

[1] In April 2012 Watts & Hughes Construction Ltd served a statutory demand on 239 Queen Street Developments Ltd for \$196,910.93. The debt was said to be due under the Construction Contracts Act 2002 for work done and under payment schedules issued under demolition and alteration works construction contracts of August 2011 and September 2011 respectively.

[2] 239 Queen Street Developments Ltd applied to set aside the statutory demand under s 290 of the Companies Act 1993. It claimed that there was a substantial dispute whether or not the debt claimed in the demand was due and owing and it alleged that it had a counterclaim, set-off or cross-demand which equalled or exceeded the sum demanded.

[3] Watts & Hughes Construction Ltd opposed. Its notice of opposition says that the amount outstanding is an amount certified by engineers under payment schedules provided under s 21 of the Construction Contracts Act. It relies on the “pay now/argue later” provisions of the Construction Contracts Act.

[4] On 9 May 2012, Associate Judge Sargisson made an order under s 290(3) of the Companies Act extending the period for compliance with the demand pending further orders. The application was set down for hearing today.

[5] Last week the applicant advised that it would withdraw the application. In response, the Watts & Hughes Construction Ltd filed a memorandum asking for the fixture to be maintained so that it could apply for orders for immediate liquidation under s 291(1)(b) of the Companies Act and for solicitor/client costs.

[6] Watts & Hughes Construction Ltd seemed to assume that there would be no opposition to an order for immediate liquidation. However, 239 Queen Street Developments Ltd opposes an immediate liquidation order. Accordingly I am required to consider how to exercise the powers under s 291 of the Companies Act.

[7] Section 291 of the Companies Act 1993 provides:

291 Additional powers of Court on application to set aside statutory demand

- (1) If, on the hearing of an application under section 290, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute, or is not subject to a counterclaim, set-off, or cross-demand, the Court may—
 - (a) Order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or
 - (b) Dismiss the application and forthwith make an order under section 241(4) putting the company into liquidation,—

on the ground that the company is unable to pay its debts.
- (2) For the purposes of the hearing of an application to put the company into liquidation pursuant to an order made under subsection (1)(a), the company is presumed to be unable to pay its debts if it failed to pay the debt within the specified period.

[8] In most cases, the normal practice is to make an order under s 291(1)(a), that is, to make an order for payment within a specified period so that in default of compliance an application for liquidation may be made. Orders under s 291(1)(b) are less usual. They involve a short-cut. That can be seen by considering the normal steps taken when a creditor applies for a liquidation order.

[9] Section 241(4)(a) of the Companies Act provides that the court in its discretion may make an order that a company be put into liquidation if the company is unable to pay its debts. Section 241(2)(c)(iv) gives a creditor standing to apply. Accordingly, a creditor's liquidation application involves at least three elements:

- (a) Whether the applicant is a creditor;
- (b) Whether the company is unable to pay its debts; and
- (c) How the court should exercise its discretion under s 241(4).

[10] Under s 287 of the Companies Act, there are rebuttable presumptions as to inability to pay debts. The most common is s 287(a) – failure to comply with a statutory demand.

[11] Even though a creditor may establish its standing as a creditor and may establish that the company is unable to pay its debts, the court retains a discretion

whether to put the company into liquidation. The creditor is entitled to *ex debito justitiae* to a winding-up order. It is for the company or other creditors or shareholders to show why a liquidation order should not be made. In *Re Thames Freightlines Ltd (In Receivership)*¹ Greig J set out principles the court takes into account in exercising its discretion.

[12] It is a feature of the liquidation application that it is advertised. That gives other creditors and shareholders of the company the opportunity to take part in the proceeding. Their input is usually most relevant at the discretion stage.

[13] It is important to distinguish the discretion under s 241 from other discretions in other provisions of the Companies Act. Under s 290 the court has a discretion whether to set aside a statutory demand. In exercising that discretion under s 290 the court decides whether it is just to allow the statutory demand to stand so that non-compliance will give rise to a presumption of inability to pay debts.² It does not exercise a discretion whether a liquidation order should be made. The discretion under s 291 is whether to order the company to pay the amount of the demand within a specified time or to make an immediate order for liquidation. That decision goes to whether to dispense with the normal procedures for a liquidation proceeding.

[14] On a hearing under s 290, when the court applies s 291(1)(a), it allows the normal principles on a liquidation application to be applied. An application for a liquidation order is made only upon non-compliance with the order for payment, but that non-compliance will give rise to a presumption of inability to pay debts under s 291(2). The application will still need to be advertised. The court will still retain its discretion whether to make a liquidation order.

[15] When the court makes an immediate order for liquidation under s 291(1)(b), it by-passes the normal procedures of a liquidation application. There is no advertising. No opportunity is given to shareholders or other creditors to be heard whether a liquidation order should be made or not. The scope for an inquiry as to the exercise of the discretion under s 241 is limited. Even though a presumption of

¹ *Re Thames Freightlines Ltd (In Rec)* (1981) NZCLC 98,112.

