IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-3382

UNDER	the Companies Act 1993
IN THE MATTER OF	an application for orders setting aside a statutory demand
BETWEEN	CHOW GROUP LIMITED Applicant
AND	CLEARWATER CONSTRUCTION LIMITED Respondent

Hearing: 30 June 2011

Counsel: D Salmon/M Heard for Applicant
L J Turner for Respondent

Judgment: 30 June 2011

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors/Counsel:
Lee Salmon Long, PO Box 2026, Shortland Street, Auckland
Fleming Foster, PO Box 76016, Manukau

L J Turner, PO Box 775, Auckland

[1] This matter is the application by Chow Group Ltd to set aside the statutory demand served on it requiring it to pay the sum of $860,614.47. The matter was originally to be called in my companies list on 24 June 2011. The respondent had filed a memorandum with the Court suggesting the matter was within a short compass and could be heard within a short time. I called a conference to discuss with the parties whether there was time to deal with the matter on 24 June 2011. After hearing the parties, I decided that there would not be enough time to hear it on that date but directed a hearing on 30 June 2011. The only reason for allocating a date of hearing then is that I had familiarised myself generally with the file, I have a judgment day today, and I knew that there would be time available to deal with it.

[2] The applicant has complained about the case being given urgency. I know that some other cases take longer to be disposed of in this Court but it seemed to me that there was the time available and it is generally desirable to have issues under the Construction Contracts Act 2002 determined promptly. I therefore took advantage of the judgment day to make myself available to determine the case.

[3] As it happened, the case has not proceeded to a hearing on the merits. That is because earlier this week the applicant filed a document indicating that it discontinued its application.

[4] The applicant also invited the Court to vacate the fixture for today on the basis that counsel would be able to deal with issues of costs and the discontinuance meant that it was unnecessary to deal with any questions arising under s 291 of the Companies Act. There was an exchange of memorandums and minutes between the Court and the applicant. I directed that the case be heard. I have heard submissions on two points:

(a) Whether the Court is seised of the matter so as to make orders under s 291; and

(b) The fixing of costs under s 59(2)(b) of the Construction Contracts Act.

[5] In the end, I do not have to decide whether the discontinuance takes away the Court's power to make orders under s 291. That is a matter that be argued on some other day. The reason is because the respondent says that it does not seek orders under s 291. One advantage of dealing with the matter promptly is that the respondent still remains within time under s 288 of the Companies Act so as to be able to file an application for liquidation within the time allowed before the presumption that arises under s 287(a) expires.

[6] For costs, s 59(2)(a) of the Construction Contracts Act applies. That allows the respondent to have the actual and reasonable costs of recovery. It is accepted that resisting the application to set aside the statutory demand is part of the costs of recovery.

[7] It is necessary to note by way of background that the applicant had issued a proceeding seeking judicial review of a determination made by an adjudicator under the Construction Contracts Act. The applicant also applied for interim relief under s 8 of the Judicature Amendment Act 1972. Rodney Hansen J heard that application. He held that the applicant had not made out the threshold under the approach I had taken under the *Kariiti*[1] decision, that is, it had not shown that there was a high likelihood of Clearwater Construction Ltd not being able to repay in the event that the applicant was successful in its judicial review application.

[8] Much of Rodney Hansen J's decision covers materials that would also have been live issues if this matter had been fully argued before me. His decision shows that Clearwater Construction Ltd had already put in significant work on issues of interim relief against steps being taken to enforce remedies under the Construction Contracts Act. Its lawyers had familiarised themselves with prior decisions, including my *Kariiti* decision. So in this case, they are claiming for the steps they have taken subsequent to the decision of Rodney Hansen J.

[9] I have been provided with copies of invoices by counsel who were engaged on the matter. Mr Thorp and Mr Turner. Mr Thorp's fees are for 4.6 hours. His fee

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[1] Kariiti Ltd v Donovan Drainage & Earthmoving Ltd HC Whangarei CIV-2010-488-613, 15 November 2010.

before GST is $2,530. In addition, there are disbursements from him of $12.65. On Mr Turner's side, there is an invoice for $7,400, plus GST. He has charged for 18.5 hours. Mr Turner says that the total time is 23 hours and taking their respective hourly rates, there is a blended hourly rate of $430 an hour. I will adopt that hourly rate for fixing costs. There is no charge for work by solicitors.

[10] For its part, the applicant acknowledges that both Mr Thorp and Mr Turner are competent counsel and that their charge-out rates are appropriate to their levels of experience and expertise.

[11] The attack then essentially came down to the hours that had been spent on the job by the two counsel.

[12] The job facing the respondent was that having succeeded on the interim relief application under the Judicature Amendment Act, it then had to deal with this application to set aside a statutory demand under s 290(4) of the Companies Act. It had already established that there was a basis for resisting claims for interim relief through the judgment of Rodney Hansen J. It had to see what differences there could be in confronting the application under the Companies Act. It wanted to rely on findings made by Rodney Hansen J. Mr Turner says that there was research done on the question of issue estoppels so as to argue that findings made by Rodney Hansen J could also be used in the application under s 290(4).

[13] The applicant had also raised the issue of solvency. Mr Turner says that research had to be done to establish the relevance of solvency in an application under s 290. He says that the applicant also alleged counterclaims, saying that the respondent was responsible for the collapse of the Palace Hotel in the course of the construction work and that required research under s 79 of the Construction Contracts Act. Mr Turner also says that it was necessary to examine the approaches taken on applications for interim relief with regard to my decision in *Kariiti* to see how that would apply in the present situation. Mr Turner says that the applicant did its work up front so that it was in a position to respond.

[14] Against that, the respondent refers me to the decision of the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd,*[2] in particular [41] and [42] and the words of Chambers J warning against judges simply accepting actual fees without further inquiry.

[15] Perhaps I can approach this matter without the disadvantage referred to by the Court of Appeal because I have been in practice more recently than the members of the Court of Appeal. Judging the matter somewhat broadly, a total of 23 hours claimed by the respondent is excessive in this case. Effectively, the respondent put in a short affidavit putting before the Court evidence that was already effectively on the record. That is, the record of the judgment in the District Court when the determination was registered, the judgment of Rodney Hansen J, and the evidence put in front of Rodney Hansen J. That was a succinct and effective way of placing that before the Court, but I doubt that a large amount of time was required for preparation of that affidavit. I do not discount the fact that the thought that was required before deciding what evidence to put forward was still valuable.

[16] In effect then, the remaining issues – the questions of issue estoppels, solvency, and counterclaim – did not require over lengthy analysis or research or preparation. In my view, that could have been accomplished in a shorter time than has been claimed for in the bills. My view is that, taking the matter overall, an appropriate amount of time for the respondent to have spent in the time after Rodney Hansen J gave his decision up to the discontinuance filed by the applicant, would be 11½ hours, and for that I adopt an hourly rate of $430 an hour. The result is $4,945.

[17] I therefore fix costs in favour of the respondent in the sum of $4,945. There is no GST on the award of costs.

R M Bell
Associate Judge

[2] *Holdfast New Zealand Limited v Selleys Property Ltd,* CA200/ 2004, 6 August 2005.