IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-581
[2012] NZHC 1076

IN THE MATTER OF	section 290 of the Companies Act 1993
BETWEEN	BOUNTIFUL HOLDINGS LIMITED Applicant
AND	UNIVERSITY OF AUCKLAND Respondent

Hearing: 8 May 2012

Appearances: E Grove for Applicant
D J Neutze and B Atkins for Respondent

Judgment: 8 May 2012

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Graeme Skeates Law, P O Box 56179 Dominion Road, Auckland, for Applicant
Email: Graeme@skeateslaw.co.nz

Brookfields, P O Box 240 Auckland 1140, for Respondent
Email: neutze@brookfields.co.nz / atkins@brookfields.co.nz

Copy for:
C T Patterson, P O Box 2886 Auckland 1140, for Applicant
Email: chris@patterson.co.nz

[1] This is an application under s 290 of the Companies Act 1995 by Bountiful Holdings Ltd to set aside a statutory demand served on it by the University of Auckland. The demand is for outstanding rent and operating expenses payable under a lease of premises on the third floor of the Owen G Glenn Building, Grafton Road, Auckland. The amount stated in the demand is $37,270.65. Bountiful applies under s 290(4)(b) on the grounds that it has an equitable set-off or counterclaim that exceeds the amount in the statutory demand.

[2] The University's response is three-fold:

(a) It says that Bountiful does not have any arguable set-off or counterclaim;

(b) It says that this case comes within the principle laid down by the Court of Appeal in the decision in *Browns Real Estate Ltd v Grand Lakes Properties Ltd,*[1] because of a no set-off provision in the lease; and

(c) It says that there is clear evidence that, in any event, Bountiful Holdings Ltd is insolvent so that no useful purpose will be served by setting aside the demand.

Background

[3] Bountiful Holdings Ltd is a restaurant and catering business. Its trade-name is Spicer's Restaurant. It carried on that business on the third floor of the Owen G Glenn Building in the university. It occupied those premises, firstly under an agreement to lease in February 2008, followed by a formal deed of lease in April 2008. The initial term of the lease was four years from 1 March 2008, with two rights of renewal for three years each. Part of the lease includes the second schedule of the ADLS Commercial Lease 5th ed 2008. Clause 1.1 of the second schedule contains the no set-off provision that the university relies on:

---

1 *Browns Real Estate Ltd v Grand Lakes Properties Ltd* [2010] NZCA 425.

> All rent shall be paid without any deductions or set-off by direct payment to the Landlord or as the Landlord may direct.

[4] Under clause 44 of the lease, disputes are to be referred to arbitration. In this case the parties have taken their dispute to arbitration. Clause 44(3) preserves the landlord's right to recover rent during an arbitration:

> 44.(3) The procedures prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the rights or remedies in the event of such default as prescribed in clause 28(1) hereof.

[5] The origins to the dispute go back to negotiations between Bountiful and the university over the granting of the lease. Inside the Owen G Glenn building there is provision for two caterers. There is the Spicers operation on the third floor and a café on the ground floor called "Delucas". There were tenders for the leases. Bountiful was the successful tenderer for the third floor site. There is evidence of discussions and of written materials that the university provided, that indicated what the successful tenderer could hope for business from the university itself. The university provided revenue projections which indicated income that would be available from catering referred to the successful tenderer by the university.

[6] Of particular relevance in this case is catering for what are called "short courses". Short courses are provided inside the Owen G Glenn Building for people attending seminars and similar educational courses. Bountiful entered into the lease on the clear understanding that it would be providing catering for the university, including catering for short courses. However, there was no formal catering agreement as such between Bountiful and the university.

[7] The lease has provisions for standards to be maintained by Bountiful, such as KPIs, but the written lease and the agreement to lease do not contain any contractual commitment on the part of the university to provide any catering work at all to Bountiful. In the initial years of the operation, Bountiful provided catering for short courses. Delucas also did some of the catering for short courses but initially only to a minor degree. However, over time the university referred more short course catering to Delucas and reduced the short course catering to Bountiful.

[8] This led to Bountiful initiating the disputes procedures under the lease, and it began an arbitration. The arbitration is being run before Mr R Fisher QC under a reference of 23 May 2011.

[9] In September 2011 the university gave formal notice to Bountiful that it would be referring no more short course catering work to it. On its face, the letter is not irrevocable. It made it clear that if there was some improvement indicated by Bountiful, then it would be open to providing further catering work to Bountiful.

