

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

CIV-2009-404-876

UNDER the Companies Act 1993
IN THE MATTER OF Application to set aside statutory demand
BETWEEN YUMMY TUMS LIMITED
Applicant
AND FOODWISE LIMITED
Respondent

Hearing: 22 June 2009
Counsel: E Grove for Applicant
M I Phillipps for Respondent
Judgment: 9 December 2009 at 3 pm

**RESERVED JUDGEMENT OF ASSOCIATE JUDGE H SARGISSON
(Application to set aside Statutory Demand)**

*This judgment was delivered by me on 9 December 2009 at 3 pm pursuant to
Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date

*Solicitors:
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[1] Yummy Tums Limited is seeking an order under s 290(4)(b) of the Companies Act 1993 setting aside the statutory demand Foodwise Limited served on it on 5 of February this year. Yummy Tums also seeks an order for costs plus disbursements on its application.

[2] The statutory demand seeks payment of \$124,005.88 owed for pre-packaged meals that Foodwise, a food manufacturer, supplied to Yummy Tums on a wholesale basis, plus interest for late payment.

[3] There is no dispute that the debt claimed in the demand is owing and due, or that Yummy Tums is not in a position to pay the debt. Yummy Tums contends, however, that it has a counterclaim against Foodwise that exceeds the amount claimed in the statutory demand and therefore that the Court should exercise its discretion to set aside the demand. It claims, in the alternative, that there are circumstances that warrant the statutory demand being set aside, in the exercise of the Court's discretion, under s 290(4)(c).

[4] The application to set aside the demand was made and served within the statutory timeframe. The time for compliance with the demand was extended by interim order made on 12 March 2009 pending further order.

Section 290

[5] Section 290 of the Companies Act 1993 states:

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 with 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.**

[Emphasis Added]

[6] The principles that apply to applications such as this are well established. See for example: *United Homes (1998) Ltd v Workman* [2001] 3 NZLR 447.

[7] In an application under s 290 the applicant has the onus of proof. Yummy Tums must therefore demonstrate that it has a counterclaim that is reasonably or fairly arguable in the circumstances or that the demand ought to be set aside on other grounds. If either threshold is established, then the matters in issue between Yummy Tums and Foodwise should be resolved by substantive proceeding. It is well established that it is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise: *Phoenix Organics Ltd v RD2 International Ltd* (2003) 9 NZCLC 263,380.

[8] As the wording of s 290(4)(b) makes clear, the Court may grant an application to set aside a statutory demand if the company “appears to have a counterclaim...” provided the counterclaim meets the requirement in the section as to amount.

[9] While the wording of s 290(4)(b) does not require that a counterclaim actually be established, a mere assertion that a counter-claim exists is not sufficient for the Court to set aside a statutory demand. In *Te Uenga Ltd v R Kendell & Co Ltd* HC AK M286-IM99 11 May 1999, Master Faire said that in order to invoke the discretion under s 290(4)(b) an applicant must go further than merely assert the

existence of a counterclaim. There must be some material short of proof that backs up the counterclaim. Similarly in *Trenchless Utility Services Ltd v Nixon* HC AK M322/98 28 October 1998 Master Faire stated that “some sort of material short of proof which backs up the claim that the amount is in dispute is generally acceptable”.

[10] Section 290(4)(c) refers to other grounds that would render it inequitable not to set aside the demand. Use of the discretion conferred by this provision is to be confined to cases that clearly justify departure from the fundamental principle that insolvency should bring an end to a company’s existence. There is a presumptive desirability of liquidation where a company is insolvent: see *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395. There, Baragwanath J noted that while it was not the function of the Court to create an exhaustive list of circumstances in which the discretion may be exercised, the discretion ought to be exercised in conformity with the purposes of the measure by which it was conferred. He noted that the structure of s 290 gives some guidance as to how the discretion is to be exercised. Instances of circumstances that may invoke the discretion include defects in the statutory demand or service where the failure to set aside the demand would cause substantial injustice; the well-founded opposition of a majority of the creditors to the company’s liquidation; and the need to prevent abuse of the statutory demand process. Tipping J added that all cases involving s 290(4)(c) come down to a Court’s judgment as to whether the creditor’s prima facie entitlement to liquidate the company is outweighed by some factor making it plainly unjust for liquidation to ensue. He stated that the ground advanced by the insolvent company must be sufficiently compelling to overcome the general policy of the Act. And in *Warren Reid Wholesale Ltd v Custom Fleet (NZ) Ltd* HC AK M2089-IM00, 23 August 2001, Master Kennedy-Grant expressed his view that the standard of proof required of an applicant who seeks to establish other grounds under s 290(4)(c) is higher than the standard of “an arguable case”.

