IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-007189

IN THE MATTER OF	the Companies Act 1993
AND IN THE MATTER OF	an application for an order pursuant to section 290 of the Act to set aside a statutory demand
BETWEEN	JIREH COMMERCIAL LIMITED Applicant
AND	DIB CONSTRUCTIONS LIMITED Respondent

Hearing: 23 April 2009

Counsel: A M Swan for applicant
M Mitch for respondent

Judgment: 24 April 2009 at 4:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 24 April 2009 at 4:30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
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[1] Jireh Commercial Limited (Jireh) has applied to set aside a statutory demand served on it by DIB Constructions Limited (DIB). Jireh accepts that it was liable to DIB for the sum demanded, but says that there is a substantial dispute as to whether the debt is owing. It says that it has paid or satisfied the debt under an arrangement made with one of DIB's directors (Mr Yuan).

[2] DIB says that the debt has never been paid to it, or satisfied. It says that Mr Yuan had no authority to enter into the arrangement on its behalf.

Background

[3] Jireh engaged DIB to undertake plastering work on a building project. DIB rendered an invoice for $163,167.63. Jireh was having financial difficulties at that time. It offered its creditors the opportunity to take land or assets in lieu of debts.

[4] In response to this offer, one of DIB's directors (Mr Yuan) agreed to buy one of the offered properties and certain safety deposit boxes from a company related to Jireh, Tony Tay Group Limited (TTG), under an arrangement whereby TTG agreed to assume liability for the debt and the amount of the debt was credited towards the purchase price of the property on settlement. The agreement provided for the debt to be the deposit, and part payment of the purchase price.

[5] In correspondence between Mr Yuan's solicitor and TTG's solicitor prior to settlement, Mr Yuan's solicitor set out this arrangement and stated:

> Provided that settlement proceeds on the above basis, our client Yixing Yuan on behalf of DIB Constructions Limited confirms that the debt of $163,167.63 as set out in 1 above is fully and finally settled (set off).

[6] Mr Yuan completed the purchase of the property from TTG. TTG credited the sum of $163,167.63 against the purchase price.

[7] After the purchase was complete, a co-director of DIB (Mr Ibrahim) challenged the arrangement. He said that the arrangement required approval of at

least two of DIB's three directors. As approval had not been given by either of the other two directors, he says DIB is not bound by the arrangement and that Jireh still owes the debt to DIB. Against that background, Mr Ibrahim had his solicitor serve the statutory demand on Jireh.

Principles for setting aside

[8] Jireh brings its application under s 290 of the Companies Act 1993. The particular parts of that section on which it relies are:

> **290 Court may set aside statutory demand**
>
> (1) The Court may, on the application of the company, set aside a 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….

[9] The inquiry which the Court must undertake in deciding whether or not there is a substantial dispute has been summarised by the Court of Appeal in *United Homes (1988) Limited v Workman* [2001] 3 NZLR 447 at para [34]:

> 34. The Court is not required in cases of this character meekly to accept without question whatever unvarnished statements may happen to be made on affidavit. The Court is entitled to act in a more robust and common-sense manner. The principles developed in cognate fields such as applications to remove caveats, and opposition to summary judgment (eg Eng Mee Yong v Letchumanan (1980) AC 331; Bilbie Dymock Corp v Patel (1987) 1 PRNZ 84) apply by analogy.

The competing arguments

[10] Counsel for Jireh acknowledged that there was a dispute as to whether the arrangement which Mr Yuan made was binding on DIB. He submitted that that dispute could and should not be resolved on this application. He argued that there was prima facie evidence before the Court that Mr Yuan entered into the arrangement on behalf of DIB (with a view to recovering its debt). He submitted

that such an arrangement was within the customary authority of a director, and was therefore binding on the company.

[11] Counsel for DIB argued that there was no substantial dispute. She had focused her written submissions on whether or not Jireh had an arguable claim to set off (s 290(4)(b)). She addressed Jireh's case (under s 290(4)(a)) that the claim had been paid or satisfied, in her oral argument. She argued that Jireh and TTG knew or ought to have known that DIB could act only by agreement of at least two directors, that the debt had never been validly assigned, and that DIB had given no consideration.

Discussion

[12] The starting point for analysis of this dispute is whether Jireh still has an obligation to DIB. Although both counsel referred to assignment of the debt (perhaps picking up on a reference to assignment made in the correspondence between solicitors pre-settlement), the correct analysis in my view is whether or not there has been a valid novation. The following extract from the judgment of Windeyer J in *Olsson v Dyson* (1969) 120 CLR 365, 388 explains what is required for novation:

> 14. … The ultimate distinction, in juristic analysis, between a transfer of a debt by assignment and by novation is simple enough. Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract: if the new contract is to be fully effective to give enforceable rights or obligations to a third person he, the third person, must be a party to the novated contract. The assignment of a debt, on the other hand, is not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is needed. The debtor is given notice of it; for notice is necessary to complete an assignment pursuant to the statute or in the case of an equitable assignment to preserve priorities. But the debtor's assent is not required. He is not a party to the transaction.
>
> 15. In Scarf v. Jardine (1882) 7 App Cas 345, at p 351 Lord Selborne said novation "means this – the term being derived from the civil law – that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract". In that sense "novation" means

