IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1150

BETWEEN	SAGE SECURITIES LIMITED Applicant
AND	HENDRICUS MARIA ROOD, WILHELMINA FRANCISCA ROOD, MARIA JULIANA ROOD AND ADVISORY TRUSTEES LIMITED Respondents

Hearing: 9 November 2009

Appearances: M. Taylor for the applicant
P.J.S. Withnall and J. Broad for the respondents

Judgment: 11 November 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 11 November 2009 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] On 8 June 2009 the respondents, who are Trustees of a Trust known as the Rood Family Trust issued a statutory demand requiring payment from the applicant Sage Securities Limited of a total sum of $600,396.86 said to represent loans made to the applicant between September 2008 and 28 February 2009, plus accumulated interest.

[2] On 22 June 2009 the applicant, applied to set aside that statutory demand. Then, on 22 October 2009, the respondents filed an application for discovery with regard to the statutory demand proceedings.

[3] The discovery application came before me on 9 November 2009. I now give my judgment with regard to that application.

[4] In response to the discovery application, the applicant maintained that the respondents were not entitled to discovery of the documents requested in the context of an application to set aside a statutory demand. Notwithstanding this, initially it seems the applicant agreed to provide informal inspection of these documents to the respondents. On this basis, counsel believed it would not be necessary to proceed with the formal discovery application.

[5] It transpires however that when the respondents' solicitor carried out the informal discovery inspection of the thirteen categories of documents sought in the discovery application, only documents from one and part of another category were made available. Given this, counsel accepted that it now became necessary for the Court to consider the formal discovery application before it before the application to set aside a statutory demand could be properly heard and determined.

Background

[6] The applicant company appears to be a property investment and lending company. Mr Philip McGaveston ("Mr. McGaveston") is the sole director and shareholder of the applicant. Mr. McGaveston apparently became aware of a property development project through an associate of his, a Mr Robert Cummings ("Mr. Cummings"), which was being undertaken by what is referred to as the

"Working Concepts Group" of companies. Mr. McGaveston then discussed the project with his accountant, Mr Alexander Watson ("Mr. Watson"). In his first affidavit dated 22 June 2009, Mr. McGaveston says that Mr. Watson suggested that he and some of his other clients might be interested in investing in the project.

[7] The respondents are also clients of Mr. Watson, and according to the 10 July 2009 affidavit of Hendricus Maria Rood ("Mr. Rood"), learned of the project through him. The respondents subsequently advanced funds to the applicant company, who then made the money available on some basis to the Working Concepts Group of companies. The first advance from the respondents to the applicant was $150,000.00 made in September 2004. A further advance of $500,000.00 was made on 29 November 2004. In August 2005, $50,000.00 was repaid to the respondents. It seems the advances which attracted a reasonably high interest rate of 12-13% p.a. were simply rolled over probably on a six-monthly basis.

[8] On 8 June 2009, first, after having requested that the "loans" not roll over for another year and secondly, after having made demand for repayment, the respondents issued a statutory demand pursuant to s 289 of the Companies Act 1993, claiming:

> (a) the sum of $600,000 loaned to Sage Securities Limited for the period 1 September 2008 – 28 February 2009 and repayable on 1 March 2009; and
>
> (b) the sum of $39,000 being interest payable on the loan monies of $600,000 at 13% per annum for the period 1 September 2008 – 28 February 2009; and
>
> (c) the sum of $21,369.86 being interest payable on the loan monies of $600,000 at 13% per annum for the period 1 March 2009 – 8 June 2009.

[9] The application to set aside the statutory demand turns on one question: whether, pursuant to s 290(4)(a) of the Companies Act 1993, there is a "substantial dispute whether or not the debt is owing or is due". The respondents state that they lent the money to the applicant as a borrower, or that at the least, the applicant has obligations as a borrower. The applicant maintains that it was merely acting as a bare trustee to facilitate investment in the projects being undertaken by the Working Concepts Group, and that there is therefore no debt owing by it. The substantive

application therefore turns on whether or not the applicant's claim that it received the money as trustee gives rise to a "substantial dispute".

[10] Discovery of a wide range of specifically identified documents is now sought by the respondents.

The Law

[11] The Court has jurisdiction to make an order for discovery for the purpose of an application to set aside a statutory demand pursuant to r 7.9 of the High Court Rules, and in particular, r 7.9(1)(d):

> **"7.9 Directions as to conduct of proceeding**
> (1) A Judge may, by interlocutory order,— …
> (d) direct the steps that must be taken to prepare a proceeding for substantive hearing:…"

[12] This was confirmed in *The Grange Ltd v City Sales Ltd* (2000) 8 NZCLC 262,119 at para 8; and *Shuttle Petroleum Distribution Ltd v Caltex New Zealand Ltd* (2002) 16 PRNZ 126.