[10] There was contested evidence as to the reasons for the university reducing and then eliminating the catering it gave to Bountiful. The university's position is that there were issues as to pricing and as to performance. Bountiful contests the claim as to performance. In particular, it says that the university did not apply any fair, objective, reasonable assessment measures to assess its performance. Bountiful makes less of a case on the pricing front.

Merits of Bountiful's cross-demand

[11] In the arbitration, Bountiful initially claimed that it had exclusivity of short course catering. But that claim has been modified to one of being a preferential caterer. In its points of claim for the arbitration it has alleged a number of causes of action: promissory estoppel, misleading and deceptive conduct under s 9 of the Fair Trading Act, breach of express or implied terms as to assessment of catering performance, and also a minor claim for breach of contract as to water pressure.

[12] The university has strenuously opposed the claims by Bountiful. In particular, with regard to the claims as to exclusivity or being a preferential contractor, it points to non-merger and entire agreement clauses in the agreement to lease. It points to authorities which indicate that in the case of contracts between commercial parties there is a strong tendency in case law today to uphold entire agreement clauses and not to allow parties to a contract to refer back to earlier negotiations if the parties have agreed in a commercial context that the agreement is to stand on its own, without reference to prior negotiations.

[13] The university also attacks Bountiful's claim for lack of quantification.

[14] I am reluctant to make a full assessment of the merits because I am conscious that this is a claim being pursued before an arbitrator. It is important that the courts respect the role of arbitration as an autonomous means of dispute resolution and do not intrude on the role of arbitrators to decide the merits of disputes referred to arbitration.[2]

[15] Accordingly, I limit myself to recording that Mr Grove has advanced arguments that show a basis for Bountiful to have an expectation of continuing catering work. It entered into the lease with a substantial capital commitment including the fit-out of premises for the lease. I also note that the university has substantial arguments by which it could oppose the case. I put the matter this way. The applicant has an arguable claim against the university but, equally, the university has arguable defences. I do not propose to go further into the merits than that.

Effect of the no set-off clause

[16] The more important issue is the effect of the decision of the Court of Appeal in *Browns Real Estate Ltd*. In that decision the Court of Appeal held that no set-off provisions in contracts could be applied in applications under s 290(4) of the Companies Act to prevent a company raising a counterclaim, set-off or cross-demand as a ground for setting aside a statutory demand. That case was an appeal from a decision of Associate Judge Osborne. A tenant had applied to set aside a statutory demand claiming rent by a landlord. The tenant claimed misrepresentation by the landlord. The lease had a no-set off provision. Associate Judge Osborne refused to set aside the statutory demand because of the no set-off provision in the lease. The Court of Appeal upheld his decision. The relevant parts of the Court of Appeal's decision are set out at paragraphs [15]-[17]:

> [15] We now move to a consideration of Grand Lakes' submission that a contractual no set-off provision of the type at issue in this case precludes a party making a successful application to set aside a statutory demand under s 290(4)(b). In *Laywood v Holmes Construction Wellington Limited*, this Court, in the context of the Construction Contracts Act 2002 (CCA),

[2] See Article 5, First Schedule, Arbitration Act 1996.

> reasoned that because s 79 of the CCA precludes a court, except in limited circumstances, from giving effect to a counterclaim, set-off or cross-demand when a sum is payable under the CCA, a debtor would therefore be prevented from relying on the existence of a counterclaim, set-off or cross-demand in any application to set aside a statutory demand. The *Laywood* reasoning was driven by the view that to give effect to a counterclaim, set-off, or cross-demand would recreate the problems that led to the enactment of the CCA and frustrate the underlying purpose of the statute. As noted in *Laywood*, statutory demands and bankruptcy notices are, in a practical sense, important debt enforcement mechanisms.
>
> [16] While it is true that the Court in *Laywood* was dealing with effectively a clash between two statutes, similar reasoning applies where there is a contractual no set-off provision. Just as in the CCA context, the efficacy of a no set-off contractual provision would be undermined if statutory demands could be set aside on the basis of a set-off, counterclaim or cross-demand a commercial party had by contract expressly agreed could not be raised. In such a situation, there seems no reason in principle why statutory demands and bankruptcy notices should not be available as debt enforcement measures when, as was conceded by Browns, other enforcement measures would be (including summary judgment). Further, we accept Grand Lakes' submission that an inability to meet the statutory demand, without recourse to the set-off or counterclaim which it is prevented from raising, would mean that Browns is insolvent: ie it would be unable to pay its debts as they become due in the normal course of business.
>
> [17] We do not accept Browns' submission that a specific reference excluding the statutory demand procedure is needed. There is a question as to whether a contractual provision, however worded, can totally oust the jurisdiction of the courts to consider a counterclaim, set-off or cross-demand. However, this is an issue that is more theoretical than real. *In our view a contractual no set-off provision of the type at issue in this case would normally result in the court's discretion being exercised against an applicant if the sole grounds for an application to set aside a statutory demand was the existence of a set-off, counterclaim or cross-demand which a party had expressly agreed could not be raised. We consider that commercial parties should be required to honour the bargain they have made, absent other grounds that tell against the recognition of a statutory demand.* Grand Lakes, rightly in our view, conceded that an application to set aside the demand can be made under s 290(4)(c). Such an application would, however, need to be on grounds other than the existence of a set-off or counterclaim. (*Emphasis added*)

