IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2009-454-278

IN THE MATTER OF	Section 290 Companies Act 1993
BETWEEN	AGNEW CONTRACT SERVICES LIMITED Applicant
AND	PAGE VIVIAN MOTORS LIMITED Respondent

Hearing: 12 May 2009

Appearances: M. Reddy - Counsel for the Applicant
S.C. Herbert - Counsel for the Respondent

Judgment: 5 June 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 5 June 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] The applicant applies, pursuant to s. 290(4) Companies Act 1993 for an order setting aside a statutory demand.

[2] The statutory demand dated 20 March 2009 ("the present statutory demand") claims the sum of $23,244.46 which is described in the demand as being "for interest and legal expenses as agreed in terms of trade."

[3] The application is opposed by the respondent.

Background Facts

[4] In the present statutory demand under consideration here, the respondent appears to seek interest and legal costs on debts which it seems were the subject of a previous statutory demand dated 3 June 2008 ("the earlier demand") and another later statutory demand. The earlier demand was addressed in a judgment I issued in this Court on 7 November 2008 under proceeding 2008-454-416.

[5] The earlier demand related to a sum of $28,810.37 claimed by the respondent to be owing for "crusher hire" under a contract by which the applicant hired a metal crusher machine from the respondent.

[6] The background facts to this matter are set out at paragraphs [8]-[26] of that earlier judgment under proceeding 2008-454-416 between the parties.

[7] Subsequent to the issue of that judgment, as I understand the position on 7 November 2008, the applicant met the terms of that judgment by paying the $22,250.00 ordered to be paid under the earlier demand together with category 2B costs and disbursements (ordered at paragraph [78] of that judgment).

[8] In its present statutory demand as I have noted the respondent seeks $23,244.46 for what is said largely to be interest and legal costs on the debt paid under the earlier demand.

[9] In addition, however, under the present statutory demand, as I understand the position, the respondent also seeks interest and costs on another earlier statutory demand. This was a third statutory demand dated 27 November 2008, the terms of which were apparently complied with by the applicant on 18 December 2008.

[10] There is, however, no detail or calculation of the respondent's "interest and legal costs" claim in the present statutory demand. Instead, all that is before the Court is a statement from the respondent to the applicant, annexed as exhibit "RBM3" to the 2nd April 2009 affidavit of Mr Richard Bruce Mexted ("Mr Mexted") filed on behalf of the applicant in this proceeding. This sets out what are said to be calculations which support the amount which the respondent claims from the applicant under the present statutory demand.

[11] According to this 2 April 2009 affidavit of Mr Mexted (at paragraph 5) the amount claimed in the present statutory demand is said to be made up of interest and costs due under an Invoice Number 04584 ($22,950.00) and an Invoice No. 04601 ($5,860.37) dated April 2008 and May 2008 respectively. The amount in the statement at "RBM3" however totals $23,408.58 and the amount claimed in the statutory demand is $23,244.26. Nothing is before the Court to identify the difference between these amounts. It can only be assumed that the difference between the statement amount in "RBM3" and the amount in the statutory demand relates to additional interest claimed for the period after the issue of the demand on 20 March 2009 up to the final date of the statement being 31 March 2009.

Counsel's Arguments and My Decision

[12] The present application, like the application by the applicant to set aside the earlier demand, is brought pursuant to s. 290 Companies Act 1993. Although the terms of the application to set-aside the present statutory demand indicate that the application is made in reliance on s. 290(4)(c) Companies Act 1993, before me, Ms Reddy for the applicant confirmed that the application also relies upon the provisions of s. 290(4)(a) Companies Act 1993.

[13] The relevant provisions of s. 290 Companies Act 1993 are:

"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 counter-claim, set-off or cross-demand and the amount specified in the demand less the amount of the counter-claim, set-off or cross-demand is less than the prescribed amount; or

(c) The demand ought to be set-aside on other grounds.

(5) A demand must not be set-aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.

(6) In sub-section (5) of this section, defect includes a material mis-statement of the amount due to the creditor and a material mis-description of the debt referred to in the demand.

