IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-2512

	UNDER	the Companies Act 1993
	BETWEEN	ACP MEDIA LIMITED Plaintiff
	AND	RAM COMMERCIALS LIMITED Defendant

Hearing: 16 February 2009

Appearances: N. Levy - Counsel for Plaintiff
D. Lester - Counsel for Defendant

Judgment: 18 February 2009 at 4.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 18 February 2009 at 4.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.

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[1] This judgment deals first with the plaintiff's request for leave to discontinue this proceeding and secondly with a costs application from the plaintiff arising from what it says was the need to commence and prosecute the proceeding.

[2] On 19 September 2008 the plaintiff served upon the defendant a statutory demand under s. 289 *Companies Act 1993* demanding payment of the sum of $7,345.19.

[3] Although some correspondence passed between the parties' advisers on 9 and 10 October 2009, no application to set aside the statutory demand was made by the defendant.

[4] Then, on 17 November 2008 the plaintiff filed its statement of claim seeking an order to place the defendant company into liquidation. This was based upon the unsatisfied statutory demand claiming $7,345.19. Service of the liquidation proceeding on the defendant took place on 28 November 2008 and advertising in the Dominion Post occurred on 21 January 2009 and in the New Zealand Gazette on 22 January 2009.

[5] It was not until 30 January 2009 that the defendant filed its statement of defence to this proceeding together with affidavits in support from Mr. Conroy and Mr. Anderson.

[6] As I understand the position, it is the plaintiff's contention that until the statement of defence was filed on 30 January 2009 there was never any proper notification of the fact that the debt claimed by the plaintiff was disputed and it was against that background that the present liquidation application was filed and proceeded. As a result, the plaintiff contends that it is entitled to costs with respect to this proceeding notwithstanding that it now seeks leave to discontinue.

[7] On these questions, it does appear that the first time the defendant raised any issue regarding a dispute over the debt claimed by the plaintiff was on 9 October 2008 when the defendant's solicitors wrote stating simply that *"the alleged debt is not due"*. No further explanation was provided.

[8] The plaintiff responded immediately. On 10 October 2008 the plaintiff's agent wrote back to the defendant's lawyers denying that there was any dispute with respect to the debt and advising that the liquidation application was to proceed. This 10 October 2008 letter met with no response.

[9] It was not until the affidavit of Mr. Anderson filed on behalf of the defendant on 30 January 2009 which indicated that the incurring of this debt was unauthorised, no contract was signed and it simply followed an order (for a lesser period than was charged) placed by a salesman who no longer worked for the defendant company, that the plaintiff had notice that the debt is a genuinely disputed one and thus it follows that liquidation proceedings were inappropriate.

[10] So far as the plaintiff's application for leave to discontinue is concerned, an order is appropriate and is now made granting leave to discontinue this proceeding.

[11] On a discontinuance r 15.23 *High Court Rules* applies. This rule states:

> *"15.23* ***Costs***
>
> > *Unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance."*

[12] The principles applying to this r 15.23 are set out in *McGechan on Procedure* at para. HR15.23.01 as follows:

> *"15.23.01* ***Principles***
>
> > *In Kroma Colour Prints v Tridonicatco NZ NZ Ltd (2008) 18 PRNZ 973, at p 975, the Court of Appeal reviewed r 476C (now r 15.23) principles in this way:*
> >
> > *The Judge correctly stated the law on r 476C. Her Honour referred to North Shore City Council v Local Government Commission (1995) 9 PRNZ 182, noting that the presumption in favour of awarding costs to a defendant against whom a proceeding had been discontinued may*

> *be displaced if there were just and equitable circumstances not to apply it. A court would not speculate on respective strengths and weaknesses of the parties' cases. The reasonableness of the stance of both parties, however, had to be considered. She also referred to Oggi Advertising Limited v McKenzie (1998) 12 PRNZ 535 which recognised that the discretion reposing in r 46 could override the general principles relating to discontinuance.*
>
> *Encompassed by that statement of principle is whether the plaintiff acted reasonably in commencing the proceeding, and the defendant in defending it. Thus, where the defendant acted reasonably in taking a step negating the point of the proceeding, and the plaintiff then discontinued, costs are likely to lie where they fall as in Olive Francis Retirement Home Ltd v Director-General of Health 13/7/05, Simon France J, HC Auckland CIV-2005-404-1367."*

