

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

**CIV 2009-404-005253**

IN THE MATTER OF     the Companies Act 1993  
  
BETWEEN                CAPPING CORPORATION LIMITED  
                            Plaintiff  
  
AND                      JILLIAN D. YOUNG  
                            Defendant

Hearing:            2 September 2009

Appearances: H Fulton for Applicant  
                  E Turner for Respondent

Judgment:         3 September 2009 at 11 am

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**JUDGMENT OF ASSOCIATE JUDGE ROBINSON**

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This judgment was delivered by me on 3 September 2009 at 11 am,  
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors:         Bell-Booth Sherry, PO box 33 002, Takapuna, Auckland  
                      Chapman Tripp, PO Box 2206, Auckland

[1] The respondent having taken an assignment of money claimed to be owing by the applicant issued a statutory demand dated 3 August 2009 for recovery of those monies. On the issue of the statutory demand s 290 Companies Act 1993 imposes a very strict time table on the company being served with the statutory demand to apply to this Court to set the statutory demand aside. Failure by the company, in this case the applicant, to comply with that timetable prevents the company from bringing an application to set aside the statutory demand.

[2] Within the time provided by s 290 the applicant brought these proceedings to set aside the statutory demand issued by the respondent. The respondent resides overseas. Her solicitors are experiencing difficulties in obtaining evidence in support of the respondent's defence. Those difficulties it seems are caused by the respondent and the assignor being overseas. However, I am concerned about the respondent's statement in the email she sent to her solicitor seeking an adjournment to this application for as long as possible saying that Law Gin Kye is not responding and that she was unsure as to how long it would take to get the necessary documents from him.

[3] I am satisfied that there is an obligation on the respondent in this case to proceed with all due diligence in presenting her defence to this application. Whilst I accept that s 290 Companies Act 1993 does not impose on a respondent the strict time limits imposed on the applicant, I also accept that the imposition of such time limits on an applicant require the Court to ensure that applications of this Court are dealt with as soon as possible. I also take into account the recognised duty on solicitors who invoke the statutory demand procedure for recovery of debt to ensure that there is really no defence to the claim by the company. Consequently, there is a duty on a solicitor invoking this procedure to make some preliminary inquiries as to whether the company could have a bona fide defence and if such a defence exists then this procedure would be inappropriate.

[4] Dealing with the circumstances in this case there is evidence that the applicant in correspondence did indicate that the demand would be opposed. However, I must have regard to not only the rights of the applicant but also the rights of the respondent to have a reasonable opportunity to present her defence to this application. I certainly do not consider that she is entitled to unlimited time in amassing evidence and preparing her defence and her legal advisors do not seek such time. What they seek is a further four weeks to file and serve their affidavit in opposition. I am satisfied that their request for such an extension is a bona fide request arising out of the particular circumstances which involve witnesses overseas and also involve obtaining evidence from the assignor of the debt to their client. They have acted responsibly in not filing an affidavit with limited information and then seeking an adjournment. However, they must appreciate that if they cannot obtain the evidence from the assignor within the time frame they are specifying then they must proceed with the evidence that is available in the knowledge that should the statutory demand be set aside, their client still has her rights to apply to the Court to enforce the debt by way of a civil action.

[5] Because of those reasons I have decided to grant the respondent's application. In coming to that decision I also take into account the fact that the extension of time is not going to cause any serious delay in the hearing of the application. A fixture can be arranged within a reasonable time taking into account the timetable order I am going to make. Time is available to deal with this matter on 20 November 2009 at 10 am for half a day. For the reasons I have given therefore I am prepared to grant the application for an extension of time. The order however is on the following conditions:

- a) The respondent shall file the notice of opposition with supporting affidavits on or before the 29 September 2009. If the respondent is in default of that direction then the registrar is to arrange a fixture for one hour before me to deal with the matter on an undefended basis. If however the respondent complies with that direction then there will be the following directions.

- b) Any evidence from the applicant in reply is to be filed and served by 13 October 2009.
- c) The proceedings will then be set down for hearing for half a day on 20 November 2009 at 10 am.
- d) There will be the standard directions for the filing of synopsis of argument, chronology, bundle of authorities and bundle of documents on the basis that the applicant's documentation shall be filed seven working days prior to the fixture and the respondents five working days prior to the fixture.

[6] The applicant seeks costs on the basis that the respondent's application for an extension of time was seeking an indulgence. The respondent being in default of her obligations under the rules, it is submitted should pay the costs involved in this application. There are it seems to me two countervailing principles. On the one hand it is the respondent seeks an indulgence yet on the other hand the respondent's application has been successful. The rule provides for the unsuccessful party to pay the costs. I do not propose to make an order requiring the applicant being the unsuccessful party to pay the costs. However, I also do not require the respondent to pay any costs because the respondent's application has been successful. There will therefore be no order for costs.

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**Associate Judge Robinson**