#108

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-000291

UNDER	Part XVI of the Companies Act 1993
IN THE MATTER OF	a proceeding to put Ormiston Hospital Investment Limited into liquidation
BETWEEN	CANAM CONSTRUCTION LIMITED Plaintiff
AND	ORMISTON HOSPITAL INVESTMENT LIMITED Defendant

Hearing: 9 August 2010

Counsel: JRJ Knight for plaintiff
Q Wang for defendant

Judgment: 10 August 2010 at 2:00pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for orders (a) staying the proceeding and staying advertising; and (b) putting defendant company into liquidation]

Solicitors: Simpson Grierson, Private Bag 92 518, Auckland for plaintiff
ForestHarrison, PO Box 828, Auckland for defendant

[1] The plaintiff seeks an order putting the defendant company into liquidation. The application is based on the non-compliance with the service of a statutory demand under the Companies Act 1993, s 289. The plaintiff relies, therefore, on the Companies Act 1993, ss 241(4)(a) and 287 and alleges the defendant is unable to pay its debts.

The application

[2] The defendant applies for orders pursuant to r 31.11 staying this proceeding and restraining advertising. The company advances four matters in support of its application, namely:

a) That it is solvent;

b) That there is a genuine and substantial dispute whether or not the debt demanded by the respondent is due;

c) The plaintiff is acting unfairly in bringing the liquidation proceeding and, in those circumstances, the liquidation proceeding is an abuse of the process of the court; and

d) Advertisement of the proceedings will cause damage to the defendant's reputation which would be difficult to quantify.

The opposition

[3] The plaintiff opposes the application pursuant to r 31.11 and says:

a) There is no legitimate dispute that a debt is owing by the defendant to the plaintiff pursuant to the Construction Contracts Act 2002, ss 23 and/or 24;

b) The plaintiff is not liable for the payments which the defendant claims by way of counterclaim or set-off;

c) The payments which the defendant claims by way of counterclaim or set-off were made by a third party and not the defendant; and

d) There is, in fact, no evidence of the solvency of the defendant.

[4] Rule 31.11 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—
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> (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
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> (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.

Applicable principles on r 31.11 applications

[5] It is appropriate that I briefly refer to the applicable principles on an application under r 31.11. Rule 31.11 of the high court rules empowers the court to make an order restraining publication of any advertisement required by r 31.9 or any other information relating to that statement of claim and staying any further proceedings in relation to the liquidation. Subrule (2) requires the court to deal with such application as if it were an application for an interim injunction and provides that if the court makes an order as sought, it may make it on such terms as the court thinks fit. The rule further provides that nothing in it shall limit the inherent jurisdiction of the court.

[6] The general principles applicable in respect of an application for an order retraining advertising and staying a winding up application were referred to in *Taxi Trucks Ltd v Nicholson.*[1] That decision referred to the earlier decision in *Exchange Finance Co Ltd v Lemmington Holdings Ltd*[2] and to the decisions in *Bateman Television Limited (in liq) & Anor v Coleridge Finance Company Ltd.*[3] The principles were confirmed also in *Edge Computers Ltd v Colonial Enterprises Ltd.*[4]

[7] From those authorities I extract the following specific principles:

a) A winding up order will not be made where there is a genuine and substantial dispute as to the existence of a debt such that it would be an abuse of the process of the court to order a winding up;

b) In such circumstances, the dispute, if genuine and substantially disputed, should be resolved through action commenced in the ordinary way and not in the companies court;

c) The assessment of whether there is a genuine and substantial dispute is made on the material before the court at the time and not on the hypothesis that some other material, which has not been produced might, nonetheless be available;

d) The governing consideration is whether proceeding with an application savours of unfairness or undue pressure;

e) The rule directs the court to deal with the application as if it were an application for an interim injunction;

f) Rule 31.11 enables the court to impose terms on any order it makes; and

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[1] *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297 (CA).
[2] *Exchange Finance Co Ltd v Lemmington Holdings Ltd* [1984] 2 NZLR 242 (CA).
[3] *Bateman Television Ltd (in liquidation) & Anor v Coleridge Finance Co Ltd* [1971] NZLR 929 (CA); [1971] NZLR 297 (PC).
[4] *Edge Computers Ltd v Colonial Enterprises Ltd* 9 PRNZ 621.

g) Such applications are interlocutory in nature and accordingly it would be wrong to express a concluded view of the merits of the dispute.

