IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-007498

IN THE MATTER OF	Section 290 of the Companies Act 1993
BETWEEN	PACIFIC AEROSPACE LTD Applicant
AND	MAGINNITY AERIAL PRODUCTS GMBH Respondent

Appearances: On the papers

Judgment: 31 July 2009 at 4:45 pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[Re. costs]

This judgment was delivered by me on 31 July 2009 at 4:45 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors/Counsel:
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Butterworth Walters (A Guest), PO Box 1972, Shortland Street, Auckland

N Gedye, PO Box 2097, Auckland
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[1] The applicant seeks an order for costs in relation to its application to set aside a statutory demand.

[2] The application was given a first call for 12 December 2008. Counsel conferred. A joint memorandum was prepared. As a result, directions were made and a fixture allocated. Counsel's appearance was excused in respect of the first call.

[3] The applicant filed submissions on or about 16 March 2009 and outside the time as directed by the Court but well before the allocated fixture.

[4] The fixture allocated for the application was for 7 May 2009.

[5] The respondent's counsel advised the Court on 30 April 2009 that the respondent had withdrawn the statutory demand. Counsel confirmed that the only issue was the question of costs. Williams J, on 1 May 2009, vacated the fixture and excused appearances. He ordered that if counsel could not agree on costs, memorandum of not more than five pages should be filed and the issue of costs would be dealt with on the papers.

[6] Memorandum have been filed in support, opposition and reply by the applicant and respondent.

[7] The applicant seeks increased costs. The calculation is based, first, on costs assessed on a 2B basis and incorporates the following allowances under the Third Schedule, namely:

Item 25, preparing and filing the application:	1.6 days
Item 27, filing the memorandum for a conference	.4 of a day
Item 29, preparing for the hearing of the application	.5 of a day

Based on the allowance for category 2 set out in Schedule 2 to the High Court Rules, that produces a basis for costs calculated on category 2, Band B, of $4000. In addition, a claim for disbursements, being the filing fee and photocopying, totalling $490.48 is made. The applicant then seeks increased costs based upon the

application of r 14.6(3) by 50%. That indicates a claim for costs of $6000, plus the disbursements I have mentioned.

[8] The respondent does not oppose costs on a category 2, Band B basis. That concession is appropriately made. I reviewed the position in *Jones Odell Motor Bodies Ltd v Hard Core Ltd* 17 PRNZ 809 at paras [4]-[20] of that judgment. For the purposes of this judgment, I reproduce what I said at the following paragraphs:

> [4] In fixing costs it is appropriate that I refer briefly to the approach, which the Court must take on an application for costs. Rule 46 provides that costs are to be in the discretion of the Court. In *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* CA 296/01 29 September 2002 the Court of Appeal, in noting the Court's over-riding discretion pursuant to r 46 said:
>
> > There is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary: *Body Corporate 97010 v Auckland City Council*. We do not think that a Court should hesitate to depart from the regime where appropriate but we agree that some articulation of the reason for doing so is to be expected, however succinct. If no reason is given it will expose the award to close appellate scrutiny.
>
> [5] The general principles to be applied in the exercise of that discretion are those contained r 47. Subrule (a) provides that:
>
> > The party who fails with respect to a proceeding … should pay costs of the party who succeeds.
>
> [6] In *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 the Court of Appeal, referring to the authorities said in relation to costs:
>
> > In the interests of predictability and expedition, Courts will be less inclined to depart from the prescribed approach. The prescribed approach includes the presumption that costs follow the event. However, we do not think that the Court should hesitate to depart from that approach where clear reason for it is shown.
>
> [7] In *Glaister & Ors v Amalgamated Dairies Ltd & Anor* [2004] 2 NZLR 606 the Court of Appeal endorsed the proposition it made in the earlier decision in *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd*. It noted that if there was any departure from the costs regime as set out by the High Court Rules that could only be done on a particularised and principled way.
>
> [17] I repeat what I said in relation to statutory demand applications in *International Airline Trading (NZ) Ltd v Rohlig NZ Ltd* HC AK CIV-2003-404-3464 23 February 2004:

[13] There is developing a trend where debt collectors use statutory demands as the first step in a process to recover a debt. The statutory demand procedure is not intended as a debt collection device. Its purpose is to provide the evidential foundation to support an application to appoint a liquidator in respect of a company. That follows from s 287 of the Companies Act 1993. One of the persons authorised to apply to appoint a liquidator, by virtue of s 241 of the Companies Act 1993, is a creditor of the company. A creditor, in terms of s 241 of the Companies Act 1993, includes both contingent and prospective creditors. A creditor will be successful if the creditor can show that the company is unable to pay its debts. It is for that purpose that the statutory demand is used. The reason that it is used is because non-compliance, in terms of s 287, presumes that the company is unable to pay its debts. Precise proof of the quantum of debt where a liquidator is appointed is a matter that will ultimately have to be determined by the liquidator of the company. The liquidator's principal duties are defined in the Companies Act 1993 starting at s 253.