[17] It is important to note that the Court of Appeal is laying down a general approach that should be followed. The court indicated how the discretion should be exercised under s 290(4)(b), especially in the highlighted part of paragraph [17]. The Court of Appeal did not lay down a black-letter rule, but simply indicated that the court had a discretion and said how that discretion should be exercised in the general run of cases. When there is a no set-off provision, the party applying to set

aside the demand has the onus of persuading the court that it should depart from the general approach set by the Court of Appeal.

[18] I regard the no set off provision in clause 1.1 of the second schedule of the lease, and also the requirement to pay rent during the conduct of an arbitration under clause 44.3, as having the same effect as the no deductions or set-off provision in the *Browns Real Estate* case.

[19] Bountiful points out that the court's approach is not inflexible and refers to my decision in *Simply Logistics Ltd v Real Foods Ltd.*[3] In that case I reviewed the *Browns Real Estate* decision. That was a case of a landlord who had issued a statutory demand for unpaid rent against a tenant who had been evicted. The tenant raised a number of claims against the landlord. I held that in two cases the tenant was entitled to raise those claims against the landlord notwithstanding the no set-off clause within the lease. In the first case, that the tenant had been supplying logistics services to the landlord. The landlord had withheld payment of invoices for those services, even though it did not dispute its liability for them. It refused to allow them to be taken into account against its own claim for rent. I held that it was not entitled to do that. In the second case, when the landlord had re-entered – and it seemed fairly clear that it had re-entered unlawfully – it had seized property of the tenant and held on to that property notwithstanding a prompt demand by the tenant for its return. It was an unlawful seizure of assets. I held that in those circumstances the tenant's claims went outside what the Court of Appeal had in mind in *Browns Real Estate*.

[20] It is important to bear in mind the purpose of no set-off clauses in leases. Their purpose is to ensure that landlords have the assurance of continued cash-flow, even when the tenant wants to run a dispute about the landlord's performance of his obligations under the lease. Mr Neutze submitted that the landlord can stipulate to be protected against a tenant raising a dispute, and withholding rent, and then running the dispute at his leisure and cutting-off the landlord's cash-flow while he runs the dispute. The commercial purpose of the no set-off provision is to provide

---

3 *Simply Logistics Ltd v Real Foods Ltd* HC Auckland CIV-2011-404-003497, 14 September 2011.

that protection to the landlords. The landlord is entitled to insist on that protection when the tenant has signed a lease containing such a no set-off provision.

[21] The disputes that the tenant is running in this case are, in my judgment, within the scope of the Court of Appeal's decision in *Browns Real Estate Ltd*. There are allegations of misrepresentation. Those allegations are made under the Fair Trading Act. In the *Brown Real Estate Ltd* case, the tenant alleged misrepresentation under the Contractual Remedies Act, but for this case there is no significant difference between the two.

[22] In *Simply Logistics Ltd*, the tenant claimed that it had an exclusivity arrangement with the landlord. It was providing logistics, warehousing and transport services to the landlord who ran a food distribution company. The landlord in that case started to give that work to third parties as well, to the disappointment of the tenant. There was no express provision in the contractual arrangements between the parties (a sub-lease and a warehousing agreement) for the tenant to have exclusivity of services. The tenant claimed that the diversion of that work away from it and to third parties had harmed it. I refused to allow that claim as a special case for departing from the *Browns Real Estate* approach. I treated that as simply part of the disputes that would have been in contemplation as falling within the no set-off clause.

