

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

CIV-2009-485-1531

BETWEEN BUSINESS CONTINUITY SERVICES
 NZ LIMITED
 Applicant

AND CONTACT ENERGY LIMITED
 Respondent

Hearing: 23 November 2009

Appearances: D.A. Bleier - Counsel for Applicant
 B. Balderstone - Counsel for Respondent

Judgment: 25 November 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 25 November 2009 at 3.00 pm pursuant to r 11.5 of the High Court Rules.

Solicitors: DLA Phillips Fox, Solicitors, PO Box 2791, Wellington
 Buddle Findlay, Solicitors, PO Box 2694, Wellington

Introduction

[1] The applicant, Business Continuity Services NZ Limited (“BCS”) applies to set aside a statutory demand issued by the respondent. BCS was a business customer of the respondent, Contact Energy Limited (“Contact”). That relationship was governed by Contact’s Standard Business Energy Supply Agreement (“the supply contract”). On 28 July 2009, Contact served the statutory demand in question seeking payment of \$3,519.98 said to be outstanding pursuant to the supply contract, \$320.00 in court costs and a \$67.50 service fee.

[2] On 10 August 2009 BCS filed an application to set aside this statutory demand, on the grounds first, that there is a substantial dispute as to whether the alleged debt is due or owing, and secondly, that BCS is solvent. The application is opposed by Contact.

Background Facts

[3] Contact began to supply electricity to BCS’s premises on the Ground Floor at 15 Edward Street, Wellington, in August 2006. BCS rents these premises from ASP Development Limited (“ASP”). BCS had previously been receiving power from a different supplier, Trustpower. The supply contract between the parties continued until BCS ceased to be a customer of Contact on 5 August 2009.

[4] Relevant terms of the supply contract include:

- (i) Access to the premises must be granted by the customer at least once per year;
- (ii) Access must be given additional to the above requirements for the purpose of testing, inspection, or maintenance of metering equipment;
- (iii) It is the customer’s responsibility to provide access to the premises during business hours. If the meter is inside a building or locked away, it is the customer’s responsibility to provide a key or to arrange access;
- (iv) If access is denied or is not possible, Contact is contractually entitled to estimate power usage, and any invoice as a result of the estimate must be paid;
- (v) It is the customer’s responsibility to pay all invoices on time, whether those invoices are based on an actual meter reading, or an estimate;

- (vi) If there is a dispute about a particular invoice, the customer must contact Contact as soon as possible, and before the due date of the invoice. Amounts not in dispute must be paid;
- (vii) The customer must give at least five business days prior notice of any work on the premises which could affect any energy supply equipment there.

[5] Throughout the whole period that BCS was a customer of Contact, Contact was never able to conduct a physical reading of the BCS meter. BCS puts responsibility for this failure on Contact. Contact strongly disputes this and says that despite numerous attempts to access the premises and read the meters, no access was made possible or permitted by BCS. The meters were kept inside the premises in a locked room. In his affidavit before the Court, Mr Jason Edward Delamore, General Manager of Retail for Contact, deposes to the difficulty Contact experienced in attempting to gain access to the meter in accordance with the supply contract. He states that BCS refused to provide a key, which is standard industry practice. Mr Delamore exhibits email notes from contractors who attempted to visit the premises and found the director of BCS, Mr. Athanasios (Arthur) Koroniadis to be uncooperative, refusing access to the meters. He exhibits letters sent to BCS asking to arrange a time for a meter reading, which he maintains were never responded to. He also exhibits call centre records showing that Contact called Mr Koroniadis monthly from October 2008 in attempts to discuss outstanding balances and get access to the meter. Messages were apparently left on phone numbers provided by Mr Koroniadis but no calls were returned and no appointments made by Mr Koroniadis.

[6] Mr Koroniadis in his 10 August 2009 affidavit claims that BCS in fact wanted Contact to take a meter reading but Contact failed to do so. Mr Stephen Pritchard, director of ASP, has also filed an affidavit, stating ASP's security guidelines around access to the building and contractors. He maintains Contact was the only electricity company that had a problem with this. Mr Delamore exhibits a certificate of title search for the premises and a companies office search for ASP, which seems to show that Mr Koroniadis is also a director of ASP, and so effectively involved with both landlord and tenant.

[7] At a specific level, on 18 January 2007, Mr Koroniadis apparently called the Contact call centre with meter readings for BCS of 16091 (night meter) and 34935 (day meter). Letters were sent to BCS in 2008 seeking to arrange a time for Contact to inspect the meters, but these do not appear to have been responded to.

