

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

**CIV 2009-406-219**

UNDER	the Companies Act 1993
IN THE MATTER OF	of an application to set aside a statutory demand for payment pursuant to s 289 Companies Act 1993 (290 Companies Act 1993)
BETWEEN	JONES RD VINEYARD LIMITED Applicant
AND	PARKERS BUSINESS SOLUTIONS LIMITED Respondent

Hearing: 12 November 2009

Counsel: S F Gaines for the Applicant  
K P Sullivan for the Respondent

Judgment: 12 November 2009

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**ORAL JUDGMENT OF MILLER J**

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[1] This is an application to set aside a statutory demand. Jones Rd Vineyard Limited says that there is a substantial dispute whether the amount claimed by Parker Business Solutions Limited, \$52,340.13, is due and owing. It concedes that an indeterminate but much smaller sum is payable. The central question concerns the scope of the respondent's engagement in relation to a series of land transactions; the applicant says that the respondent's services involved accounting and miscellaneous consulting work, while the respondent says that it was also the project manager.

## **Background**

[2] Susheel Dutt, a partner and director of Parker Business Solutions and a chartered accountant, says that the project involved the purchase of a block of land from Talleys, its subdivision and on-sale to other interests who would develop it as vineyards. He suggests that this was a \$10m transaction which was expected to yield a profit of \$1.5m.

[3] Gareth Exton, the director of the applicant, says that Mr Dutt was engaged to provide professional services, being two GST returns, one company filing, and miscellaneous consultancy advice. Mr Dutt says that he has significant experience in structuring transactions, while Mr Exton was a fencing contractor, and was engaged to form the respondent company and set up a structure to deal with the purchase and on-sale of the land. Part of his brief was to ensure that no tax would be payable on the profit.

[4] The parties agree that no engagement letter was prepared, although Mr Exton was a new client. No charge out rates were agreed. Mr Dutt says that his charge out rate for project management and consultancy is \$300 per hour plus GST, while for accounting work he charges \$180 per hour. He claims that an estimate of \$100,000.00 was given informally for his fees. Mr Exton denies that.

[5] Mr Dutt says that in his capacity as project manager he was involved in all the meetings and the origination of the project, and was the liaison with lawyers and other accountants. He describes himself as the key point of contact for the applicant company. Negotiations were complex and at times relationships among the various parties became strained. He says that he spent significant time on an IRD audit. Lastly, he says that he was involved in settlement of the transaction.

[6] Mr Dutt says his fee is reasonable, and says that it is based on timesheets that he has produced. He admits minor errors in the timesheets, and says they are immaterial. He claims that there is no dispute about the quality of the work that he provided. He also complains that the applicant, which he fears may now be a shell

company, has refused to submit to costs revision through the Institute of Chartered Accountants.

[7] In a reply affidavit, Mr Exton flatly rejects Mr Dutt's claim that he acted as a project manager, and says that he was never advised of the charge out rate for project management and consultancy work. The respondent was engaged as an accountant only, and he did not need agents to arrange the commercial transaction. What he needed was legal and accounting advice. The technical side of the transactions was developed and completed by the solicitors. He also says that because the respondent will not release the files, there is no way of knowing exactly what Mr Dutt claims to have done.

### **Approach**

[8] A statutory demand will be set aside if there is a substantial dispute whether the debt is owing or due: s 290(4)(a) Companies Act 1993. Jones Rd Vineyard must show a fairly arguable basis upon which it is not liable: *United Homes (1998) Ltd v Workman* [2001] 3 NZLR 447. It is not enough for the applicant to merely assert a dispute, but the Court will not normally resolve disputed questions of fact on affidavit evidence alone, particularly where credibility is in issue.

### **Discussion**

[9] The central question is whether it is arguable that Mr Dutt was not engaged as a project manager, as he claims. As to that, he says his engagement was confirmed at a meeting on 23 May 2008, which was attended by all of the parties. Mr Exton flatly denies that, and there is no contemporaneous documentary evidence nor even corroborating evidence from others who attended the meeting.

[10] In the circumstances, it is manifest that there is a substantial dispute about the debt. The statutory demand must be set aside.

## Terms

[11] That is not the end of the matter, however. Mr Exton concedes that some money is payable to the respondent for services that it provided. No attempt has been made to quantify what the applicant says is payable, and there is no evidence that the applicant is solvent. On the face of it, it appears that the applicant has chosen to stonewall the respondent. In the circumstances, this is one of those cases in which the demand should be set aside on terms designed to encourage both parties to resolve the dispute as quickly and as inexpensively as possible: *Waverley Developments Limited v Queen City Property Group Limited* HC AK 13 February 1998 M1527-IM02.

[12] Having regard to the nature of the dispute, it would not be appropriate to require the applicant to pay in the full amount claimed. It should, however, be required to pay in an amount that gives both parties an incentive to engage in dispute resolution efficiently and without delay. In my judgment that sum is \$31,000. I reach that figure by dividing the fee by the consultancy rate of \$300 per hour that seems to have been applied to most of the bill and by modifying it by \$180 per hour. That figure gives Mr Dutt (provisionally) the benefit of the doubt about the amount of work that he says he did, while confining him to the hourly rate payable for accountancy work. It is of course necessary to facilitate the dispute resolution that the files held by Parkers Business Solutions be delivered to Jones Rd Vineyard without delay.

[13] Accordingly I make the following directions: the statutory demand is set aside on terms that within 14 days Jones Rd Vineyard Limited is to pay into Court the sum of \$31,000 and within seven days Parkers Business Solutions Limited is to deliver all of the files owned by Jones Rd Vineyard Limited to Jones Rd or its solicitors.

[14] Both parties seek costs, Mr Sullivan on an indemnity basis having regard to the terms of a Calderbank offer which I have examined. However, in this context the important point is that Jones Rd Vineyard has succeeded in having the notice set aside on terms. Having regard to the issue of a payment in and the Calderbank offer,

it is appropriate that costs should lie where they fall, and I so order.

Miller J

**Solicitors:**

Hardy-Jones Clark for the Applicant

Duncan Cotterill, Wellington for the Respondent