Issues

[11] There is no dispute that, for the purpose of Yummy Tums' first ground, if there is an arguable counterclaim to Foodwise's claim in debt that meets the requirement as to amount, that is that exceeds the debt (or when set off would leave a debt of \$1000 or less), the Court should set aside the demand. If the counterclaim is successful the damages, when off-set, would extinguish the debt.

[12] There is no common ground between the parties as to Yummy Tum's alternative ground. The alternative ground appears to proceed on the basis that even if the counterclaim does not meet the statutory requirement as to amount, there are factors that make it plainly unjust for liquidation to ensue until Yummy Tums has had the opportunity to prosecute the counterclaim by way of a separate proceeding. For that purpose, Yummy Tums contends the statutory demand should be set aside. The factors Yummy Tums relies on are that Foodwise allowed Yummy Tums to operate in arrears for a long period, but then invoked the statutory demand procedure and invited Yummy Tum's distributor, Deejays, to "by pass" it and instead to source replacement product directly from Foodwise. Yummy Tums argues these factors point to conduct intended to sabotage its business.

[13] The only real matters put in issue are therefore:

- a) Whether for the purpose of s290(4)(b) Yummy Tums appears to have a counterclaim that equates to at least \$123,005.88; or
- b) Whether it would be plainly unjust in any event if the Court were not to exercise its discretion to set aside the statutory demand under s 290(4)(c).

[14] Before dealing with these issues it is helpful to set out a brief summary of the background facts.

Background facts

[15] Yummy Tums is in the business of wholesaling pre-packaged food, primarily for school meals. In 2005 it asked Foodwise to make its school meals, and in conjunction with Foodwise's food technologists the parties agreed on a recipe, processing and packaging to make the meals suitable for sale to schools and other buyers.

[16] The first supply to Yummy Tums was on 10 October 2005 and thereafter Foodwise was Yummy Tums' main manufacturer. The parties' commercial relationship initially operated smoothly with Foodwise manufacturing the school meals for Yummy Tums on a regular basis.

[17] On 4 July 2007, some 20 months after the initial supply, Yummy Tums completed a credit application form. As its name suggests the credit application form is a document primarily concerned with the provision of credit, and it contains a statement of Foodwise's standard terms of trade.

[18] In terms of the parties' actual trading arrangements, Yummy Tums was generally in arrears but in mid – 2008 Foodwise decided to call in the arrears. There is no dispute that Foodwise had the right to do so under the standard terms of the parties' trading arrangements. Negotiations between the parties followed and Yummy Tums decided to try to sell its business. It entered into discussions for that purpose with its main distributor, Dee Jays. It was also at this point that Ms Hume, Yummy Tums' director, says she introduced Foodwise to Dee Jays. The discussions were unsuccessful and late last year, as Yummy Tums was still in arrears, Foodwise cut off supply.

[19] Yummy Tums' complaint stems not from the cutting off of supply, which it concedes Foodwise was within its rights to do, but from Foodwise's subsequent decision to start supplying Dee Jays with similar product. Foodwise accepts the product it supplies to Dee Jays is similar.

Discussion

Is there an arguable counterclaim for the required minimum amount?

[20] Yummy Tums relies on four alternative bases for its counterclaim. The four bases are breach of confidence, unlawful interference with contractual relations, passing off and breach of the Fair Trading Act 1986.

[21] For the purpose of dealing with this question, however, it is unnecessary to determine the arguability of the various causes of action on which the counterclaim is based. This is because even assuming that Yummy Tums were able to show that it has an arguable counterclaim based on one or other of the four actions it claims to have, there is no evidence that indicates the counterclaim would be for the required minimum amount. Yummy Tums' alleged loss was advanced on the basis of the value of the business it says it would have been able to sell but for Foodwise's conduct. Ms Hume deposes that the business was worth far more than the amount of Foodwise's statutory demand. But there was no attempt to identify what that value might be, or to provide some confirmation of that value. The Court has only Ms Hume's assertion that the company had the kind of value she claims. That does not go far enough to satisfy the proviso in s 290(4)(b).

