IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-3254

IN THE MATTER OF	Section 290 of the Companies Act
BETWEEN	SIPKA HOLDINGS LIMITED Plaintiff
AND	NOBILO & CO LIMITED Defendant

Hearing: 19 June 2009

Appearances: Mr P J Wright for applicant
Ms N Tabb for respondent

Judgment: 19 June 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Solicitors:

Stainton Chellew, P O Box 989, Auckland

Ms Natalie Tabb, P O Box 101972, North Shore Mail Centre

[1] In this proceeding the respondent Nobilo and Co Limited instructed a debt collection firm who on their behalf posted a statutory demand to the applicant. The applicant considering that the statutory demand was not justified instructed its solicitors to take steps to set aside the statutory demand. That the statutory demand was not justified has been tacitly accepted by the respondent which does not oppose the making of an order setting it aside. The parties are now in dispute over the matter of costs.

[2] Essentially the respondent says it should not have to pay costs because:

a) It did not actually serve the statutory demand at the applicant's registered office.

b) It sent advice to the applicant before the applicant issued proceedings saying that it was all a mistake and that it would not be proceeding with the statutory demand. I should add that the applicant says it never got the notice that the respondent says it sent.

[3] I consider that the respondent should pay costs. It is idle for the respondent to say that it did not comply with the requirements of the laws as to service. Giving a notice whether served regularly or otherwise is intended to put pressure on companies such as the applicant. That's why they are sent. The statutory demand ? should not have been sent – wherever it was sent - because the respondent admittedly had no right to pursue the statutory demand.

[4] The next issue concerns the respondents sending notice that they did not intend to take any further action on the statutory demand. Essentially what was being attempted here was the respondents seeking to mitigate the harm that had been done by the respondent's wrongful act. But it does not excuse the respondent for wrongly sending a statutory demand in the first place. There is a dispute as to whether the advice was received or not, but the fact is that the applicant went to the effort and expense of filing an application to set aside the statutory demand which is something that it presumably would not have done if it did not still believe that it was in peril from the statutory demand.

[5] In my view the respondent ought to pay costs. The applicant has indicated it is prepared to compromise and take costs on a 1A basis.

[6] I should add that the Courts have frequently deprecated the misuse of statutory demands. It is no answer for the respondent to say it made a 'mistake'. Before a company issues a statutory demand it should check the position very carefully both to make sure that the facts support the issue of a demand and that legally it has got the right to do what it proposes doing. It does not seem that any great care was taken in this case but in any event, as I say, that a mistake was made is neither here nor there when it comes to a making of a cost order on an application to set-aside a statutory demand. If an entity deliberately issued a statutory demand when it knew it was not entitled to, that may have significance in that even greater costs could be awarded. But the fact of a mistake does not of itself excuse the respondent company from paying some costs.

[7] The respondent will pay costs on a 1A basis together with disbursements to be fixed by the Registrar.

_____

J.P. Doogue
Associate Judge