IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-165
CIV-2009-485-166
CIV-2009-485-167

BETWEEN	XO LIMITED Applicant
AND	BARTERMEN TURKEY SADV DANIEL EVANS MIRIAM WORSNOP Respondents

Judgment: 22 July 2009 at 12.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 22 July 2009 at 12.00 p.m. pursuant to r 11.5 of the High Court Rules.

Solicitors: Thomas Dewar Szirany Letts, Solicitors, PO Box 31-240, Lower Hutt
Johnston Lawrence, Lawyers, PO Box 1213, Wellington

Introduction

[1] On 2 June 2009, I gave judgment in this matter setting aside three statutory demands dated 9 January 2009 issued by the three respondents against the applicant.

[2] The applications to set aside the statutory demands by Daniel Evans ("Mr. Evans") and Miriam Worsnop ("Mr. Worsnop") were unopposed. Accordingly, I made orders to set them aside by consent. The application to set aside the statutory demand by Bartermen Turkey SADV ("Bartermen Turkey") was defended unsuccessfully.

[3] At para. [18] of the judgment I addressed the issue of costs and directed that the parties file memoranda on the issue, should they be unable to reach agreement. It appears they have been unable to agree.

[4] The applicant filed its memorandum as to costs on 24 June 2009. On 25 June 2009, counsel for the respondents sought two further weeks for the filing of submissions, which I granted. The respondents, however, failed to file any memoranda as to costs by the directed date, 9 July 2009. Nearly an additional two weeks has elapsed since that date and no memorandum on costs has been filed. The applicant is entitled to a decision on costs. I am therefore required to give my decision on the question of costs on the basis of the material currently before the Court.

[5] The applicant seeks costs on a category 2B basis against Bartermen Turkey and Ms. Worsnop, but asks for an order for increased costs in respect of Mr. Evans.

Calderbank Letter

[6] However, before determining costs in respect of each respondent, I will briefly deal with the effect of a Calderbank letter dated 23 April 2009, in which the respondents offered to set aside all three statutory demands on the basis that costs were to lie where they fell. The applicant replied that it was not prepared to accept

the offer unless the respondents paid for over $7000 in fees that it had already incurred.

[7] Rule 14.11 of the High Court Rules provides for the effect of such offers on questions of costs and states as follows:

> "14.11 **Effect on costs**
>
> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
>
> …
>
> (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—
>
> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
>
> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.
>
> (4) The offer may be taken into account, if party A makes an offer that—
>
> (a) does not fall within paragraph (a) or (b) of subclause (3); and
>
> (b) is close to the value or benefit of the judgment obtained by party B."

[8] The overall effect of r 14.11 is that the maker of an offer secures a right to costs if the offer is worth more, or is more beneficial to the other party, than the judgment subsequently obtained. The offer may also be taken into account if it is close to the value or benefit of the judgment. These provisions are of course subject to subclause (1), which provides that the effect of such offers is at the discretion of the Court.

[9] The applicant submits that the Court ought not rely on the Calderbank letter because substantial costs had already been incurred in respect of the proceedings, and because the statutory demands were "completely baseless". It refers to *Concrete Structures (NZ) Limited v Palmer* HC AK CIV-2004-463-825 7 April 2005, where Courtney J was not prepared to take into account the defendant's Calderbank offer because, by the time it was made, the parties had already incurred substantial costs, and the difference in costs if the letter were taken into account was unlikely to be significant.

[10] The present case does not appear to me to properly fall within r 14.11 (3) or (4). The applicant was in effect asked to abandon its applications, but was provided with little incentive to do so. In light of the subsequent success of those applications, in my view it was not reasonable to expect the applicant to withdraw the applications and forego any claim to the substantial costs that had already been incurred: compare *Phoenix Organics Ltd v RD2 International Ltd (No 2)* HC AK CIV-2005-404-5070 21 December 2005 at [25]-[26]. On this basis alone, I do not consider that it can be said that the offer was more than or almost as beneficial to the applicant as the judgment obtained.

