

**IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY**

CIV 2009-441-11

BETWEEN

KINETIC ELECTRIC SOLUTIONS
LIMITED
Plaintiff

AND

BAYWIDE HOUSE REPILING LIMITED
Defendant

Appearances: S.J. Webster - Counsel for Plaintiff
M.B. Lawson - Counsel for Defendant

Judgment: 22 April 2009 at 4.00 pm

**JUDGMENT AS TO COSTS
OF ASSOCIATE JUDGE D.I. GENDALL**

*This judgment was delivered by Associate Judge Gendall on 22 April 2009 at
4.00 p.m. pursuant to r 11.5 of the High Court Rules.*

Solicitors: Sainsbury Logan & Williams, Solicitors, PO Box 41, Napier
Lawson Robinson, Solicitors, PO Box 45, Napier

Introduction

[1] This proceeding is settled, except for the issue of costs.

[2] The plaintiff seeks an award of costs on the basis that the liquidation proceedings were the motivating force behind the settlement and the payment of the debt.

[3] The defendant opposes this, contends that these proceedings were unnecessary and suggests this is an appropriate case for costs to lie where they fall.

Background Facts

[4] On 20 November 2008, the plaintiff served the defendant with a statutory demand claiming \$15,516.44. This was served at the defendant's registered office pursuant to section 289 Companies Act 1993. The defendant did not seek to set aside this statutory demand.

[5] A statement of claim seeking liquidation of the defendant was filed on 12 January 2009. It was then served personally on Brendon Hurley, the sole director of the defendant company, as well as at the defendant's registered office. The defendant did not file a statement of defence in response.

[6] On 12 February 2009, the day of the first call of this matter, counsel for the defendant asked that the matter be adjourned. An adjournment was granted (noted as a final adjournment) to enable the defendant to pay the debt. Counsel for the defendant contended that the defendant was solvent and that there was also an issue as to the true identity of who the debtor was here. The defendant subsequently lodged an application for abridgement of time to bring its defence on 26 March 2009, the day of the resumed court date. The matter was again adjourned this time to the following morning.

[7] Then, on 27 March 2009, the parties entered into a confidential settlement agreement whereby the plaintiff was to receive the sum of \$15,516.44 upon issuing a tax invoice for that amount payable by another company, Hawke's Bay Builders and

Renovators Limited. The issue of costs was reserved pending memoranda from counsel. Those memoranda have now been filed.

Counsels' Submission and my Decision

[8] The plaintiff seeks an award of costs here on a category 2B basis and disbursements. It submits that the issuing of liquidation proceedings was the motivating force behind the settlement and eventual payment of the debt, and that all the actions the plaintiff took with regard to the liquidation proceedings were instrumental in bringing about a solution whereby payment was made. Reference is made to *Contact 98FM Limited v 89FM Limited* HC Auckland M269/01 14 February 2002, a case concerning the defendant's obligation to pay costs in circumstances where the principal debt had been settled.

[9] The plaintiff notes further that the defendant failed to take any steps to defend the proceedings. The defendant explains its inactivity on the basis that the plaintiff served the statutory demand at a vacant address, where the plaintiff knew the director no longer resided. Although the proceedings were also served on the director, they were not dealt with until the return of the defendant's solicitor at the end of January 2009. By this time the date for filing a defence had passed.

[10] The defendant submits that the proceedings have been unnecessary because payment has always been offered by the company that actually commissioned the work and owed the debt. It claims that it has attempted to have the plaintiff invoice that company from the outset, and that similar requests had previously resulted in the correct entity being invoiced. The settlement agreement now provides for payment of the debt by the appropriate debtor company, Hawkes Bay Builders and Renovators Ltd. The defendant therefore argues that it was neither insolvent nor indebted to the plaintiff, and that this was thus a situation where liquidation proceedings were inappropriate despite the fact that the defendant company took no steps. On this basis it is submitted that there should not be an award as to costs and that costs should lay where they fall.

[11] In *RPNZ Properties Limited v Solwind Limited* HC Auckland CIV 2007-488-780 9 June 2008, Robinson AJ awarded costs to the plaintiff following the

withdrawal of liquidation proceedings against the defendant. There, the defendant opposed the plaintiff's application for costs on the basis that the liquidation proceedings were based on a debt that was contested. In considering the defendant's argument, Robinson AJ noted that the liquidation proceedings were based on the ground that the defendant had failed to comply with a statutory demand and that the defendant had taken no steps to either pay the amount claimed or have the statutory demand set aside. The plaintiff was therefore entitled to assume that the debt was not disputed and that the defendant was insolvent. An order of costs against the defendant was accordingly made in that case.

[12] In my view, similar reasoning applies in the present case. I do not accept the defendant's argument that it failed to respond to the plaintiff's statutory demand because it had not in fact been served. It was the defendant's responsibility to ensure that the address of its registered office remained current. The affidavit of service dated 12 January 2009 also states that, although the address was vacant at the time of service, the mailbox containing the plaintiff's statutory demand was cleared overnight.

[13] The defendant also did not provide to the Court any evidence for its claims that payment had been offered to the plaintiff from the outset and that the proceedings were thus unnecessary.

[14] For these reasons, I find that the plaintiff is entitled to costs here and they are to be assessed on a category 2B basis. Costs have been set out in the schedule to the settlement agreement, but have not been consented to by the parties. I award costs to the plaintiff on a scale 2B basis as follows:

Item 21	Preparing and issuing Statutory Demand	0.2
Item 22	Preparing Statement of Claim and other documents	0.6
Item 23	Appearance at Hearing (12 February 2009)	0.4
Item 23	Appearance at Hearing (26 & 27 March 2009)	0.4
	Total	1.6

[15] Applying the appropriate daily recovery rate for a 2B proceeding (\$1,600.00 per day), I award scale costs in the order of \$2,560.00 and disbursements as set out in the schedule to the settlement agreement (\$946.00).

‘Associate Judge D.I. Gendall’