IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1483

BETWEEN	DUFFILL WATTS LIMITED Plaintiff
AND	MOGANS HOMES LIMITED Defendant

Hearing: 26 May 2009

Appearances: M Broad for plaintiff
A K Singh for defendant

Judgment: 28 May 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.30 pm on Thursday 28 May 2009

Solicitors/counsel :
Kensington Swan Auckland, mark.broad@kensingtonswan.com
Webb Farry, PO Box 5541, Dunedin bjudd@webbfarry.co.nz
Penney Patel Law, PO Box 26344, Epsom, Auckland anand@pennypatel.co.nz

[1] The plaintiff seeks an order for the liquidation of the defendant company. On 6 January 2009 it served on the defendant a statutory demand seeking payment of the sum of $37,659.90 for professional services associated with a subdivisional proposal. The defendant has failed to pay the sum claimed, or any part of it, neither has it secured or compounded the sum concerned to the reasonable satisfaction of the plaintiff. Time for compliance with the provisions of the statutory demand expired on 29 January 2009.

[2] The defendant did not apply to set aside the statutory demand, but, following service of the liquidation proceedings on 26 March 2009, it filed and served the present application for orders restraining publication and staying the proceeding. The defendant has also filed and served a statement of defence in the substantive proceedings.

Legal principles

[3] The present application is governed by r 31.11 which provides:

> **31.11 Power to stay liquidation proceedings**
>
> (1) If an application for putting a company into liquidation is made under rule 31.3, the defendant company, or, with the leave of the court, any creditor or shareholder of that company or the Registrar of Companies, may, within 5 working days after the date of the service of the statement of claim on the defendant company, apply to the court—
>
> (a) for an order restraining publication of an advertisement required by rule 31.9 or any other information relating to that statement of claim; and
>
> (b) for an order staying any further proceedings in relation to the liquidation.
>
> (2) The court must treat an application under subclause (1) as if it were an application for an interim injunction and, if it makes the order sought, it may do so on whatever terms the court thinks just.
>
> (3) The inherent jurisdiction of the court is not limited by this rule.

[4] The proper approach to applications for restraint and stay is well settled. A useful summary of the relevant principles appears in *Nemesis Holdings Ltd v North Harbour Industrial Holdings Ltd* (1989) 1 PRNZ 379, 385 where Wallace J took into account the following considerations:

> (a) The Court has an inherent jurisdiction to stay winding-up proceedings where the debt upon which such proceedings are founded is the subject of genuine dispute. In those circumstances the plaintiff cannot show it has the status of a creditor or that there has been neglect by the company to pay.
>
> (b) The jurisdiction is an inherent one to prevent abuse of process. There is no inflexible rule.
>
> (c) The governing consideration is whether the proceedings suggest unfairness or undue pressure.
>
> (d) It is a serious matter to stay winding-up proceedings, so the decision to do so is never made lightly. The onus is on the applicant and it is normally necessary to demonstrate "something more" than the balance of convenience considerations which are usually considered on an application for interim injunction. If the defendant company has had an opportunity to file appropriate affidavits, such defendant is required to establish a strong prima facie case of the existence of a genuine dispute on substantial grounds, or show that there are clear and persuasive grounds for a stay.

[5] The defendant had an opportunity to challenge the plaintiff's claim by taking steps to apply to set aside the statutory demand. It failed to do so. The procedural consequences of a failure to challenge a statutory demand have been considered in a number of cases. Of particular assistance is *Balmoral Marketing Ltd v Karapiro Spa Ltd* HC AK CIV 2005-404-6396 3 October 2006, approved and followed in *Foundation Securities (NZ) Ltd v Direct Labour Services Limited & Anor* HC AK CIV 2006-404-4391 24 January 2007.

[6] In *Balmoral Marketing* at [46] Abbott AJ, having considered a number of authorities, listed the following principles:

> (a) Each case must be considered on its particular facts;
>
> (b) A defendant which fails to apply to set aside a statutory demand on the ground that the debt is disputed will need to show some exceptional factor to justify the failure to apply: that factor is likely to reflect the existence of a genuine dispute;

(c) The Court retains a discretion to consider a dispute where it is satisfied that there is a genuine basis for it;

(d) A defence raised late may well count against the defendant in costs.

Factual background

[7] The defendant is the owner of a property at 120 Wyllie Road, Papatoetoe which was capable of being subdivided into four lots. The defendant wished to do so. The plaintiff was recommended to it as a firm of experienced planning consultants.