Bartermen Turkey

[11] As the successful party in the application to set aside the statutory demand, the applicant is entitled to an award of costs against Bartermen Turkey. This is clear from r 14.2(a), which provides as a general principle on the determination of costs that "the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds".

[12] Bartermen Turkey sought payment of an alleged debt of $6,944 that was said to arise from work-related accommodation expenses incurred by the applicant when its employees were in Turkey. Bartermen Turkey claimed that the applicant had acquired a credit facility with the respondent whereby it agreed to pay for these expenses. Because the claim involved factual disputes concerning the very existence of the debt in issue, the applicant was successful in its application to set aside the statutory demand. It is therefore entitled to costs on a category 2B basis.

[13] The applicant, however, seeks an order for costs of $4,680 plus disbursements, including allowance for second counsel at the hearing. I do not think that this was an appropriate case for second counsel. The issues raised were relatively straightforward, and there was therefore no need for second counsel: see *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 at [16]-[22].

[14] An order is now made that Category 2B costs of $4,680 are to be paid by the respondent Bartermen Turkey to the applicant, together with disbursements of $405.33 as set out in Schedule A to the applicant's 24 June 2009 memorandum as to costs.

Miriam Worsnop

[15] Ms. Worsnop's statutory demand sought a sum of $51,838.28 for expenses incurred in the course of providing professional services for the applicant. She then withdrew her opposition to the application to set aside the demand. The applicant emphasises that Ms Worsnop's statutory demand sought expenses which were the subject of a full and final settlement, and that it was therefore inappropriate to issue the demand without any prior correspondence on that issue, approximately 18 months after the alleged debt was said to arise.

[16] Here, Ms. Worsnop has not provided me with a reason to depart from the principle that costs are to follow the event. While it is therefore not necessary for me to conclusively determine whether there was obviously no basis for Ms Worsnop's statutory demand, I note that it is often inappropriate to issue a statutory demand without first seeking payment from the alleged debtor directly. Due to the often draconian consequences which can flow from the issue of a statutory demand, creditors must be prudent to ensure that the alleged debt is not genuinely disputed. Steps must accordingly be taken to a reasonable extent to ascertain whether such a dispute exists prior to the issue of a statutory demand: *Keystone Ridge Limited v City Sales Limited* HC AK M549-IM02 19 July 2002 at [10].

[17] Based on these considerations, I am satisfied that the applicant is entitled to an order for costs against Ms. Worsnop on a category 2B basis. An order is now made that Category 2B costs of $3,680 are to be paid by the respondent Ms. Worsnop to the applicant, together with disbursements of $405.33, as set out in Schedule A to the applicant's 24 June 2009 memorandum as to costs.

Daniel Evans

[18] As previously stated, increased costs are sought with respect to the application to set aside the statutory demand by Mr. Evans. On this, the applicant relies on r 14.6.3(b)(ii), which provides that a Court has discretion to make an order for increased costs if:

> "… the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by … taking or pursuing an unnecessary step or an argument that lacks merit".

[19] In *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897, the Court of Appeal noted that, where the Court considers an increase is justified in accordance with the terms of the rules, costs should be uplifted to what would be a reasonable fee in terms of the rules, but should not normally be uplifted by more than 50 percent.

[20] Mr. Evans was a director and also the CEO of the applicant before he resigned in 2007. His statutory demand claimed an outstanding debt of $99,258.45. It appears that he sought to rely on a settlement agreement from 2007, which provided that the applicant was to pay to Mr. Evans a sum of $80,000 on raising $1,000,000 in investments within three months of the date of the agreement. He argued that he was entitled to this payment following a new share issue which allegedly raised $1,000,000. Mr. Evans also claimed $19,258.45 as reimbursement for expenses on behalf of Ms. Worsnop.

[21] According to the applicant, there was no correspondence on this issue before the statutory demand was issued, although Mr Evans could have simply asked whether the applicant had in fact raised the $1,000,000 in question. As evidenced by its annual reports, the applicant only raised an amount of $527,670 during the relevant period. Following the issue of the demand, the applicant filed affidavit evidence disputing that any such investment was ever received, and Mr Evans subsequently withdrew his opposition to the application.