Background

[8] The plaintiff entered into a contract with the defendant on 4 July 2007 to construct a medical centre at Ormiston Road, Manukau, Auckland.

[9] The engineer to that contract is Turn Around Engineering and Management Ltd.

[10] Part of the contract works included lift installations.

[11] Clause 11.1.1 of the contract provides:

> The Period of Defects Liability shall be:
>
> (a) In respect of the Contracts Works:
>
> (i) In respect of building work – 13 weeks
>
> (ii) In respect of hydraulic and plumbing services, drainage, electrical, mechanical and lift services – 52 weeks.

[12] Clause 11.5.1 of the contract provides:

> (a) The contractor shall provide guarantees as set out below:
>
> ...
>
> ix) Lift 1 year – conditional upon the Principal entering into a direct service contract with the Lift subcontractor at date of Practical Completion.

[13] The plaintiff subcontracted to WDL Holdings Ltd for the provisions of the lifts pursuant to a subcontract agreement dated 22 February 2008. Both the director of the plaintiff and the director of the defendant were directors of WDL Holdings Ltd. The plaintiff included in its contract price a sum for the supply and installation of the lifts. It invoiced the defendant for those sums. It passed on the payments to WDL Holdings Ltd.

[14] The lifts were installed between February and March 2009. There were problems. The defendant has issued proceedings against the plaintiff in the District Court. The notice of claim was very recent. The copy document produced is dated 4 August 2010. It identifies a claim in respect of the lifts of $78,476.12. It refers to a number of other matters in respect of which it claims remedial work was required. That part of the claim has not been quantified.

[15] The plaintiff completed the contract works and a certificate of practical completion was issued by the engineer to the contract on 23 April 2009. That confirmed practical completion on 13 March 2009.

[16] On 29 September 2009 the plaintiff submitted its final payment claim which was for $130,910.96 plus GST. The covering letter noted that the final payment schedule was due on or before 29 October 2009 and that payment was due on or before 12 November 2009.

[17] On 2 December 2009 the engineer to the contract issued a document dated 30 November 2009 headed *Payment Schedule.* It referred to "Canam Progress Claim Number 24 (Final)". It disclosed a GST inclusive amount of $121,162.50. It recorded the date for payment as "immediate". The plaintiff says that it decided that it would accept the lesser sum shown on the payment schedule.

[18] The engineer to the contract has sworn an affidavit in which he says that, following his issue of the draft final payment schedule on 2 December 2009, he had discussions with representatives of the plaintiff. He received email comments on the draft schedule. As a result, on 5 December 2009, he issued a further draft payment scheduled, which was also dated 30 November 2009. That showed a final payment, including GST, of $124,600.46. The changes to the document which was issued on 2 December 2009 were to entries under a heading *Less (for deductions).* The deductions were reduced from $23,210.96 to $20,155.00. Save for that change and the corresponding alteration to the amount due, it was in the same form that I have described in [17] of this judgment.

[19] No payment was made.

[20] The defendant claims it discovered a number of defects in the lifts. It claims it notified the plaintiff of these. It says the plaintiff took no action. Because the defects had to be remedied so the medical centre could run smoothly, the defendant says it arranged for remedial works to be undertaken. It claims it paid the costs of these remedial of $78,476.12.

[21] The plaintiff's position is that it is entitled to payment of $121,162.50 pursuant to the Construction Contracts Act 2002, ss 23 or 24.

[22] On 18 December 2009 the plaintiff served a statutory demand on the defendant for $121,162.50. No application was made to set that statutory demand aside.

[23] A further development occurred.

[24] On 24 December 2009 the engineer issued another payment schedule. It showed a new deduction of $73,476.12. It contained the following description of the deduction "costs associated with remedial work to three lifts during the defects liability period (costs as notified to Canam 17 December 2009)". It certified the amount due at $41,938.74

[25] On 29 December 2009 the defendant paid $41,938.74.

Is there a genuine and substantial dispute whether or not the debt demanded by the defendant is due?

[26] This is a construction contract.