² *Re a Debtor* [1989] 1 WLR 271 (CA) at 276 per Nicholls LJ.

inability to pay debts under s 287(a) may not be established, the company is treated as unable to pay its debts.

[16] This means that if the court is to take the short-cut route under s 291(1)(b), the court must have clear evidence that the company is insolvent; there may be no presumption of inability to pay debts under s 287. The court must also be persuaded that to give creditors and shareholders the opportunity to be heard, and to give the opportunity to consider whether the discretion should be exercised, would not serve any useful purpose. To take that course, the court has to be satisfied that the company is clearly unable to pay its debts, and that liquidation is such a foregone conclusion that any inquiry as to the exercise of the discretion is unnecessary.

[17] The creditor seeking an order under s 291(1)(b) must establish these matters to the court's satisfaction. It would not be wise to circumscribe the kinds of cases where this might arise, but there are two kinds of cases that come to mind. First, a company might be moribund. It may have ceased trading or carrying on any other form of activity. A second case is that creditors' interests are in such peril that the need to give urgent relief takes priority. These are situations akin to when the court might consider the appointment of interim liquidators.

[18] I now consider this case.

[19] The applicant has conceded that the respondent must prevail on the setting-side application because of the "pay now/argue later" principles of the Construction Contracts Act. It has not abandoned its counterclaim. It simply recognises that case law from decisions such as *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd*³ and *Laywood v Holmes Construction Wellington Ltd*⁴ means that in the face of liability under the provisions of the Construction Contracts Act, s 79 of that Act prevails over s 290 of the Companies Act so that opposition to a statutory demand based on purported counterclaims is fruitless. It does not mean that the applicant has abandoned counterclaims that it might otherwise wish to assert. In particular, s 26 of the Construction Contracts Act recognises the possibility of

³ *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 18 PRNZ 97.

⁴ *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 (CA) at [49]–[65].

independent proceedings. An employer who might be liable to pay under payment claims still retains the right to issue separate proceedings to obtain a final determination as to net liability between the parties.

[20] In *Laywood v Holmes Construction Wellington Ltd*⁵ the Court of Appeal noted that the position may be different when an application for adjudication or for liquidation is heard on its merits as opposed to the position under s 290 or where an application is made to set aside a bankruptcy notice.

[21] Counsel has advised that Watts & Hughes Construction Ltd has given a notice of adjudication under the Construction Contracts Act, and that the applicant is awaiting determinations by the engineer which the applicant hopes will be in its favour and will support its claims to liquidated damages.

[22] Mr Kohler took the point that that was simply advice from the bar. He also made the point that this is a situation where the “pay now/argue later” policy of the Construction Contracts Act should be recognised. He advised that Watts & Hughes Construction Ltd was the head contractor on the job, and it has its own liabilities to the sub-contractors employed on this project. The principle of the Act requires that the applicant should pay now, with arguments as to counterclaims to take place later. Mr Kohler relied on these principles of the Construction Contracts Act to ask first, for an immediate order for liquidation or, second, for an adjournment where the court can consider at that stage whether to make an immediate order for liquidation.

[23] In my judgment arguments along the lines of “pay now/argue later” under the Construction Contracts Act are not appropriate to require an immediate order for liquidation. That is because the policies of “pay now/argue later” eventually run out. Once there is a bankruptcy or a liquidation, the principles of insolvency set-off take over. The relevant set-off provision is s 310 of the Companies Act 1993. It can be a relevant factor on a hearing of a liquidation application whether a claimant is a creditor after s 310 of the Companies Act has been applied. It may be necessary to see whether there is a net liability after taking into account all claims between the claimant and the company.

⁵ At [61] and [65].

[24] Accordingly, the claims of the applicant that it may have set-offs that could be raised on liquidation should be heeded and should not be brushed aside by an immediate order for liquidation. For those reasons, I do not regard this as an appropriate case to make an immediate order for liquidation, nor to adjourn the matter for further consideration. I will make an order under s 291(1)(a).

[25] I order 239 Queen Street Developments Ltd to pay Watts & Hughes Construction Ltd the sum of \$196,910.93 by *9 August 2012*. In default of payment, Watts & Hughes Construction Ltd may apply for a liquidation order.

[26] I dismiss the application to set aside the statutory demand. The time for compliance with the statutory demand is extended to *9 August 2012*.

[27] Watts & Hughes Construction Ltd also applies for costs under s 24(2) of the Construction Contracts Act. The applicant does not dispute its liability for costs. Watts & Hughes Construction Ltd accepts that the costs must be actual and reasonable. I have not been provided with a schedule setting out the proposed actual and reasonable costs. Mr Kohler suggests that the parties confer to see if they can reach agreement. That is an acceptable course. If the parties are not able to agree, they may file memoranda. Mr Kohler should go first and Mr Hoskin should come afterwards. Mr Hoskin's response should come within 5 working days of Mr Kohler filing his memorandum in court.

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R M Bell
Associate Judge