[8] The defendant's sole director, Mr Ganesh, instructed the plaintiff in about July 2007. He says he was told by Mr Hawkins, a senior figure within the plaintiff organisation, that resource consent would be obtained by November 2007. On that basis, because the defendant was anxious to proceed expeditiously, the plaintiff was retained. The plaintiff denies having given any assurance to the defendant as to time.

[9] On 24 July 2007, the plaintiff sent a letter of engagement to the defendant, together with a short form of agreement. The letter of engagement runs to several pages, and sets out detailed terms and estimated costs. The defendant signed the documents and returned them to the plaintiff.

[10] Subsequently the plaintiff carried out a feasibility study and then embarked upon the first phase of its work, directed at obtaining a resource consent from the local authority, the Manukau City Council. Progress was slow. There was significant correspondence between the plaintiff and the Council. Although the documents placed before the Court are limited in extent, it is a proper inference that there were on-going difficulties about stormwater reticulation and with utilities.

[11] At a meeting between the plaintiff and the defendant in February 2008, Mr Ganesh was told that there would be a delay of some weeks. The delay stretched well beyond that. On 4 June 2008 there was a meeting involving Mr Hawkins of the plaintiff and Mr Ganesh, where the progress of the project was discussed as well as payment of the plaintiff's invoices, which by then had accumulated and remained

unpaid. Mr Ganesh told Mr Hawkins that the defendant was not satisfied with progress and was not willing to make a payment in the light of the delay. But an accommodation was reached.

[12] On the following day, Mr Hawkins sent an e-mail to the defendant which read:

> Hi Mohini and Michael
>
> Thanks for the meeting yesterday. My understanding of the next steps is as follows:
>
> 1. I will send you a copy of the resource consent application.
>
> 2. I will ask Vrinda to get Karl to do the revised arborist's report (done).
>
> 3. I will ask Vrinda to draft the response to the current section 92 request from Council and get this back into Council as soon as Karl has done his report (done).
>
> 4. I will talk to Mike Blackburn about any verbal agreement Suresh had with him for the price of the architectural consent drawings.
>
> 5. I will ask Vrinda to check with Manukau City Council the validity period etc for the building consent application so that you can be in a position to start work on 22 April 2009 without having to reapply for building consent (done).
>
> 6. You will send us a cheque for $10,000 as part payment on our invoices and then pay the remaining invoices when you see that things are moving again.
>
> Could you please e-mail me a quick reply to confirm that I have your addresses correct.
>
> Regards
>
> Steve Hawkins

[13] It is common ground that this e-mail accurately reflected an agreement reached at the meeting of 4 June, and that it thereby varied the parties' prior obligations. The defendant paid the sum of $10,000 and awaited further progress.

[14] In an affidavit filed in support of the present application Mr Ganesh asserted that the plaintiff had simply done nothing further, following the 5 June e-mail. But that is plainly not right. Mr Hawkins has filed an affidavit which annexes a number of documents, including correspondence with the Council and a succession of e-

mails to the defendant. Correspondence with the Council was copied to the defendant. It showed that the difficulties with the resource consent application were on-going, but that attempts were being made to find practical solutions to outstanding problems. The defendant was kept advised.

[15] Between June and October there was a series of e-mails from the plaintiff seeking in-put from the defendant, asking whether the e-mail addresses were still current, and later seeking payment of the plaintiff's outstanding invoices. The defendant did not respond to a single communication from the plaintiff.

[16] On 6 January 2009 the plaintiff served its statutory demand, and in February 2009 it withdrew the resource consent application because, by reason of the passage of time, the Council would have been obliged, within a matter of weeks, to issue an adverse determination.

[17] Mr Broad submits that the plaintiff was entitled to infer, as it did, that in the absence of any communication from the defendant over a period of months, the defendant had lost interest in the project and its failure to pay the plaintiff's invoices suggested insolvency.

[18] Mr Singh argues that the defendant is entitled to an abatement, or other form of set off against the plaintiff's charges, because the defendant did not get what it bargained for, namely the resource consent and subdivisional approval. He relies in particular on the time estimates said to have been provided on behalf of the plaintiff to Mr Ganesh.

[19] The plaintiff denies giving any such estimates. But even if they were given, they could not, in my view, have amounted to anything more than statements of opinion that were not of themselves actionable at the suit of the defendant. The plaintiff and defendant were effectively in the hands of the Manukau City Council. Moreover, the short form agreement signed by the defendant contained a provision to this effect that it, together with the covering letter " … will replace all or any oral agreement previously reached between the Parties".