> simply a new contract standing in the place of the old. It may be a new contract between the parties to the old contract, A (in this case Dyson) and B (in this case the company); or it may be a contract between them and a new party, or parties, e.g., between A, B and C (in this case the respondent). It is in the latter sense that the word is most often used in common law countries in connexion with the transfer of debts from one creditor to another. As put in Corbin on Contracts, vol. 6, p. 189, speaking of the law in the United States:
>
> > "All novations are substituted contracts; and the converse is also true that all substituted contracts are novations, unless we follow the more usual custom of using the word novation only in cases where the substituted contract involves a substituted debtor or creditor as a new party."

[13] Adopting this analysis, the inquiry in this case must be whether there was an agreement between Jireh, DIB and TTG by which TTG assumed Jireh's obligation for the debt.

[14] The evidence discloses clearly that Jireh and TTG intended the arrangement with Mr Yuan to have that effect. The critical issue is whether it is arguable that Mr Yuan bound DIB to this new contract.

[15] Mr Yuan's co-director Mr Ibrahim disputes that DIB agreed to Jireh's debt being settled in this way. In a letter written to TTG on 19 September 2008, Mr Ibrahim's solicitor states, after recording Mr Ibrahim's understanding of the agreement between Mr Yuan and TTG, that Mr Ibrahim had no prior knowledge of this transaction and did not consent to it.

[16] Counsel for Jireh relies on s 18 of the Companies Act 1993, the relevant portions of which read:

> **18 Dealings between company and other persons**
>
> (1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that—
>
> (a) This Act or the constitution of the company has not been complied with:
>
> (b) A person named as a director of the company … —
>
> (iii) Does not have authority to exercise a power which a director of a company carrying on business of the

> kind carried on by the company customarily has authority to exercise:
>
> …
>
> unless the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a), (b), … as the case may be, of this subsection.

[17] This authority can be express or implied*:* *Brookers Company & Securities Law* CA18.05:

> **CA18.05 Actions beyond authority of agent**
>
> A company, as an abstract legal entity, effects its dealings through persons acting on its behalf. Section 18(1)(b)-(e) recognises that persons dealing with a company are, in reality, dealing with "agents" of the company. Those agents may act under actual or apparent authority.
>
> Actual authority may be express (for example conferred under the company's constitution or by board resolution) or implied. Implied authority may arise when, due to the position held by the relevant person and the nature of the company, the transaction could normally be expected to be within that person's powers to perform: *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549; [1967] 3 WLR 1408 (CA).

[18] I consider that it is at least arguable that Mr Yuan had implied authority to enter this arrangement on behalf of DIB. He is referred to in correspondence as managing director of DIB at that time. DIB has not challenged that. I accept the submission of counsel for Jireh that it is arguable that a director (and perhaps even more so a managing director) would customarily have authority to agree to novate a debt. The existence of such authority is particularly likely where there are real concerns about the ability of the original debtor (Jireh) to pay, and the new debtor (TTG) is offering assets to meet the debt.

[19] Although this is a matter of internal management, I consider that it is also arguable that there were arrangements within DIB for Mr Yuan personally to receive the benefit of the debt and account subsequently to his co-directors. There is evidence of this arrangement in the letter from Ibrahim's solicitor to TTG of 19 September 2008:

> On the eventual sale of that land, Mr Yuan was to retain the amount of the debt and to deduct payment for his work and to then pay our client an

> amount to which he was entitled for his work undertaken by them in terms of the contract.

[20] As already mentioned, counsel for DIB argued that Jireh and TTG had knowledge that DIB could only act by agreement of at least two directors. For the purpose of the present application it is sufficient to say that I find no evidence that Jireh or TTG knew or ought to have known of any requirement that DIB could only act by two directors. DIB's constitution is not before the Court. The only evidence to which DIB's counsel could refer me is a letter written by DIB to Jireh and TTG on 29 May 2008 setting out the unpaid claims and requesting a meeting, which was signed by two directors. I do not find that sufficient to impute the necessary knowledge to Jireh.

[21] I can deal briefly with two other points raised by counsel for DIB. First, it is clear from the passage from *Olsson v Dyson* cited above that the rights and obligations under the new contract constitute consideration. Secondly, there is no rule to the effect that Jireh must produce detailed evidence of solvency in order to have the demand set aside: *Kim v Wasan International Company L*imited CA 39/06, 4 October 2006.

Decision

[22] For the reasons I have given I find that there is a substantial dispute as to whether Jireh owes the debt demanded by DIB. The application to set aside the statutory demand is granted.

[23] As the successful party, Jireh is entitled to costs. DIB is to pay Jireh costs on a 2B basis together with disbursements as fixed by the Registrar.

Associate Judge Abbott