[14] I emphasise these matters because there is a common misconception that the statutory demand procedure is in some way analogous to the summary judgment regime which relates to ordinary proceedings. A summary judgment application is, of course, [813]an interlocutory application. An application made to set aside a statutory demand, as I have already said, is an originating application. In short, it is a discrete, stand-alone, application.

[15] Because of its special nature, an order on the application concludes the specific application to the Court. Generally it will not be appropriate to reserve costs pending some other event. However, because the Court is required to exercise the discretion, each case will be determined on the facts before the Court. Nevertheless, there needs to be good reason for departing from the general principle that the party who fails should pay costs to the party who succeeds.

[16] If the above points are observed, statutory demands should only be issued in cases which are appropriate, that is, where there is a genuine basis for establishing the evidential foundation so that an application can ultimately be made to appoint a liquidator. It is quite improper for the procedure to be used as a debt collection device or as a device to embarrass a party in a situation where there is a contest as to liability for a given debt.

[20] The judgments of Heath J, in Keystone Ridge Ltd v City Sales Ltd 19/7/02, Heath J, HC Auckland M549im02, and Master Lang, in Insolare Investments Ltd v Fetherston 17/10/02, Master Lang, HC Auckland M1042im02, emphasise the need for creditors to take care before issuing statutory demands that there is in fact no dispute as to the debt. Service of the statutory demand on a company requires it to work within a very tight timetable imposed by s 290 of the Companies Act 1993. If it fails to so act, then the presumption created by s 287 applies.

Rules 46 and 47 mentioned above are the predecessors of the current rules 14.1 and 14.2.

[9] There had been a number of decisions where the Courts have commented that if a statutory demand is withdrawn before the actual hearing of the application to set aside the statutory demand, the Court will apply, by analogy, the position that arises on a notice of discontinuance. That, of course, is set out in r 15.23 of the High Court Rules. There is a presumption that a discontinuing party will be liable for costs, *North Shore City Council v Local Government Commission* 9 PRNZ 182. In *Kroma Colour Prints v Tridonicatco NZ* 18 PRNZ 973, that principle was approved by the Court of Appeal. The Court noted at [12] that the presumption may be displaced if there were just and equitable circumstances which favoured not applying the presumption. The Court of Appeal also noted that it would not speculate on the respective strengths and weaknesses of the parties' cases. It noted that the reasonableness of the stance of both parties, however, had to be considered. It also recognised that the general discretion reposing in what is now r 14.1 would override the general principles relating to a discontinuance in an appropriate case.

[10] Accordingly, it is necessary for the purposes of this case to analyse the applicant's submission that the order for costs should be made on an increased basis and on the application of r 14.6(3) of the High Court Rules.

[11] Rule 14.6(3) of the High Court Rules provides:

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> (a) increasing costs otherwise payable under those rules (increased costs); or
> (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
>
> (2) The court may make the order at any stage of a proceeding and in relation to any step in it.
>
> (3) The court may order a party to pay increased costs if –
>
> (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
> (i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[12] Mr Gedye bases the applicant's claim for increased costs on the proposition that the respondent took and pursued unnecessary steps and argument that lacked merit and failed without reasonable justification to admit facts or accept legal arguments. He summarised the applicant's position as follows:

(a) This is a clear case of abuse of the statutory demand procedure;

(b) The applicant attempted to settle the claim and the statutory demand on two occasions;

(c) The applicant also issued clear warnings in relation to costs;

(d) The respondent's late withdrawal of the statutory demand has all the hallmarks of tactical conduct;

(e) The matters relied upon in summary fulfil the criteria set out in r 14.6(3)(b)(ii) and (iii) of the High Court Rules.

[13] Mr Gedye relies upon correspondence sent on 15 July 2008 by himself as counsel to the solicitors for the respondent. He correctly observes that his correspondence set out in detail numerous disputes of fact. The response he received did not remove those disputes. He next points to a letter of 31 October 2008, again referring to the facts or disputes and asserting that it would be an abuse of process to issue a statutory demand and a warning of intention to claim costs. The respondent's solicitors replied claiming there was no merit in the counterclaim or set-off which the applicant was advancing.