[23] In a similar way, I regard the claims here as disputes that, typically, could arise between landlords and tenant. The *Browns Real Estate* approach applies. The landlord is entitled to require the rent to continue to be paid to it, notwithstanding arguments as to it allegedly diverting work away from its tenant in favour of other caterers. That may be hard on a tenant who finds its cash-flow cut off as a result of the actions of its landlord but, hard as it may be, that is the effect of the contractual arrangements that the tenant has entered into.

[24] Mr Grove advanced the argument that the university had deliberately engineered matters so as to cut off the cash-flow. I accept Mr Neutze's submission that the evidence does not point to any such deliberate Machiavellian conduct on the part of the university. There would have to be something strong in the evidence for

me to hold that such a claim was arguable. In this regard, the Court of Appeal's decision in *Industrial Group Ltd v Bakker*[4] is distinguishable. There, there was much stronger evidence of deceitful conduct by the creditor who had issued a statutory demand, than there is in this case.

[25] I accept that in issuing the statutory demand the university was doing no more than asserting its rights under the lease to recover payment of rent. It was entitled to exercise its powers under the lease, even though it may cause hardship on Bountiful Holdings Ltd. It is not something that gives any cause for setting aside the statutory demand.

The insolvency of Bountiful Holdings Ltd

[26] There is an added consideration in this case - the poor financial position of Bountiful. The arbitrator has ordered a stay of the arbitration because Bountiful has not provided security for costs which the arbitrator had ordered. The arbitrator had required security for costs to be provided because he considered reason had been given to believe that Bountiful Holdings Ltd might not be able to meet an award of costs made against it in the arbitration.

[27] There is also evidence from Bountiful itself that it is insolvent. A witness for the university, Mr Munro, has reviewed the financial statements of Bountiful. It has not made a trading profit since it took the lease. Mr Munro says that the financial statements also show that there is a negative equity.

[28] The purpose of an application under s 290 to set aside a statutory demand is to prevent a statutory demand running so that on non-compliance the presumption of insolvency will arise.[5] There is no good case for setting aside a statutory demand when there is clear evidence that the company is, in any event, insolvent. Not allowing the presumption to arise would not change anything. The poor financial position of Bountiful Holdings Ltd gives another reason for not setting aside the statutory demand.

---

[4] *Industrial Group Ltd v Bakker* [2011] NZCA 142.
[5] Companies Act 1993, s 287(a).

Bountiful's undisputed invoices

[29] The university has acknowledged that there are invoices issued to it by Bountiful which have not been paid. It disputes only one of those invoices. It also says that since the issue of the statutory demand other rent has fallen due - for the period from 1 to 15 February 2012. The lease came to an end on 15 February 2012, after the university issued a notice under s 245 of the Property Law Act and Bountiful did not comply with it. The university says that it applied the amount of Bountiful's undisputed invoices towards the February rent, and it also applied the balance against the statutory demand. It says that the balance claimable under the statutory demand is $31,934.97. On the basis of that adjustment, I vary the statutory demand so that the sum payable under it is $31,934.97. In all other respects, I uphold the statutory demand.

Disposition

[30] Under s 291(1)(a) I make an order that Bountiful Holdings Ltd is to pay the sum of $31,934.97 by ***25 May 2012***. If that sum is not paid to the university by that date, the university will be entitled to present an application for Bountiful Holdings Ltd to be put into liquidation.

[31] The university seeks costs. Mr Grove recognises that costs follow the event. There will be an order for costs to the university on a 2B basis. I trust that counsel will be able to agree on costs but if they cannot they may file a memorandum.

[32] I also add this. This has only been a decision in respect of a statutory demand. Bountiful applied to set aside so that at any hearing on any liquidation application it will not be caught with an argument that it ought to have applied to set aside a statutory demand.[6] The decision not to set aside the statutory demand does not pre-determine how any decision on a liquidation application will be decided. At that hearing, the court has a wider discretion than it has when considering whether to

---

[6] As under *Balmoral Marketing Ltd v Karapiro Spa Ltd* HC Auckland CIV-2005-404-6396, 3 October 2006 and *Foundation Securities (NZ) Ltd v Direct Labour Services Ltd* HC Auckland CIV-2006-404-4391, 1 February 2007.

set aside a statutory demand. Nothing that I say in this decision should be taken as giving any suggestion as to how the court ought to decide how any liquidation application ought to be determined.

.....

R M Bell
Associate Judge