *Benjamin Developments Ltd* case Hardie Boys J also cited that and other established authorities and added (p 203) the warning against allowing:
>
> > '... the background to create the uncertainty of meaning and then use it again to resolve that uncertainty in a manner which is, in my view at least, contrary to the plain meaning of the words. Such an approach is not in accordance with the authorities.'"

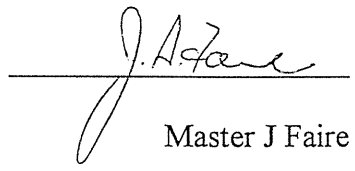
In this case, the accord and satisfaction contained in the letter of 31 October clearly does not express the parties' intentions. In my view, this is an obvious case for a reference to the surrounding factual matrix to determine precisely what the terms of the settlement agreed to were. The evidence establishes that some allowance for a Mercury Energy account was made. That in itself would raise a question mark as to at least quantum in relation to that account. That, however, does not fairly dispose of the matter because the way the evidence was adduced before this Court it is unclear who was present at the meeting which led to the settlement contained in the letter. It is therefore impossible, in this proceeding, to resolve precisely what the surrounding factual matrix was and therefore precisely what the concluded settlement agreement was. When it comes to the question of the Auckland City Council account, there is a further objection and that is that the account itself does not seem to be based on any specific instruction given by the defendant company in a way that could be said that the defendant company "incurred" the account.

I cannot and do not in this proceeding express any final view on whether the account could or should have been taken into account for the purposes of the October settlement.

Suffice to say it is a matter that, in my view, requires analysis in an ordinary action after discovery and cross-examination of the witnesses who both attended the meeting and later negotiated the settlement. What is important for this proceeding, however, is that I am satisfied that the defendant has established that there is a genuine dispute concerning the debt the subject of the demand and as pleaded in the statement of claim. The dispute goes to the heart of the matter because it relates to the issue of whether or not there is liability attaching to the defendant in respect of both accounts arising out of the October settlement.

I discussed with counsel whether, in relation to the Mercury Energy account, there might at least a basis for the giving of some security which would be the amount of the account less the GST, less the allowance called for in the document which was tendered at the October meeting. Having considered the matter further I have reached the view that the dispute does go to the question of liability for the whole account and it seems to me, therefore, that this a case where the ordering of terms by way of paying a portion of the account in as security is not justified.

Accordingly, I reach the conclusion that the defendant has established that there is a genuine and substantial dispute as to the existence of this debt. The dispute attaches to the whole debt, both as to liability and quantum. In the circumstances, I order that publication of any advertisement or any other information relating to the statement of claim in this proceeding is restrained. This proceeding in relation to the liquidation is stayed. The defendant has been successful on this application and is therefore entitled to costs which I fix at $1,500 plus disbursements as fixed by the Registrar.



Master J Faire