

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

CIV-2009-442-404

BETWEEN DELANY TRANSPORT LIMITED
Applicant

AND PAULA MAREE STEEL
Respondent

Hearing: 10 December 2009

Appearances: Mr G W Allan for Applicant
Mr P R McRae for Respondent

Judgment: 10 December 2009

(ORAL) JUDGMENT OF LANG J
[on application to set aside statutory demand]

Solicitors:
Pitt & Moore, Nelson
C & F Legal Ltd, Nelson

[1] Mr Delany and Ms Steel are the shareholders in Delany Transport Limited (“the company”). Mr Delany owns 51 per cent of the shares in the company and Ms Steel owns 49 per cent. Mr Delany, however, is the sole director of the company and has always been responsible for its day to day operation. The company operates a furniture removal business under a franchise arrangement with New Zealand Van Lines Limited.

[2] Mr Delany and Ms Steel lived together in a defacto relationship from January 1995 to May 2004. There are two children from the relationship who are now aged 11 and 9 years respectively. After the parties separated Ms Steel remained in the family home at 10 Fairfield Street, Brightwater. Mr Delany has lived in rented accommodation since that date.

[3] It is fair to say that there has been considerable delay in finalising issues of relationship property. Proceedings were filed in the Family Court in November 2005, but to date they have not been determined. They are next for mention in the Family Court in February 2010. Counsel expect that at that time a fixture will be allocated in March or April 2010.

[4] Mr Delany and Ms Steel acquired the franchise and the other assets of the company by obtaining a loan from the Westpac Banking Corporation in the sum of approximately \$145,000. To date that loan appears to have been treated in the company’s books of account as a loan made directly by the Bank to the company. It is clear, however, that the bank made the loan directly to the parties jointly, and that they then made the funds available to the company. The company should therefore have recorded the loan as being a loan from the parties by way of current account advance. The accountants acting for the company have confirmed that this is how they propose to treat it in the future.

[5] Ms Steel has grown frustrated with the delays in having the relationship property issues resolved. On 17 September 2009 she served a statutory demand on the registered office of the company seeking repayment of the current account advance. Ms Steel sought repayment of the sum of \$133,450.93, being the full amount of the current account advance made by both Mr Delany and Ms Steel.

[6] The company has now applied for an order setting aside the statutory demand. It contends that the Court should set the demand aside on two bases. First, it says that the debt is not owing solely to Ms Steel and for that reason she has no entitlement to unilaterally call it up. Secondly, it contends that other reasons exist that would render it inequitable or unjust for the statutory demand to remain in existence at this stage. Ms Steel acknowledges, however, that her entitlement in relation to the current account advance is for no more than one half of the amount claimed in the statutory demand.

[7] The Court has the power to set aside a statutory demand by virtue of s 290 of the Companies Act 1993. It provides as follows:

290 Court may set aside statutory demand

- (1) The Court may, on the application of the company, set aside a statutory demand.
- (2) The application must be—
 - (a) Made within 10 working days of the date of service of the demand; and
 - (b) Served on the creditor within 10 working days of the date of service of the demand.
- (3) No extension of time may be given for making or serving an application to have a statutory demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the statutory demand.
- (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
 - (a) There is a substantial dispute whether or not the debt is owing or is due; or
 - (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
 - (c) The demand ought to be set aside on other grounds.
- (5) A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.
- (6) In subsection (5) of this section, “defect” includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.
- (7) An order under this section may be made subject to conditions.

[8] In the present case counsel for Mr Delany relies on the grounds contained in s 290(4)(a) and (c).

Is the debt disputed?

[9] I deal first with the claim that it is not open to Ms Steel to unilaterally call for repayment of the entire debt.

[10] There is a paucity of evidence surrounding the precise circumstances in which the parties came to advance the funds to the company. It is clear, however, that the loan from the bank was to the parties jointly and there is a strong likelihood that the advance was made by the parties jointly to the company. The company's accounts do not assist in this regard because, as I have already explained, they have not shown the loan as being by way of current account advance.