[27] The Construction Contracts Act 2002, s 3 sets out the underlying philosophy behind that act.

[28] In *Laywood v Holmes Construction (Wellington) Ltd*[5] when discussing the position of an adjudicator's award the Court of Appeal observed what the objective was, namely:

> an attempt to provide a speedy mechanism by which a person providing construction services can obtain payment and ensure some cash flow before final resolution of all issues between the parties.

At [52][6] the court said "The CCA adopts a 'pay now, argue later' philosophy.

[29] Application was made by the judgment debtor, Mr GJ Rees in the related proceedings, for leave to appeal the decision of the Court of Appeal. The judgment of the Supreme Court delivered on 15 May 2009 dismissed the application for leave to appeal. Of particular importance is the endorsement of the Court of Appeal's reasons for its judgment. The Supreme Court said:[7]

> Although the matters in issue are of general practical significance and would otherwise meet the criteria for leave, we find the judgment below compelling and consider that the proposed appeal has no prospect of success on any of the grounds advanced on behalf of the applicants.

[30] Of importance to this case is the decision *Salem Ltd v Top End Homes* Ltd[8]CA 169/05 12 December 2005 at [22] where the court said:

> What is plain is that ss 20 to 23 of the Act are designed to facilitate regular and timely payments between the parties to a construction contract. If a property owner does not respond to a payment claim by serving a payment schedule, then the contractor is entitled to recover the amount of his claim as a debt due. Put colloquially, the payer is under an obligation to pay first and argue later. This, we are satisfied, is the intention of the legislation. No doubt it reflects the philosophy referred to earlier that cashflow is the very life blood of the building industry. Contractors (and their sub-contractors in turn) are entitled to be promptly paid where they have invoked the payment regime under the Act and the payer has not responded as the Act requires.

That philosophy is reinforced by s 79, which deals with set-offs and counterclaims and which provides as follows:

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[5] *Laywood v Holmes Construction (Wellington) Ltd* [2009] NZCA 35, [2009] 2 NZLR 243.
[6] Ibid.
[7] *Laywood v Holmes Construction (Wellington) Ltd* [2009] NZSC 44, [2009] 2 NZLR 243 at 259 [2].
[8] *Salem Ltd v Top End Homes* Ltd CA 169/05 12 December 2005 at [22].

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
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> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—
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> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[31] Authorities have demonstrated that the 'pay now, argue later' philosophy is not an inflexible law and certainly will not be followed where irretrievable prejudice is the result: *Concrete Structures (NZ) Ltd v Palmer;*[9] *Yun Corporation Ltd v YQT Ltd.*[10]

[32] *In Laywood v Holmes Construction (Wellington) Ltd*[11] the difference between an application challenging a statutory demand or a bankruptcy notice from the position where an order appointing a liquidator or an adjudication in bankruptcy is sought was recognised. In both instances the court has a statutory discretion. One can see the possibility of irretrievable prejudice if there exists a strong counterclaim but an inability to pay pending the determination of the counterclaim. That is not the situation which is before me in this application, however.

[33] Counsel, in their helpful submissions, referred me to a number of specific provisions in the contract.

[34] The final payment claim was made on 29 September 2009. No payment schedule followed. That omission brings into play the Construction Contracts Act 2002, s 23 and by subs (2) permits the plaintiff to seek from the defendant as a debt due the unpaid portion of the claimed amount and the actual and reasonable costs of recovery.

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[9] *Concrete Structures (NZ) Ltd v Palmer* [2006] NZAR 513.
[10] *Yun Corporation Ltd v YQT Ltd* HC Auckland CIV 2009-404-7656 26 February 2010 per Associate Judge Abbott.
[11] *Laywood v Holmes Construction (Wellington) Ltd,* above n 5.

[35] Counsel were in agreement that there was no time specified in the contract for the payment of the amount claimed under the payment claim. The result is, twenty working days is the time within which payment is to be made pursuant to the Construction Contracts Act 2002 s 22(b)(ii). Since no payment has been made, prima facie, the plaintiff is entitled to recover the debt due in its payment claim.