[20] Mr Singh also argued that if the dispute was fully considered at trial, then the defendant may be able to make out an implied term, for breach of which the defendant may be entitled to relief. But, after discussion, he conceded that there was no room for the implication of any meaningful term in the present instance. For one thing, the short form of agreement precludes the implication of a term, and for another, it is impossible to formulate a term to which both parties would have agreed.

[21] There is no doubt that this project took a very long time – much longer than either party expected at the outset. But it seems that significant unexpected hurdles were encountered along the way. Mr Singh accepts that the defendant agreed to the contractual variation evidenced by Mr Hawkins' e-mail of 5 June 2008, and that it was therefore required to pay the outstanding invoices (save for the $10,000 paid immediately) " … when you see that things are moving again".

[22] The plaintiff has adduced in evidence a number of documents which establish that much was done after 5 June 2008 by the plaintiff, and that the defendant was aware of the steps so taken. In terms of their bargain, therefore, the defendant was bound to pay the invoices which had accumulated to date by about August or September 2008. It did not do so. Indeed, there is no evidence of any communication by the defendant to the plaintiff after June 2008.

[23] In my view, the debt cannot be said to be genuinely disputed. The defendant has simply failed to abide by its promise to pay the outstanding invoices upon the making of further progress by the plaintiff.

[24] The information before the Court is consistent with the defendant having simply lost interest in the project. That is the logical inference to be drawn from the defendant's failure to respond at all to the many communications from the plaintiff after 5 June 2008.

Failure to set aside

[25] The defendant does not dispute that the statutory demand was served upon it on 6 January 2009. However, Mr Ganesh took no step to deal with it before it expired. In his affidavit he simply says:

> The statutory demand was left with my daughter. Unfortunately it was not brought to my notice immediately. The defendant therefore lost the opportunity to apply to have it set aside.

[26] Limited evidence of that sort is unsatisfactory. Mr Ganesh does not mention the date upon which he did become aware of the existence of the statutory demand, nor does he explain why the document, plainly important, was not referred to him immediately. The first formal written suggestion of a dispute was contained in a letter written by a solicitor acting for the defendant on 23 February 2009, although in fairness to the defendant it should be said that it appears from the correspondence the existence of a dispute may have been notified a little earlier than that.

[27] The defendant has not identified an exceptional factor of the sort that would justify the grant of a stay, where it has earlier failed to apply to set aside the statutory demand.

Solvency

[28] By reason of its failure to comply with the statutory demand, the defendant is deemed to be insolvent by virtue of s 287 of the Companies Act 1993. That presumption may be rebutted by evidence to the contrary, but such evidence must be cogent: *Concept Manufacturing Ltd v Concept Lighting Ltd* [2000] BCL 699 at [12], followed in *Foundation Securities* at [24].

[29] Mr Ganesh has produced the company's accounts for the financial year ended 31 March 2008. The defendant's balance sheet indicates a significant excess of liabilities over assets, although Mr Singh points out that much of the defendant's indebtedness takes the form of an inter-company loan from a sister company.

Mr Ganesh says the defendant has net assets of $2 million, but it is difficult to accept a bare assertion which seems not to match the defendant's annual accounts.

[30] In circumstances where a defendant is truly solvent and there is a genuine dispute, the defendant will often lodge the amount in dispute with an acceptable stakeholder. That has not occurred here, although the defendant says it is in a position to comply with an order directing that the amount in dispute be paid into Court. Evidence as to the defendant's solvency is not, in my opinion, sufficiently compelling to justify the orders sought by the defendant, given my conclusion that the debt claimed by the plaintiff is not genuinely disputed.

Res judicata

[31] The plaintiff seeks an order declaring the defendant to be estopped from raising afresh at the liquidation hearing, matters litigated on the present application. I am not prepared to make an order of that type. Estoppel issues will be for the Judge hearing the liquidation proceeding to determine.

Conclusion

[32] In my view the defendant is not entitled to the orders sought, either under the more general principles discussed in *Nemesis Holdings,* or in the context of the principles developed in cases where a defendant has failed to apply to set aside a statutory demand.

[33] Accordingly, the application is dismissed.

Costs

[34] Mr Broad has indicated that if successful the plaintiff wishes to seek costs above scale. The plaintiff is to file and serve a costs memorandum within ten working days of the date of this judgment. The defendant is to respond within a further ten working days. The plaintiff will have five working days to reply.

Thereafter I will deal with the question of costs on the papers unless either counsel seeks an oral hearing.

C J Allan J