(7) An order under this section may be made subject to conditions."

[14] 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.

[15] 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).

[16] 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."

[17] 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.

[18] 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."

[19] The catch-all "other grounds" in s 290(4)(c) were considered by the Court of Appeal in *Commissioner of Inland Revenue v Chester Trustee Services Limited* (2002) 9 NZCLC 263,016. There, Tipping J commented at [3]:

> "[2] … the general policy of the Act that insolvent companies should be put into liquidation, if a creditor seeks such an order, should not be departed from lightly. To justify such departure there must be some other factor, be it policy, principle or simply the justice of the particular case, which outweighs the prima facie entitlement of the creditor to an order putting the insolvent company into liquidation. If the focus is on the justice of the particular case the discretion must always be exercised on a principled basis and not on some ad hoc perception of what individual justice might require. All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement is outweighed by some factor or factors making it plainly unjust for liquidation to ensue. The ground advanced by the insolvent company must be sufficiently compelling to overcome the general policy of the Act with regard to insolvent companies."

[20] Examples of situations which would fit within s 290(4)(c) are where there are defects or irregularities in the statutory demand or process such that failure to set aside the demand would cause substantial injustice (ie. defects not coming within s 290(5)), where there is a well-founded opposition by a majority of creditors to the winding up of the company, and, at [60]:

> "[2] It will also be legitimate for the court to use s 290(4)(c) to prevent an abuse of the statutory demand process. Where a statutory demand is being used for a purpose that is not contemplated by the Companies Act it will be appropriate for the court to set aside the demand, notwithstanding the company's insolvency."

[21] Beck (at para 482) notes that a statutory demand might be set aside under s 290(4)(c) where it has been issued to place "undue pressure" on the company. Mere pressure to meet the debt is not "undue" however; there needs to be some other improper or ulterior purpose: *Apple Fields Ltd v The Trustees Executors and Agency Company of New Zealand Ltd* (1999) 8 NZCLC 262,008. Thus, in *Waikato Business Equipment Ltd v Taylor* HC HAM M324/00 6 June 2001 Master Faire stated at [12]:

> "[2] … it cannot be improper for a creditor to make a statutory demand on a debtor in order to apply pressure to realise assets to pay a due debt. It will only be improper if some ulterior purpose that is improper and which might amount to an abuse of the Court's processes that the Court would be justified in setting a statutory demand aside."

[22] Lastly, where a ground has been made out under s 290(4), the Court still has a discretion as to whether to set the statutory demand aside. However, in *Alfex Doors and Windows Ltd v Alutech Windows & Doors Ltd* (2001) 16 PRNZ 963 the Court of Appeal held at [14] that:

> "… where grounds for setting aside under s 290(4) are clearly made out, it will be a rare case in which, in exercise of the residual discretion, the application is refused. The circumstances of each case will call for consideration."

[23] Similarly, in *Primary Health Remuera Ltd v Avoca Residential Construction Ltd* (2004) 9 NZCLC 263,647 (CA) at [42], O'Regan J said that "in general terms, the discretion not to set aside a statutory demand when the necessary jurisdiction to do so is established under s 290(4)(a) or (b) will be exercised only in rare cases, when there are strong grounds for doing so."

[24] The essential arguments advanced by the applicant in support of its application here are first, that the debt claimed is the subject of a substantial dispute, secondly, that the issue of costs and interest claimed in the demand is *res judicata* (in

particular that the respondent is estopped from seeking solicitor/client costs and interest on the original sum sought in the 3 June 2008 earlier demand); and thirdly that it is an abuse of process and unfair to revisit the question of costs and interest by way of the present statutory demand which is a further (and third) demand issued by the respondent under the same contract and circumstances.

[25] Before me, significant argument was advanced by counsel for both parties with regard to the issue of *res judicata* and the contention that the respondent was estopped from questioning the merits of an earlier decision of this Court.

[26] As I see the position, however, it is not necessary to consider these aspects in determining the present application which can be quickly disposed of.

