IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2673

	UNDER	the Companies Act 1993
	BETWEEN	NORTHERN CREST INVESTMENTS LIMITED Applicant
	AND	ROBT. JONES HOLDINGS LIMITED Respondent

Hearing: 6 March 2009

Appearances: J. Douglas - Counsel for Applicant
D. Chesterman - Counsel for Respondent

Judgment: 11 March 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 11 March 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction and Background

[1] This is an application to set-aside a statutory demand under s. 290 *Companies Act 1993* ("the Act"). It is opposed by the respondent.

[2] The statutory demand was issued on 20 November 2008 against the applicant claiming the sum of $48,030.55. This was described as outstanding rental under a lease together with car park rates and GST.

[3] The lease in question ("the lease") related to part of Level 12 of Qantas House in Auckland and a number of car parks. The respondent was landlord under the lease and the applicant tenant. It seems the lease was terminated by the respondent as a result of default by the applicant as tenant. The parties accept that this termination took effect from 25 August 2008.

[4] The statutory demand claims rent subsequent to the termination date for the months of October and November 2008 of $20,846.66 per month plus GST. In addition car park rates for the months July, August and September 2008 totalling $1,000.50 plus GST are claimed. If this amount of $1,000.50 plus GST were to be apportioned to include only the amount owing before the lease was purported to be terminated on 25 August 2008, as I understand it, the outstanding car park rates for the period prior to that date would total $685.12 (including GST).

[5] The lease was entered into on 25 July 2005 between the respondent as landlord and the applicant (under its former name Blue Chip New Zealand Limited) as tenant. It was for a term of six years from 7 March 2005 expiring on 6 March 2011.

[6] As essential terms in the lease, paragraphs 10.4.3 and 10.4.4 provided:

> *"10.4.3 - The Lessee covenants to compensate the Lessor in respect of any breach of an essential term of this Lease and the Lessor is entitled to recover damages from the Lessee in respect of such breaches. The*

Lessor's entitlement under this clause is in addition to any other remedy or entitlement to which the Lessor is entitled (including the right to terminate the Lease).

10.4.4 - The Lessor shall be entitled to institute legal proceedings claiming damages against the Lessee in respect of the entire Lease term including the periods before and after the Lessee has vacated the Premises or the abandonment, termination, repudiation, acceptance of repudiation or surrender by operation of law whether the proceedings are instituted before or after such conduct."

[7] As I understand the position, since termination of the lease on 25 August 2008, despite its efforts to do so, the respondent has been unable to re-let the premises and they remain vacant. The respondent says, however, that since termination, it has carried out work to remove rubbish and make required repairs to the premises as a result of the applicant's breach of its obligations as tenant.

[8] Notwithstanding these matters, the statutory demand in question simply claims rental for 2 monthly periods post 25 August 2008 and the $1,000.50 plus GST for car park rates.

Counsel's Arguments and My Decision

[9] The present application is brought under s. 290(4) *Companies Act 1993* on the basis that there is a substantial and genuine dispute as to whether or not the amount claimed by the respondent in the statutory demand constitutes a "debt" owed by the applicant.

[10] In essence, the applicant's position is that the amount claimed represents unliquidated damages for breach of the lease contract rather than a "debt" due and that this amount therefore is not able to be the subject of a statutory demand.

[11] Section 290(4) of the Act provides as relevant:

"290 Court may set aside 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

(b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or

(c) The demand ought to be set aside on other grounds.

(5) A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.

(6) In subsection (5) of this section, defect includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.

(7) An order under this section may be made subject to conditions."

[12] It is clear from the authorities that: "*The onus is on the applicant to show a fairly arguable basis upon which it is not liable for the amount claimed*": per Master Venning in *Eastgate Real Estate Ltd v Walker* (2001) 15 PRNZ 308 at [30]; and see *Queen City Residential Limited v Patterson Co-Partners Architect Limited (No 2)* (1995) 7 NZCLC 260 at 936.