[13] In *The Grange Ltd v City Sales Ltd*, Master Kennedy-Grant found that the particular discovery sought might "give the lie" to the applicant's case that the statutory demand should be set aside. He found that, as is the case in applications for summary judgment, the Court is entitled to test the evidence of the applicant, and to reject that evidence if it is inconsistent with contemporary documents. The Master concluded at para 18 with a warning:

> "[18] While I appreciate that the order that I am about to make may be used on frequent occasions in future in relation to applications to set aside statutory demands (and I make it clear that it is *not* to be taken as a general precedent but to be limited to cases such as the present where there are clearly identifiable categories of documents some at least of which must exist on the deponent's own evidence), I consider that the proper order to make in this case is one for the discovery of the documents of which discovery is sought."

[14] In *Shuttle Petroleum Distribution Ltd v Caltex New Zealand Ltd* discovery was sought by the applicant who wished to set aside the statutory demand. In ordering discovery, Master Faire stated at para 13:

> “13] In principle the same approach [as that taken in summary judgment], in my view should be adopted in relation to applications for discovery where an application to set aside a statutory demand is made. In short, the applications will be confined to those relatively narrow band of marginal cases where an outlined defence including a defence of set-off or a counterclaim is made out but the Court encounters genuine difficulty in determining whether or not the defence to the claim or the counterclaim does exist. If the Court has reason to believe that discovery in the proceeding will or may assist that determination it may be appropriate to order discovery.”

[15] I have also been directed to the decision of Doogue AJ in *Pacific Vineyards Ltd v Wisely Holdings Ltd* (2006) 18 PRNZ 371. In that case, the respondent to the application to set aside the statutory demand applied for discovery against the applicant. After referring to *Shuttle Petroleum Distribution Ltd v Caltex New Zealand Ltd* and the judgment of McGechan J in *NZI Bank Ltd v Philpott* (1988) 1 PRNZ 560, Doogue AJ found at para 18:

> “… if the determination (in applications to set aside statutory demands) of whether or not there is a properly arguable defence to go to trial is finely balanced, then resort may be had to discovery to assist the Court in making its determination. In such a case, the Court will allow the exceptional course of discovery to be followed because otherwise there is a risk that injustice will be done to the debtor in that it will not be given the opportunity to air its defence in substantive proceedings and yet there is a possibility that it does have a reasonably arguable defence.”

[16] The applicant’s defence in that case concerned the contents of an oral agreement. On the evidence already before the Court, it was apparent that there was a direct collision between the parties as to their recollection of what was agreed to. Doogue AJ was satisfied that the applicant had a good arguable defence, and that the Court did not need any further assistance to resolve the question of whether that defence had a reasonable basis such that the statutory demand should be set aside. As such, the respondent’s application for discovery was dismissed.

Discussion

[17] In opposing the discovery application, counsel for the applicant contended that the present case is not one where documents exist which could substantiate an outline defence, as in *Shuttle Petroleum Distribution Ltd v Caltex New Zealand Ltd*, and he argued that the present case is similar to in *Pacific Vineyards Ltd v Wisely Holdings Ltd*, where the applicant had made out a reasonably arguable case and discovery was refused.

[18] The applicant relies on documentation already before the Court to support its argument that it has done enough here to make out a substantial dispute as to whether the debt is owing, by establishing a reasonably arguable case that the respondent's money was received on trust rather than borrowed. This is a position which counsel maintained no further discovery will be able to displace. In particular, counsel for the applicant relies on two unilateral declarations of trust, which appear to be dated September 2004 and November 2004. The September declaration is not signed. The November declaration appears to be signed by Mr. McGaveston and M.r Watson, but not any of the respondents. The November declaration lists Mr Rood. (as a representative of the respondents) as a "contributor", and declares that the applicant holds the money raised for the loan and the securities related to the loan "on trust". One of the Working Concepts companies, Bishop Lenihan Concepts Limited, is listed as "borrower".

[19] The applicant further relies on correspondence between Working Concepts and the respondents' solicitor between August and November 2008 which refers to declarations of trust, which he says confirms that the declarations of trust are determinative of the underlying relationship between the parties. On the basis of this documentation, counsel for the applicant contended that there was clearly a reasonably arguable case that the monies in question were advanced on trust, and that even in the event that the documents sought did support the respondents' characterisation of the advances, a substantial dispute of fact would remain.

[20] In response, counsel notes that the respondent's application seeks very specific discovery of 13 listed documents which were identified by a memorandum received by the respondents after their opposition to the substantive proceeding was filed, and it is this kind of limited discovery which was mandated in *The Grange Ltd v City Sales Ltd.* Counsel for the respondent argues that, without the discovery sought, the Court would have genuine difficulty in determining the substantive application: *Shuttle Petroleum Distribution Ltd v Caltex New Zealand Ltd*.