[27] In my view, there can be little dispute here that the respondent's claim in the present statutory demand is the subject of a substantial dispute as to whether this debt may be owing or due.

[28] I reach this conclusion for the following reasons:

(a) No details are provided by the respondent in the present statutory demand to explain the breakdown of the amount claimed either by way of interest or legal costs.

(b) So far as interest is concerned, para. (b) of the relevant part of the earlier Hire Contract between the parties provides:

> "(b) Accounts unpaid 10 days after due date <u>may</u> incur a monthly 2% late payment fee."
>
> (emphasis added)

Even considering the various bland notations for "interest per contract" in the statement from the respondent to the applicant annexed as exhibit "RBM3" to the 2nd April 2009 affidavit of Mr Mexted, a proper calculation of this interest claim is difficult if not impossible to make. No evidence on this aspect is before the Court. No details of the amounts on which interest is claimed, nor the rates charged, nor whether the interest may have been compounding on some basis, or the starting or finishing points for that interest, are included. And, as I understand the position, no amounts for interest were claimed in the respondent's earlier statutory demands, giving

rise to the question as to whether the respondent had waived interest on those claimed rental instalments under the discretionary "unpaid accounts may incur interest" provision in the Hire Contract noted above, only now to endeavour to resurrect such claims. But, in any event, in my view the bald claim for "interest" here is quite properly the subject of a substantial dispute by the applicant, a dispute that needs to be resolved elsewhere rather than in this Companies Court.

(c) With regard to the claim for legal costs, (as I understand it, a large claim for over $15,700.00), counsel for the applicant has confirmed that the issue of these costs has been sent for a Fees Review to the New Zealand Law Society, this having occurred on 10 May 2009. In my view it is entirely premature for the respondent here to pursue those costs through the statutory demand procedure, with the serious consequences which necessarily attach to that action, when a review is pending. A question must arise as to whether those costs are in fact due and payable when Law Society consideration under the review process is still to take place. And, in addition, it must be remembered that category 2B scale costs plus disbursements were ordered against the applicant on the earlier application to set aside the 3 June 2008 statutory demand (a decision not appealed by the respondent) and, as I understand it, these have now been paid.

(d) In my view the applicant here should be given a proper opportunity to test the respondent's late interest and costs claims making up the amounts specified in the present statutory demand in a forum or forums which are outside the present Companies Court process.

(e) A debtor company such as the applicant here seeking to set aside a statutory demand because there is a substantial dispute over the existence of a debt does not have to establish that it is impossible for the plaintiff to succeed: *NZ Factors Ltd v Farmers Trading Co Ltd* [1992] 3 NZLR 703. An application like the present for an order setting aside a statutory demand need only show a fairly arguable basis on which the applicant is not liable for the amount claimed. *Forge Holdings Ltd v Kearney Finance (NZ) Ltd* 20/6/95, Tipping J,

HC Christchurch M149/95 and *United Homes (1988) Ltd v Workman* [2001] 3NZLR 447 (CA).

[29] For all these reasons, in my view the applicant here has done enough to show that a substantial dispute exists here. The applicant has clearly shown a fairly arguable basis on which it is not liable for the amount claimed in the respondent's present statutory demand.

[30] And, as I see it, the "defect or irregularity" provisions in s. 290(5) and the "material misstatement of the amount due" provisions in s. 290 (6) Companies Act 1993 do not assist the respondent here, given the real absence of any material before the Court evidencing a precise calculation of properly unchallenged amounts due under the present statutory demand. What amount, if any, that may ultimately turn out to be due to the respondent simply cannot be determined here.

Result

[31] For the reasons outlined above the application before the Court succeeds.

[32] An order is now made setting aside the respondent's present statutory demand dated 20 March 2009.

[33] As to costs these are reserved. If counsel are unable to agree between themselves on the question of costs then they may file memoranda on this issue (sequentially) which are to be referred to me and, in the absence of either party indicating they wish to be heard on the matter, I will decide the question of costs based upon the material before the Court.

'Associate Judge D.I. Gendall'