[8] Some two years later, in February 2009, Mr Koroniadis again provided Contact with meter readings for BCS this time of 13110 (night meter) and 37881 (day meter). This concerned Contact, because if the readings were correct, the night meter had gone backwards since the reading provided by Mr Koroniadis in January 2007. Contact was already concerned because it says Mr Koroniadis' readings were extremely low for commercial premises and BCS's alleged electricity usage much lower than when it was a customer of Trustpower.

[9] Given what is alleged to be BCS's erratic payment history, and continuing failure to pay its electricity bill, Contact says it had no choice but to instruct its solicitors to issue the present statutory demand. Following this, Mr Koroniadis provided Contact with photographs of the electricity meter, and he contended this was evidence that the meter readings he had provided to Contact were correct. These photographs are also before the Court. The photographs were put next to a copy of the Dominion Post and another photograph taken, to illustrate that the readings were current. These readings were again lower than those provided by Mr Koroniadis in February 2009, causing Contact further concern that the meter may be faulty or may have been tampered with. Contact's solicitors wrote to BCS explaining their concern and again requested access to the meter so that Contact could test it and verify the accuracy of the readings. BCS responded but did not state that access would be allowed.

[10] Contact's solicitors contacted BCS again on 4 August 2009 seeking a time to get access to the meter. On the same day, Contact received information from a third party, VirCom that VirCom had instructions and would be removing BCS's meters and installing new ones. A further letter was sent to BCS on 5 August 2009 confirming that Contact did not consent to the removal of the meters, and that the meters could not be removed without Contact's consent. A time to inspect the meters was again sought. The meters were removed however on 6 August 2009, without Contact having had access to them.

[11] Mr Koroniadis and Mr Stephen Pritchard, director of ASP, have filed affidavits deposing that the meters were removed simply because of alterations required to the building to provide two new tenancies. In accordance with the building and resource consent, each tenancy it is said is required to have its own electrical feed and supply of power. For that reason, they say, the existing three phase meter used by BCS (and owned by ASP) was replaced with three separate single phase meters. Due to Contact's concerns that the meters may have been faulty or tampered with, ASP sent them to VirCom for testing. Their report apparently states that there was no evidence of tampering.

[12] Because of the above difficulties around access to the meters, the outstanding electricity bill the subject of the statutory demand is based entirely on estimated usage. BCS disputes that this amount is owing, on the basis that it says it does not believe it used that much electricity. It says that the photographs taken of the meters verify Mr Koroniadis' meter readings, and that the testing of the meter by VirCom answers any claim that the meters were faulty or tampered with.

[13] Contact says that these matters do not equate to a genuine or substantial dispute. It says the evidence filed by BCS does not answer the possibility that the meters were tampered with by computer. Contact says that this dispute has been manufactured by BCS in its refusal to allow Contact access to the meters, and that BCS has destroyed the only means of resolving the dispute, by removing the meters. BCS had a contractual obligation to pay the estimated invoices, and an obligation to allow Contact to investigate any dispute arising from those estimates. Both its failure to pay, and its destruction of the means of investigation are clearly in breach of contract.

Counsel's Arguments and My Decision

[14] The present application is brought in reliance on s. 290 of the Companies Act 1993 which states, as relevant:

“290 Court may set aside statutory demand

- (1) The Court may, on the application of the company, set aside a 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.
- ...
- (7) An order under this section may be made subject to conditions.”

[15] It is clear from the authorities that: “The onus is on the applicant to show a fairly arguable basis upon which it is not liable for the amount claimed”: per Master Venning in *Eastgate Real Estate Ltd v Walker* (2001) 15 PRNZ 308 at [30]; *Queen City Residential Limited v Patterson Co-Partners Architect Limited (No 2)* (1995) 7 NZCLC 260 at 936.

[16] Under s. 290(4)(a) the Court may grant an application to set-aside a statutory demand if it is satisfied that there is a substantial dispute as to whether or not the debt is owing or is due. Whether there is a “substantial dispute” is a question of fact to be determined in light of all the relevant circumstances: *Brookers’ Company and Securities Law* at CA290.03(3).

[17] The test is as stated in *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297 (CA), a case under the then s 218 of the Companies Act 1955 (which stipulated when a company would be deemed unable to pay its debts):

“The applicant must show a genuine and substantial dispute as to the existence of the debt, and that it would be unfair – as it usually would be – to allow that dispute to be resolved by the Companies Court rather than by action commenced in the usual way. That assessment must be made on the material before the Court, and not on the hypothesis that some other material, which has not been adduced, might nonetheless be available.”

[18] Merely asserting a dispute exists is insufficient and the applicant needs to provide material, short of proof, to support its assertion: *North Harbour Equine Hospital Ltd v Little* HC AK CIV 2006-404-7585 19 February 2007. Where such material is available, the dispute is normally to be determined on a full and ordinary hearing. It is not usually possible to resolve disputed questions of fact on affidavit evidence alone.