[13] Under s 290(4)(a) the Court may grant an application to set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether or not the debt is owing or is due. Whether there is a "*substantial dispute*" is a question of fact to be determined in light of all the relevant circumstances: *Lockwood Buildings Ltd v*

Hunter Douglas Coilcoaters Ltd (1988) 4 NZCLC 64,295; *Brookers' Commentary* at CA290.03(3).

[14] The test is as stated in *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297 (CA), a case under the then s 218 of the Companies Act 1955 (which stipulated when a company would be deemed unable to pay its debts):

> *"[2] The applicant must show a genuine and substantial dispute as to the existence of the debt, and that it would be unfair – as it usually would be – to allow that dispute to be resolved by the Companies Court rather than by action commenced in the usual way. That assessment must be made on the material before the Court, and not on the hypothesis that some other material, which has not been adduced, might nonetheless be available."*

[15] It is clear from s. 290(4)(a) of the Act that the applicant here must provide material to support its claim that there is a substantial dispute as to whether the debt is owing or due to the respondent. The question for determination therefore is whether the amount claimed in the statutory demand is a "debt".

[16] In *Colonial Mutual Life Assurance Society Limited v Commissioner of Inland Revenue* [1999] NZTC 15,1375 the Court held that:

> *"…A debt is something owed by one person to another. In legal (and common) usage it refers to what arises between the parties by reason of a prior obligation, whether contractual or statutory. The debtor has an obligation to pay "the debt" and can be sued on it." (para. 109).*

[17] The Court of Appeal in *OPC Managed Rehab Limited v Accident Compensation Corporation* [2006] 1 NZLR 778 held that a statutory demand had to relate to a "*debt that is due"* mirroring the language of s. 289 2A of the Act.

[18] Rental can be claimed as a debt if the lease has not been terminated by re-entry or otherwise – *Miller v Mattin* (1993) 2 NZ Conveyancing Cases 191,714. However, in the present case there is no dispute between the parties that the lease

was terminated on 25 August 2008 by re-entry on the part of the respondent as landlord.

[19] For the purposes of section 218 of the *Companies Act 1955*, (the predecessor of s. 290(4)(a) of the Act) it was held that a claim for damages for breach of contract not converted into a judgment debt could not be a "debt" due: *Re Prime Link Removals Ltd* [1987] 1 NZLR 510, 512.

[20] There is no doubt, however, that it is open to the respondent to bring a claim for damages based on the applicant's default under the lease or its alleged repudiation and to have that claim liquidated by judgment or arbitral award. The amount of any such judgment or award would then constitute "a debt". Until that happens, however, the respondent's claim for damages is unliquidated and, as I see it, cannot constitute "a debt".

[21] Before me, counsel for the respondent endeavoured to argue that the rental claim constitutes a debt, relying on the judgment of the Court of Appeal in *OPC Managed Rehab Limited v Accident Compensation Corporation.* In that case, the Court determined that a restitutionary action for money had and received was so similar to an action for the recovery of debt that it could be treated as a "debt due" for the purposes of section 289 of the Companies Act 1993. After reviewing various definitions of "debt", O'Regan J stated at paragraph [38]:

> *"Overall, a common theme of the above definitions, and that given by Hammond J in the* Colonial Mutual *case…, is that a "debt" arises where there is money owing from one person to another, and there is an obligation to pay that money. The definitions disclose that the common use of the term is where there is money owing pursuant to a judgment, contract or statute. However, the definitions do not discount that a "debt" may arise in some other way; for example the* Oxford Companion to Law *says "also from and by reason of any other ground of obligation", while* Black's Law Dictionary *refers to "a specific sum of money due by agreement or otherwise" (emphasis added)."*

[22] The respondent here argued that following the decision in *OPC Managed Rehab Limited v Accident Compensation Corporation*, whether the amount claimed

is more properly legally described as ‘damages’ or ‘debt’ is not relevant – the question is only whether the amount claimed is akin to a debt and fits within the definitions provided in that judgment. Counsel attempted to distinguish the present claim from apparently similar cases where a suit for damages for loss of bargain was the appropriate course, as those cases related to amounts which would have been payable in the future and required consideration of factors which caused the sum to be inchoate. The claim here is for a past rental period. It is said that the only argument that could be raised to suggest that the claim is inchoate or contingent is that the respondent has failed to mitigate its losses. The respondent submitted that in the circumstances of this case, where there is evidence that the respondent is actively attempting to let the premises, that argument is untenable.