[11] Jointly owned property may, however, be severed into ownership as tenants in common by a party evincing a clear intention that that is to be the case. For present purposes I am satisfied that Ms Steel's action in issuing the statutory demand made it clear that she sought repayment of her share of the debt. There can really be no dispute that the company owes both Mr Steel and Ms Delany the amounts that they have advanced to it. I am therefore satisfied that there is no dispute in existence that brings s 290(4)(a) into play.

(ii) *Do other grounds justify the Court setting aside the demand?*

[12] The real issue I have been required to determine is whether the Court should set the demand aside based on grounds of unfairness or oppression. The Court has always exercised its power to set aside a statutory demand or to stay a liquidation proceeding if it is satisfied that the proceedings are oppressive or that the creditor is using the proceeding for an improper purpose: *Exchange Finance Ltd v Lemmington Holdings Ltd* [1984] 2 NZLR 242 (CA) at 245.

[13] In the present case, counsel for Mr Delany submits that Ms Steel is using the statutory demand procedure unfairly or oppressively because she is endeavouring to place pressure on Mr Delany to settle the relationship property proceedings in a manner that is advantageous to her. Counsel points out that the relationship property proceedings have been on foot for a number of years now, and it is therefore no

coincidence that Ms Steel has issued the demand at a stage that is imminent to the proceeding in the Family Court finally being determined.

[14] Counsel also points out that there is a realistic prospect that the relationship property proceedings will be resolved or determined in a manner that will enable Ms Steel to keep the matrimonial home and Mr Delany to retain the company that provides his livelihood. He submits that it would be wrong in principle and unfair if the Court was to enable Ms Steel to place the company in liquidation in those circumstances.

[15] I consider, however, that the existence of the relationship property proceedings does not prevent Ms Steel from placing pressure on the company to pay a debt that is properly due to her. Authority for that proposition is to be found in *Coin Cascade Investments Ltd v Walker* (1998) 13 PRNZ 129. That case has obvious differences to the present, because it involved an application to the Court for an interim injunction staying the commencement of a liquidation proceeding. It was not an application by a debtor company to set aside a statutory demand. It also involved a claim by one spouse against the company for the payment of a dividend that the company had declared some years earlier. There was no dispute that the company was solvent and in a position to pay the debt.

[16] In the present case all the indications are to the effect that Delany Transport Limited is insolvent because to date it has been unable to repay the current account advances. In addition, counsel advised me from the bar that a valuation of the company produced for the purposes of the relationship property proceedings has assessed the value of the company as being nil.

[17] Notwithstanding those differences, the important point of principle to be determined from *Coin Cascade* is that the existence of relationship property proceedings does not prevent one party to those proceedings from enforcing property rights against a third party such as the company in the present case. I consider that Ms Steel is therefore entitled to place pressure on the company to seek repayment of her share of the current account advance notwithstanding the existence of the

relationship property proceedings. For this reason I have concluded that it would not be appropriate to set the demand aside on the basis for which Mr Delany contends.

Result

[18] As a consequence, I am prepared to set the statutory demand aside but only to the extent that it represents monies owing to Mr Delany rather than Ms Steel. I therefore make an order setting the statutory demand aside other than to the extent of \$65,390.55.

[19] Counsel for Ms Steel submitted that the company should be given a further ten days to comply with the demand. Given the time of year, however, that is completely unrealistic. If the company is to be able to have a realistic chance of raising funds to pay the debt it will need more time than that. For this reason I extend the time for complying with the statutory demand to 22 January 2010. This should give the company sufficient time to make the necessary arrangements to enable the current account to be paid out. If it does not, it will be a matter for Mr Delany and his advisers to take such steps as they deem appropriate to persuade the Court that any liquidation proceedings should be adjourned to await the outcome of the relationship property claim in the Family Court.

Costs

[20] Counsel for Ms Steel seeks costs. Counsel for the company submits that costs should lie where they fall on the basis that both parties have succeeded in part.

[21] In my view Ms Steel has been the successful party in this proceeding. The fact that I have set part of the amount claimed in the statutory demand aside reflects only the fact that Ms Steel had purported to make a claim in respect of the amounts that the company owed to both herself and Mr Delany.

[22] The real issue to be determined in this application was whether the current account advance owing to Ms Steel should not be permitted to proceed. Ms Steel

has prevailed in relation to that issue. She is therefore to have costs on a Category 2B basis together with disbursements as fixed by the Registrar.

Lang J