[13] Applying these principles, in the present case I am satisfied that the plaintiff acted reasonably in commencing this proceeding. The statutory demand served upon the defendant company on 19 September 2008 was met with the letter noted at para. [7] above from the defendant's solicitors on 9 October 2008. However, no explanation of any kind was given as to why "the alleged debt is not due" nor was any application brought to set aside the statutory demand.

[14] As I have noted, the 9 October 2008 letter was in turn the subject of an immediate response from the plaintiff's agents on 10 October 2008. In that response, the plaintiff advised it did not accept the debt was disputed and confirmed that instructions had been given to proceed with an application for liquidation of the defendant company. That 10 October 2008 letter it seems was ignored and met with no response.

[15] Subsequently, therefore, the plaintiff issued the present proceedings and on 28 November 2008 served the statement of claim and related documents upon the defendant. Again this met with no response.

[16] Two more months went by. Then, on 21 and 22 January 2009 advertising of

the liquidation application took place.

[17] As I see the position the issue of these proceedings and the required advertising were based properly upon the view that the defendant company was presumed to be unable to pay its debts in terms of s. 287 *Companies Act 1993* as it had failed to comply with the statutory demand.

[18] It was only subsequently on 30 January 2009 when the defendant filed its statement of defence effectively raising for the first time its defences to the liquidation proceeding (both that the debt was properly disputed and the defendant company was solvent) that matters came to a head.

[19] In addition, only when the 30 January 2009 affidavit of Mr. Anderson on behalf of the defendant was to hand was the plaintiff aware that instructions had been given by the defendant to place $10,000.00 in its solicitor's trust account to cover the claimed debt.

[20] In my view, from the date when the plaintiff had a reasonable opportunity to consider the matters raised in the defendant's statement of defence and supporting affidavits, it is clear that the plaintiff had no reasonable cause to continue with this proceeding. It was only then that the plaintiff had notice that the debt was strongly disputed and from that point steps other than liquidation to resolve this dispute between the parties were appropriate.

[21] Given this, in my view it is appropriate for the plaintiff to be entitled to its costs and disbursements in this proceeding up to and including 9 February 2009 being 5 working days after the statement of defence was filed. That 5 working day period would have provided a reasonable opportunity for the plaintiff to consider the defendant's statement of defence and affidavits. As I see it, these proceedings were properly issued and the plaintiff acted reasonably in pursuing them up to that date given the failure on the part of the defendant either to apply to set aside the statutory demand or to provide any basis to support its dispute of the debt and/or confirm its solvency.

[22] It was not until the defendant filed its statement of defence and supporting affidavits on 30 January 2009 that the balance then changed whereupon the plaintiff properly sought leave to discontinue this proceeding.

[23] Before me the decision in *Delta Installations Limited v Hamilton Joinery Limited* (2003) 16PRNZ 820 was referred to. In that case the defendant had placed the plaintiff squarely on notice that the claim was in dispute when the statutory demand was issued. That differs markedly from the situation in the present case. Here the defendant gave no detail of any kind to justify its initial comment that the debt was disputed. Further, the plaintiff's warning the next day that liquidation proceedings would be taken was met with silence. In my view the plaintiff was entitled to assume at that point that the defendant was unable to substantiate its claim that the debt was disputed. The liquidation proceedings over one month later which followed were properly brought.

[24] That said an order is now made that the defendant is to pay to the plaintiff costs on a Category 2B basis together with disbursements as approved by the Registrar with respect to this proceeding up to and including 9 February 2009.

[25] With regard to matters which have arisen subsequent to 9 February 2009, costs for that period are simply to lie where they fall.

'Associate Judge D.I. Gendall'