

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

**CIV 2009-404-576**

IN THE MATTER OF      of section 290 of the Companies Act 1993

BETWEEN                      ROYCE INVESTMENTS  
   Applicant

AND                              NEW ZEALAND HOUSING  
   FOUNDATION  
   Respondent

Hearing:              4 May 2009

Appearances: P F Chambers for the Applicant  
                         J Ropati for Respondent

Judgment:              4 May 2009

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**ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**

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*Counsel:*

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[1] The respondent (“NZHF”) issued a statutory demand against the applicant (“Royce”) for repayment of the sum of \$56,250 inclusive of GST. The claim is made pursuant to a deed of covenant dated 24 June 2004. The entire terms of that deed are set out below.

“Background

- A. Royce and Housing New Zealand Limited (“HNZ”) will be entering into an agreement for the development and sale and purchase of approximately 68 houses at West Coast Road, Glen Eden (“Agreement”) intended for occupation by Te Whanau O Waipareira Trust (“Trust”).
- B. Foundation has agreed to provide facilitation, co-ordination and relationship interface services as defined in the Consultancy Agreement attached (Schedule 1) in respect of the development with HNZ, the Trust and Waitakere City Council.

THE PARTIES AGREE as follows:

- 1. Royce covenants with the Foundation to pay to the Foundation:
  - (a) a service fee of \$100,000.00 plus GST at the stage when the first payment is due to be made under the Agreement.
  - (b) a further service fee of \$50,000.00 plus GST when the last Residence achieves reaches Practical Completion under the Agreement. The expressions “Residence” and “Practical Completion” have the meaning given to them in the Agreement.
- 2. The foundation covenants to provide assistance and support for the establishment of a drug rehabilitation community house in Auckland for up to 18 months following the date of this Deed.”

[2] In essence NZHF agreed to provide “facilitation, co-ordination and relationship interface services” in connection with a housing development. The balance of NZHF’s fee of \$50,000.00 plus GST was due when the last residence achieved “practical completion”. In addition NZHF agreed “to provide assistance and support” for the establishment of a drug rehabilitation community house in Auckland for up to 18 months i.e. until 24 December 2005.

## **Application to set aside Statutory Demand**

[3] Royce denies any indebtedness and says there is “a substantial and ongoing dispute... which the respondent has been aware of since... 2 December 2009”. In an affidavit dated 9 February 2009 Mr Eatson a director of Royce avers there were breaches of the covenant in that any payment, if due, was to originate from funds held by HNZ to be released after practical completion was signed off by HNZ and a certificate of completion was given by the local authority.

[4] Further, Mr Eatson deposed NZHF had not honoured its obligations for assistance to the establishment of a drug rehabilitation community house in Auckland. However in the outcome Mr Eatson states Royce’s lawyer had written to NZHF canceling the parties agreement and demanding the refund of the initial payment made because of its failure to provide assistance pursuant to the deed of covenant. In an affidavit by Mr Ellery, another of the Royce’s directors he deposes there are background factors which explain the terms of the agreement entered into between the parties. According to Mr Ellery he said when NZHF purchased the land Royce gave up its own option for that land in return for oral undertakings that NZHF would engage the construction services of companies associated with Royce. Another part of the arrangement “included NZHF building within that development a ‘halfway’ (drug rehabilitation) house, due to then recent events exposing me to the horrors of drug addiction by way of a close family member, of which Mr Donnelly was well aware.”

[5] Mr Ellery said NZHF failed to honour its promise to engage the services of all three companies associated with Royce. He said it was agreed that the deed would record that the assistance required with the establishment of the drug rehabilitation house would be provided by the funds paid to NZHF by Royce.

[6] Mr Ellery also asserts that practical completion is not achieved until code of compliance certificates have issued – by inference he claims that code of compliance certificates have not issued. He says neither is practical completion achieved even though all newly erected houses are occupied.

## **The respondent's evidence**

[7] In his affidavit for NZHF Mr Donnelly acknowledges that the term “practical completion” has the meaning given to it by the agreement between Royce and HNZ. He says practical completion was achieved in respect of the last of the residences by at least June 2008. Further as all residences were occupied by HNZ at that time the balance of \$50,000.00 plus GST then became due for payment by Royce.

[8] Mr Donnelly denies any claim that a compliance certificate was required as a precondition to payment. He denies also any suggestion that the payment became due only when Royce received payment from HNZ.

[9] Mr Donnelly deposes NZHF did provide assistance and support for the establishment of a drug rehabilitation community house in Auckland – and offered ongoing assistance beyond the required 18-month period which expired in December 2005. He says at no time was any issue ever taken by Royce over the assistance provided during the covenant period.

[10] Ms Dunn has also sworn an affidavit on behalf of NZHF. She says on 26 March 2009 she made a formal request to HNZ under the Information Act concerning the subject development. She annexes HNZ's reply where it is stated:

“I can inform you that on 8 June 2008 the development... was certified as practically complete by Housing New Zealand Corporation.”

[11] Royce's counsel at the beginning of today's hearing submitted Ms Dunn's affidavit should not be read due to the witnessing solicitors connection to HNZ. I informed counsel it would be read. There is no suggestion of prejudice or unreliability arising in HNZ's letter due to the solicitor's connection.

## **Considerations**

[12] The application is without any merit at all. Mr Ellery's contributions by explaining the background are of no assistance. Mr Ellery's and Mr Eatson's complaints about breach of the covenant to provide assistance for the establishment

of a drug rehabilitation community house in Auckland are completely unsupported by evidence. There is no evidence to challenge the claim of Mr Donnelly that that support has been given.

[13] The claim on behalf of Royce that practical completion means upon issue of a certificate of compliance is likewise faulty. At various times Royce has through lawyers maintained that its agreement with HNZ confirms that practical completion is tied with the issue of a code of compliance certificate. Yet they have refused to deliver evidence of that claim. They have refused to provide a copy of their agreement with HNZ. In any event, HNZ's recent letter confirms that practical completion of the development occurred in June last year.

[14] Royce must upon this application show that there is arguably a genuine and substantial dispute as to the existence of the debt. Royce has not done that. It has not adduced evidence when such could have been expected. It has tried to explain its version of NZHF's obligation of commitment due to background factors which were not referred to at all in the deed of covenant.

[15] As certain as this Court is that Royce does not have a reasonably arguable case, it is equally certain it can establish no basis for a counter claim or cross demand.

### **Conclusion**

- [16] (a) The application is **dismissed**.
- (b) Costs to **NZHF** on a category **2B** basis.
- (c) The statutory demand compliance period is extended to **4:00pm 18 May 2009**.