[22] The applicant now submits that an order of increased costs is justified on the basis that Mr Evans had no evidence to support his contention that over $1,000,000

was raised by the applicant, and that Mr Evans should have at least inquired with the applicant before issuing a statutory demand. An uplift of $1,500 is sought on costs of $3,680 (calculated on a category 2B basis) to go to the costs of preparing affidavits. The applicant says that the size and complexity of this statutory demand justified the amount of work that went into the application to have it set aside.

[23] The applicant also referred me to my decision in *Summer Construction Limited v Bakker* HC WN CIV-2006-485-1499 10 November 2006, where I concluded at [29] that the Court views seriously any decision taken by a party to proceed with an inappropriate statutory demand in the face of a warning issued by an applicant company. It is not clear to me whether such a warning was indeed given in the present case, or whether the applicant here seeks to rely on its first affidavit that was filed at the outset of the proceeding which stated that the applicant had not raised $1,000,000.

[24] It is of course well established that the issuing of a statutory demand is a serious step and is not to be invoked in inappropriate cases: *Ebert Construction Ltd v Advanced Windows Ltd* (2001) 14 PRNZ 681. The recipient of a statutory demand is subjected to a stringent procedure if it wishes to avert the danger of being placed into liquidation. This is because the Companies Act 1993 establishes a presumption of insolvency if a company fails to comply with a statutory demand. The recipient of the demand must show that the debt in issue is genuinely disputed, and that it is at risk of being placed in liquidation if the application is dismissed.

[25] It follows that a statutory demand should only be issued in cases where there is a "genuine basis for establishing the evidential foundation so that an application can ultimately be made to appoint a liquidator": *International Airline Trading (NZ) Ltd v Rohlig NZ Ltd* HC AK CIV-2003-404-3464 23 February 2004 at [16]. As noted previously, steps must be taken to ascertain whether there is a genuine basis for a statutory demand before the demand is issued: *Keystone Ridge Limited v City Sales Limited*.

[26] Where a statutory demand is withdrawn before the actual hearing of the application to set it aside, the Court generally will not inquire into the merits of the

case unless the answer is clear and obvious: *Furnz Ltd v Goode Industries Ltd* HC AK CIV-2008-404-1024 13 October 2008 at [6]. However, there is certainly force in the applicant's submission here that the respondent Mr. Evans did not have sufficient information to warrant the issue of a statutory demand and that he should at least have attempted to obtain the relevant information from the applicant to ensure that his claim was well-founded.

[27] It appears that Mr Evans simply assumed that the applicant's shares were issued at $4 and that the new share issue therefore raised over $1,000,000, when in fact only $527,670 had been raised. Within this context, it must have been apparent to Mr Evans that the dispute with the applicant was not suitable for resolution in the context of liquidation proceedings, and that it was inappropriate to issue the statutory demand based on a mere assumption of entitlement.

[28] Nevertheless, I am not satisfied that these circumstances warrant an order for increased costs in the sum contended for. There is no evidence before me that the applicant even attempted to contact the respondent Mr. Evans to put him on notice that the debt was genuinely disputed. Instead, the applicant filed an affidavit at the outset of the proceeding, simply stating that it had "not received $1,000,000.00 in investment or anything like that". It seems that the respondent Mr. Evans later removed his opposition to the application on the basis of another affidavit by the applicant that explained why he was mistaken in his view that $1,000,000 had been raised. It is therefore likely that most of the costs of preparing the application could have been avoided if the applicant had simply volunteered this information after being served with Mr. Evans' statutory demand.

[29] Based on these considerations, I consider that a modest uplift of $500 on costs of $3,680 is appropriate. An order is now made that costs of $4,180 are to be paid by the respondent Mr. Evans to the applicant, together with disbursements of $405.33.

'Associate Judge D.I. Gendall'