[14] In addition, Mr Gedye referred to attempts to settle the case. I do not regard them as significant in the exercise of the discretion in this case and for that matter I do not review that aspect further.

[15] Mr Gedye then refers to the respondent asserting that the applicant was insolvent. The importance of that matter is that it led to the applicant filing an affidavit from the applicant's accountant on the issue.

[16] It is appropriate that I briefly comment on this aspect. Insolvency as such is usually not a matter for direct inquiry where an application is made to set aside a statutory demand. Further, the purpose of the statutory demand itself is a first step in a creditor's attempt to lay the jurisdictional foundation for an application to appoint a liquidator under s 241 of the Companies Act. The inquiry that the Court makes when an application to set aside a statutory demand is made under s 290(4)(a) or (b) does not include an inquiry as to the actual solvency of the alleged debtor company. There would have to be some special circumstance, which is certainly not evident on the material before me, which would justify making that inquiry. Likewise, it will not be a proper ground to set aside a statutory demand that the alleged debtor company is in fact solvent when the alleged debtor company cannot satisfy the provisions of s 290(4)(a) or (b). That argument might be thought to be able to be raised under s 290(4)(c). That position, however, was rejected by the Court of

Appeal in *AMC Construction Ltd v Frews Contracting Ltd* 25 September 2008 CA 145/08. At paragraph [7] of the judgment the Court said:

> … If there is no dispute as to the company's liability, so that para (a) or (b) cannot be invoked, it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid. If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed. If it is not met, and an application for liquidation is filed, in reliance on the presumption in s 287(a) that the company is unable to pay its debts, then the company will have an opportunity on the liquidation application to rebut the statutory presumption, which applies "unless the contrary is proved". There might be circumstances in which it is appropriate to advance the inquiry as to solvency to the s 290 stage, but that would require some particular circumstance not present in this case.

[17] The position adopted by the respondent in this case in seeking to directly raise insolvency as a ground for refusing to set aside the statutory demand was inappropriate and misplaced. It simply added an issue that was not relevant to the circumstances which the Court is required to examine under s 290(4) of the Companies Act 1993 and having regard to the facts in this case.

[18] The respondent's response to the principal matters that I have identified in support of the application for increased costs was that it took the decision to withdraw the demand following a decision of the Supreme Court in *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384. Further, that the alleged disputes as to fact were allegedly advanced as a basis for implying additional terms in the agreement between the parties. In addition, the respondent claimed the applicant's alleged losses had not been quantified for the purpose of the counterclaim.

[19] I refrain from an examination of the case on the merits. That is clearly unnecessary in this case. What is apparent, however, is that a clear warning was given by the applicant prior to the issue of the statutory demand that:

a) it would allege a substantial and genuine dispute as to whether the debt claimed was due and owing

b) having been put on notice that that position would be adopted, the respondent nevertheless proceeded with the application.

Further, the respondent raised the issue of alleged insolvency on the part of the applicant. The applicant's position seems to be that evidence responding to that out of an abundance of caution was necessary. Although I doubt that that evidence was necessary, one can understand counsel's concern. In this case, there was simply no need for an investigation of the applicant's insolvency at the stage where the standing of the statutory demand was being investigated by the Court.

[20] The respondent claims there was an agreement on costs. I have reviewed the correspondence and am of the view that there was no agreement as such on the quantum of costs.

[21] This dispute should never have been the subject of a statutory demand application. The proper place for the resolution of this dispute is by the issue of proceedings in the ordinary way.

[22] When the matter is considered in light of the matters just discussed, I am led to the conclusion that a proper case is made out pursuant to r 14.63 for increased costs. In arriving at that conclusion, I take account of the Court of Appeal's guidance on this topic set out in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897. I have already determined that the appropriate category for this proceeding pursuant to r 14.3 is category 2. I am satisfied that the steps that I have referred to in this judgment for the purposes of r 14.5 justify a band B designation. Finally, I am satisfied that a proper case has been made out for the application of r 14.6(3)(b)(iii) and (iv). I am satisfied that a 50% increase on a normal 2B cost quantum is appropriate.

Decision

[23] The respondent shall pay the applicant's costs which I fix at $6000, together with disbursements as fixed by the Registrar.

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JA Faire
Associate Judge