[22] Indeed, as against Ms Hume's assertion as to value, stand other factors that appear to belie the assertion. Most significantly is Yummy Tums' long outstanding and substantial debt, which it effectively funded by Foodwise's indulgence. The debt existed well before the occurrence of the events relied on in support of the alleged counterclaim, and there is no indication that Yummy Tums is or was ever in a position to obtain other funding in order to clear the debt and manage its business so as to meet its debts to Foodwise in a timely way. Indeed there is no hint of a suggestion that Yummy Tums had the ability to put other funding arrangements in place or to provide security for such funding. There is also no indication that Yummy Tums had substantial fixed or other assets of value it could liquidate to meet the debt. It appears it had goodwill but it is of unidentified value in the evidence. Nor is there any evidence of what it was seeking for its business or that it had any realistic prospect of realising that amount. Given this situation, it is impossible to

identify any support in the evidence that quantifies the value the business had, or that confirms rather than counters the contention that the business was worth far more than the amount of Foodwise's statutory demand.

[23] In *Datasouth Holdings Ltd v Melco Sales (NZ) Ltd* HC CHCH M41/96 17 May 1996, the Court held that contingent and unquantified counter-claims or set-offs cannot assist an applicant to set aside a statutory demand because under s 290(4)(b) the counter-claim or set-off must be quantified so the Court can determine whether the amount specified in the demand less the amount of the counter-claim or set-off is less than the prescribed amount. Likewise, in *Alfex Doors and Windows Ltd v Alutech Windows and Doors Ltd* (2001) 16 PRNZ 963, the Court of Appeal held that an unquantified claim for liquidated damages will not generally meet the generally accepted threshold of a "fairly arguable basis".

[24] The first ground must therefore fail. The alleged counterclaim is unquantified and there is no confirmation that it had a value that exceeded or came close to the undisputed debt Yummy Tums owes.

[25] That brings me to Yummy Tums' alternative ground.

Is it plainly unjust not to exercise the Court's discretion under sub-section (4)(c) to set aside the demand on the alternative ground?

[26] The alternative ground relies first on the contention that Yummy Tums has an arguable counterclaim albeit of an indeterminate amount. For reasons I will come to, it is unnecessary to decide whether or not Yummy Tums does indeed have an arguable counterclaim albeit for an unquantified amount. Suffice to say that, on the evidence as it presently stands, there are apparent difficulties with at least some of the causes of action relied on, and scant evidence to confirm key elements of all of them.

[27] More importantly for present purposes as already noted, is that a counterclaim of unquantified or indeterminate amount cannot of itself be a sufficient basis to set aside a statutory demand when the Act expressly requires that a

counterclaim must not only be arguable but that it must be not less than the prescribed amount. Of necessity, the counterclaim must be quantified. Counsel for Yummy Tums did not seek to argue the contrary, but he stressed that the other factors relied on together with the counterclaim tip the balance in Yummy Tum's favour when it comes to the exercise of discretion under subs 4(c). He stressed that Foodwise had allowed Yummy Tums to operate in arrears and submitted that this indulgence rendered unfair Foodwise's decision to invoke the statutory demand procedure. He argued that this was particularly so because Foodwise set about simultaneously sabotaging Yummy Tum's business by inviting its distributor, Dee Jays, to "by pass" Yummy Tums and instead to source replacement product directly from Foodwise.

[28] I do not accept the submission as to unfairness because:

- a) The fact that Foodwise has allowed Yummy Tums to operate in arrears points simply to an indulgence to extend substantial credit. The decision not to continue to extend credit was not unfair. As counsel conceded, Foodwise was entitled to decide that the situation could not continue and to require that Yummy Tums' substantial debt be reduced and brought into compliance with the agreed terms of trade. There is also no case on the evidence for saying Foodwise did not give reasonable notice of its change of position. The fact that Foodwise eventually issued a statutory demand when nothing happened to remedy the situation is also not unfair. It is simply a commercial inevitability;
- b) The contention that Foodwise set out to sabotage Yummy Tums is a factor raised in some or all of the causes of action Yummy Tums relies on for the purposes of its counterclaim. It does not provide any reason additional to the unquantified counterclaim itself to justify the exercise of the discretion. Something more than an unquantified counterclaim is required under s 290(4).

[29] The factors Yummy Tums relies on do not raise therefore a sufficient basis for Yummy Tums to withhold monies it admits it owes in the hope that it will recover sufficient on its unquantified claim to extinguish its indebtedness which, by its own admission, it lacks the means to pay.

Decision

[30] Yummy Tums has failed to discharge the onus on it to show that it has an arguable counterclaim of sufficient value for the purpose of relief under s 290(4)(b). Similarly, it has failed to discharge the onus on it to show that there are sufficient grounds for the exercise of the Court's discretion under s 290(4)(c).

[31] The application to set aside the statutory demand is therefore dismissed.

[32] Costs will follow the event and are to be awarded to Foodwise on a 2B basis plus disbursements to be fixed by the Registrar.

Associate Judge Sargisson