[21] Counsel for the respondents essentially maintained that further discovery could reveal that the applicant's characterisation of the advance as being one held on trust rather than a simple loan is not reasonably arguable for the purposes of the present application to set aside the statutory demand. This is particularly so given that in this

case, there were no direct dealings between the parties at the time that the advances were made, and so the evidence that exists is largely documentary. It is not a case like *Pacific Vineyards Ltd v Wisely Holdings Ltd* where determination of the factual dispute would likely require oral evidence. Furthermore, the nature of the relationship between the parties means that most of the relevant documents are in the possession and control of the applicant, who it is suggested has put forward "somewhat selective" documentary records.

[22] In support of these arguments, counsel states that, given that the funds were to be on-lent to a third party, it might be wondered how the legal and equitable interest in the monies did not pass from the respondents to the applicant. Further, even if the applicant were a trustee in some way, that does not necessarily exclude it having some responsibilities as a borrower. Counsel states also that the documentary evidence presently before the Court to support the applicant's case is not complete, and that what he suggests as the applicant's apparent depth of involvement in the Working Concepts group is inconsistent with its alleged position as a bare trustee. Perhaps most importantly, counsel notes that the very limited informal discovery which has taken place to date has revealed documents which do appear to contradict the applicant's case.

[23] As to this last aspect, the respondents have been given access to certain financial statements of the applicant but only for the years ending 31 March 2006 and 31 March 2008. In both of these sets of annual accounts, the respondents' advances are treated as a term liability on the applicant's balance sheet, and the on-lending of those funds is listed as an asset. Counsel states that this is quite inconsistent with the applicant holding the position of a bare trustee for the respondents' funds. It needs to be noted, however, that the 2008 accounts include a sentence in the accompanying notes stating "These deposits are managed by Sage Securities Limited as Trustee", which does not appear in the 2006 accounts. By the time that the 2008 accounts were prepared, however, the respondents had sought repayment of the loans. The respondents' also apparently received access through informal discovery to two documents contemporaneous with lending to the applicant by another contributor, Ray J Watts Limited. This documentation uses language consistent with the applicant being a borrower, rather than a trustee of funds. In light

of these documents, counsel for the respondents submits that it would be difficult for the Court to come to a proper decision without the other relevant documents before it.

[24] Counsel for the applicant relied heavily on *Pacific Vineyards Ltd v Wisely Holdings Ltd* and *Shuttle Petroleum Distribution Ltd v Caltex New Zealand Ltd* in arguing that, as it had made out a reasonable defence and a dispute as to the debt, that the statutory demand should be set aside and that discovery would be inappropriate. In my view, that position fails to adequately recognise that this is an application being made by a respondent, and it is possible that the question of whether the applicant's case is of any substance may be able to be determined by reference to the documents without the inevitable need for oral evidence.

[25] In my view, this discovery application is on all fours with *The Grange Ltd v City Sales Ltd.* There is a limited list of what I see are properly identified documents sought by the respondent which may (or may not) "give the lie" to the applicant's argument in the substantive proceedings. Given issues of concern over the evidence already before the Court, some of which I have outlined at para. [23] above, all relevant documents should be before the Court to enable it to properly proceed. I am satisfied, as noted in *Shuttle Petroleum v Caltex* that this is one of those relatively narrow band of marginal cases where an outline defence to the statutory demand has perhaps been made out but the Court has genuine difficulty in determining whether there is a defence and is of the view that discovery might well assist that determination. In addition, no issue was taken before me on the part of the applicant with any of the particular documents sought by the respondents here. In these circumstances, I take the view that the substantive proceedings here cannot be properly determined without the discovery sought being ordered.

Result

[26] For these reasons, the respondents' application for orders for discovery is successful.

[27] I now make the following orders:

(a) The applicant within 10 working days of the date of this judgment is to discover and produce for inspection by the respondents:

(i) Agreement for Sale and Purchase of 3/12 Laidlaw Way to Ray Watts.

(ii) Litigation Funding Agreement between the applicant and Marac.

(iii) General Security Agreement from Concepts 128 Limited to the applicant.

(iv) Deed of priority with Marac.

(v) Arrangement between applicant and Manchester Securities Limited to project-manage litigation.

(vi) Debenture from Working Concepts Limited to Manchester Securities Limited.

(vii) Assignment to applicant of debenture from Working Concepts Limited to Manchester Securities Limited.

(viii) First mortgage held by applicant over two sections in Flat Bush.

(ix) First mortgage held by applicant over 12A/196 Hobson Street, Auckland.

(x) Second mortgage held by applicant over 63 Kestev Drive, Flat Bush.

(xi) Financial statements for Working Concepts group of companies.

(xii) Financial statements for applicant, other than the financial statements for the years ended 31 March 2006 and 31 March 2008.

(b) The applicant is to pay the costs of the respondent on this application for discovery on a category 2B basis together with disbursements as fixed by the Registrar.

[28] As a next event this matter is to be the subject of a call in the List at 10.00 am on 7 December 2009 to review the position with regard to the application by the applicant to set aside the statutory demand.

'Associate Judge D.I. Gendall'