[23] The respondent submitted that its claim fits within the *Colonial Mutual Life Assurance Society Limited v Commissioner of Inland Revenue* definition, referred to in *OPC Managed Rehab Limited v Accident Compensation Corporation* and set out above, as the demand relates to a prior contractual obligation, and the applicant has an obligation to pay the amount demanded and can be sued on it.

[24] In support of that argument that the demand relates to a prior contractual obligation, the respondent pointed to clauses 3.1 and 3.3 of the Lease, which contractually oblige the applicant to pay rent and rates monthly. The respondent noted that it is rent and rates owed for months which have passed which is sought in the demand here. However, in my view this argument is easily answered as the Lease itself refers to obligations to pay “during the term of this lease.” As such, it would be a stretch of the language indeed to construe these clauses as conferring a prior contractual obligation to pay for rent for periods following the termination of the contract.

[25] Counsel for the respondent went on in his argument before me to point to clauses 10.1 (i) and 10.4.4 of the lease. Clause 10.1(i) provides that if defaults or termination events occur the lessor may re-enter *“without releasing the lessee from any liability in respect of the breach or non-observance of any covenant, condition or agreement of this lease.”*

[26] In my view it is clear that this clause is not able to be read as applying to liabilities that would have accrued but for termination of the lease (as opposed to liabilities accrued prior to or by virtue of termination). In addition, if it were to have that meaning, as I see the position, it would be penal and thus unenforceable in effect.

[27] Clause 10.4.4 of the lease recognises that termination does not prevent the lessor from asserting a claim for damages in respect of the entire lease period, for example a loss of bargain claim deriving from a termination based on repudiatory breach. In that context, however, the usual principles relating to the need for repudiatory breach, mitigation and the time value of money will apply – see, for example, *Morris v Robt. Jones Investments [1994] 2 NZ Conv. Cas 191.783.*

[28] I am satisfied that the above referenced provisions of the Lease do not entitle the respondent to issue a statutory demand for post termination rental (as opposed to an established claim for damages for breach of the lease) as it is not a *"debt"* due from the applicant. The respondent cannot both exercise a right to terminate the Lease as it has done here and seek to assert contractual entitlements that have fallen away because it has done so.

[29] As to the claim for unpaid car park rates, Counsel for the respondent submitted that these are a debt which fell due prior to re-entry and termination of the lease. The lease contract refers to the billing of rates monthly, but counsel for the respondent submitted and it was not disputed that the established practice was for quarterly billing in advance. The rates invoice in question relates to a quarterly instalment for the period from July to September 2008. As it was a quarterly invoice, the applicant was obligated to pay the amount prior to re-entry. As such, I am satisfied that the whole of this amount fits within the definition of "debt" under section 289, and the amount exceeding $1000, it satisfies the minimum prescribed amount for a statutory demand: Companies Act Liquidation Regulations 1994, reg 5. The statutory demand therefore is to stand with respect to the reduced sum of $1,125.56 on the basis that the amount claimed in the 20 November 2008 demand is simply a material misdescription in terms of s. 290 (5) and (6) of the Act – see *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 795 (CA).

Result

[30] The present application to set aside the statutory demand is successful but only in part. With regard to the claim for car park rates, the statutory demand will stand in the sum of $1,125.56. The demand, in so far as it relates to the balance, is set aside.

[31] An order is now made that the Applicant is to have a period of five (5) working days from the date of this judgment to pay and satisfy the $1,125.56 due under the statutory demand failing which the respondent may commence liquidation proceedings against the applicant.

[32] As to costs, the applicant and the respondent have each been partially successful here and in my view costs should therefore lie where they fall. There is to be no order made as to costs.

‘Associate Judge D.I. Gendall’