[36] Because the plaintiff elected not to pursue the precise amount set out in its claim of 29 September 2009, I consider two alternative positions. The first is that the engineer to the contract, by the document issued on 2 December 2009, issued a final payment schedule which, in terms of clause 12.5.8 of the contract, called for payment within 10 working days. I dismiss that alternative because, on the evidence produced to me, this document seems to have been treated as a draft and, indeed, the engineer's evidence that he received further submissions from the plaintiff concerning alterations to it, was not challenged.

[37] I consider the second alternative. That is that the two documents that were issued respectively on 2 and 5 December 2009 by the engineer were, in terms of the contract, a progress payment schedules.

[38] Clause 12.5.4 of the contract provides:

> **12.5.4** Should the issue of the Final Payment Schedule be delayed by more than one Month after the receipt by the Engineer of the Contractor's final payment claim, then the Engineer shall immediately issue a statement of his or her reasons why such a Final Payment Schedule cannot be issued or otherwise dealt with in accordance with the contract. The Engineer shall issue further explanatory statements at Monthly intervals thereafter until the issue of the Final Payment Schedule. At the time of issuing any explanatory statement under this clause, the Engineer shall issue a certificate in the form of a provisional Progress Payment Schedule to the Principal for all amounts due under the contract which can reasonably be certified at that time, and the process under 12.2.1 to 12.2.7 shall apply.

[39] If either of the documents issued on either 2 or 5 December 2009 were not final payment schedules, they were progress payment schedules in which case they were required by clause 12.2.6 to be paid within five working days of the date of the progress payment schedule.

[40] The sums set out in both documents were not paid. The plaintiff, in fact, has elected to claim for the lesser of the two. I conclude, therefore, on an alternative basis the sum which is claimed is justified as a payment which was required to be made within five working days. As a consequence of the non-payment of that sum, it may be recovered by the operation of the Construction Contracts Act 2002, s (24).

[41] I therefore conclude that there is no genuine and substantial dispute as to the sum which is claimed by the plaintiff.

Is there any unfairness in allowing this proceeding to proceed?

[42] Mr Wang acknowledged that the defendant company was able to pay the debt. I do not have any detailed information before me on the defendant's solvency. Certainly the case was not argued on the basis that if I refused the application, that there would be a real likelihood of an order being made appointing a liquidator because of an inability to pay. This is not such a case. Rather it is a case of a defendant endeavouring to obtain some security in respect of a claim which it wishes to bring against the plaintiff. Its purpose simply is in complete contradiction to the whole purpose of the Construction Contracts Act 2002 and to which I have made reference not only by referring to s 3 but to the authorities.

[43] Reference is made in the grounds to damage caused by advertising. No specific submissions or evidence were advanced on that aspect. The result is that, in respect of the grounds (a), (c) and (d) referred to in [2] of this judgment, I conclude that they do not form a basis justifying the grant of an order staying the proceeding. The short answer is that the defendant should pay the debt which has been demanded and pursue its other proceeding before another forum.

Next step and costs

[44] The substantive proceeding was adjourned to await the outcome of this application for stay. In those circumstances, it is appropriate that I adjourn the

liquidation proceeding to a further date to enable either payment to be made or advertising to be completed in accordance with r 31.9 of the High Court Rules.

[45] The plaintiff has been successful in opposing the application. Prima facie it is entitled to costs. Whether the matter be finally determined as a case where there has been no payment following the failure to submit a payment schedule and therefore pursuant to the Construction Contracts Act 2002, s 23, or a failure to make a payment following the issue of a payment schedule, the cost consequences are the same, namely that the plaintiff may recover the actual and reasonable costs of the recovery awarded against the party obliged to pay by the court. No evidence as to precisely what those costs were was placed before me. Counsel requested that I reserve the matter for either agreement or further direction. I proceed on that basis.

Orders

[46] I order:

a) The defendant's application for an order staying this proceeding and restraining advertising is refused;

b) The substantive application seeking an order placing the defendant into liquidation and appointing a liquidator is adjourned to the Companies List at 10am on 10 September 2010;

c) Costs on this application are reserved. If counsel cannot agree memoranda and supporting affidavits shall be filed and served at seven-day intervals in support, opposition and reply. On receipt of the reply memorandum and reply affidavit, the file shall be referred to me for determination of costs.

JA Faire
Associate Judge