[19] In particular, where there are issues of credibility, Master Venning noted in *Androcles Investments Ltd v Highway Publications Ltd* HC CHCH M455/00 14 February 2001 at [6] that:

“the Court cannot resolve those issues on the affidavit evidence unless, of course, the situation is that contemplated by *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 where the evidence is contrary to contemporaneous documents or earlier statements of the party.”

[20] Even if any of the grounds in s 290(4) are made out, the Court retains a discretion to refuse to set aside the statutory demand, although cases where this discretion is exercised will be rare: *Alfex Doors and Windows Ltd v Alutech Windows and Doors Ltd* (2001) 16 PRNZ 963 (CA).

[21] And under s. 290(7) Companies Act 1993, an order setting aside a statutory demand may be made subject to conditions, for example, to pay the amount in dispute into Court pending determination of the dispute between the parties: *Waverly Developments Ltd v Queen City Property Group Ltd* HC AK M1527-IM02 13 February 2003.

[22] Here, counsel for BCS submits that there is clearly a substantial dispute as to the amount said to be owing in the invoices issued by Contact which form the basis of the statutory demand. He makes this submission particularly given first the dispute he says exists as to whether Mr Koroniadis' meter readings were accurate and secondly, bearing in mind the fact that the invoices were based entirely on estimates. Counsel states that Contact is free to pursue BCS for alleged breaches of contract, meter tampering, and other alleged activities by ordinary proceedings, but the companies court here is not the appropriate avenue for these matters to be heard. He adds that, given this is a very small (and disputed) debt, the issuing of a statutory

demand is excessive, and he goes on to suggest that Contact may be using the statutory demand process as a debt collection device.

[23] In response, counsel for Contact submits that BCS's failure to provide evidence explaining the disparity in the meter readings provided by Mr Koroniadis and its failure to provide access to the meter particularly before having it removed, must weigh against BCS in this application. Counsel also notes that there is no evidence of any kind before the Court as to BCS's solvency. She submits that the evidence shows that any "dispute" here has been manufactured by BCS, and the means of resolving the dispute destroyed by BCS. In those circumstances, it is argued that there is no dispute which is genuine or substantial. A further argument is advanced that no factors exist here justifying an exercise of the Court's discretion in favour of BCS pursuant to s 290(4)(c) in the present circumstances where BCS has clearly failed to act in good faith towards Contact, and where BCS has provided no evidence of its solvency.

[24] On the evidence presently before the Court, it seems to me that the behaviour of BCS pursuant to the supply contract may be rather difficult to justify. However, as a result of all the difficulties Contact experienced in gaining access to provide an actual meter reading, the total electricity used by BCS and the debt for the supply of this electricity may be the subject of some uncertainty. Whether the debt claimed by Contact is accurate, or whether BCS's alleged conduct means that in any event it is contractually liable for the debt, is not a matter that can be definitively addressed in this context. These are matters which ideally can and should be addressed in ordinary proceedings.

[25] In issuing a statutory demand for what is a relatively small amount here, in circumstances where it may well be seen as obvious that the debt was going to be disputed, Contact might be regarded as acting somewhat arbitrarily in this case. On the evidence before the Court, however, it is apparent that there is some strength in Contact's submission that any dispute, when properly tested and considered in detail, may be seen to have been largely manufactured, intentionally or not, by BCS. Under all the circumstances here, and as BCS states that it is solvent (and its counsel confirmed before me that to support this it can pay the disputed amount now into a trust account), I consider that it is appropriate to set the statutory demand aside

subject to the condition that BCS pay the statutory demand amount into Court pending final resolution of the dispute between the parties.

Result

[26] The application for an order setting aside the statutory demand notionally succeeds. This is on the conditions outlined below.

[27] Orders are now made in the following terms:

- (a) The statutory demand dated 28 July 2009 issued by the respondent Contact and served on the applicant BCS is now set aside subject to the following conditions.
- (b) The applicant BCS is by 5.00pm on 2 December 2009 to pay into this Court the sum of \$3,907.48. This sum once paid is to be held on interest bearing deposit until further order of this Court subject to the following conditions.
- (c) This \$3,907.48 is to be retained in Court pending final resolution between the parties as to the proper amount due to the respondent, Contact, if any, as claimed in the statutory demand.
- (d) If the applicant BCS defaults in making payment of this \$3,907.48 into Court by 2 December 2009 then the respondent Contact may immediately bring an application in this Court to place the applicant into liquidation.

[28] As to the question of costs on this application, BCS has been partially successful in having the statutory demand set aside but on payment conditions. Contact has also been partly successful in having the amount claimed paid into Court pending resolution of the dispute. I am satisfied therefore that costs on this application should lie where they fall. There is to be no order made as to costs.

‘Associate Judge D.I. Gendall’