#105

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2010-409-000301

BETWEEN	DRIFTWOOD DEVELOPMENTS LIMITED Plaintiff
AND	PIMLICO PROPERTIES LIMITED Defendant

Hearing: 1 June 2010

Appearances: D M Lester for Plaintiff
R G Smedley for Defendant

Judgment: 3 June 2010

JUDGMENT OF ASSOCIATE JUDGE DOHERTY
on Application to Set Aside Statutory Demand

The application

[1] On 19 February 2009 the plaintiff obtained summary judgment against the defendant. That judgment was appealed. On 10 November 2009 the Court of Appeal allowed the appeal, quashed the summary judgment and remitted the matter to the High Court for trial. It also awarded costs to the defendant.

[2] Counsel did not specifically refer to the point, but costs in the Court of Appeal are awarded pursuant to r 53 Court of Appeal (Civil) Rules 2005. Unlike r 14.8 High Court Rules, r 53 CA(C)R makes no pronouncement upon the effect of a costs order, ie that when costs are fixed they become due and payable (r 14.8(1)(b) High Court Rules).

[3] Whilst HCR goes further, I do not think there is any distinction to be made between the sets of rules. It is trite that an order of any Court comes into effect immediately unless it is made conditionally or is appealed or stayed. That includes a costs order. Rule 14.8(1)(b) merely reinforces that payment of costs on an interlocutory does not wait until the final determination of the substantive proceeding. It is analogous to the terms of trade for a commercial transaction.

[4] In any event, the plaintiff accepts those costs became payable when the Court made the order. The plaintiff did not pay those costs.

[5] The defendant served a statutory demand in respect of the amount of unpaid costs. This application is to set that demand aside.

Costs awards: statutory demands

[6] The defendant relies upon the decisions in *Spencer v Jed Rice Building Contractors Ltd* HC Auckland CIV-2007-404-007539, 21 February 2008, Associate Judge Abbott; *Wiseline Corporation Limited v Hockey* HC Auckland 26 July 2002, Nicholson J; and *Waimarie Management Ltd v Body Corporate 169791* HC Auckland CIV-2010-404-000189, 10 February 2010, Associate Judge Abbott to support its submission that costs awards are a special category of debt in the context of statutory demands.

[7] I accept the plaintiff's argument that these cases say no more than that the District Court Rules and High Court Rules provide that costs are due and payable when they are fixed. That is, they do not elevate Court-awarded costs above any other debt that is due and payable (eg failure to pay for goods on due date as agreed).

[8] *Jed Rice* concerned an application for an order restraining advertising and stay of an application for liquidation. The plaintiff applied to liquidate Jed Rice on an unsatisfied demand relating to two awards of costs made in her favour in the District Court.

[9] The judgment in *Jed Rice* referred to both *Wiseline* and *Volcanic Investments limited v Dempsey and Woods Civil Contractors Limited* (2005) 18 PRNZ 97. The

latter related to a statutory demand for the amount of an award of an adjudicator under the Construction Contracts Act 2002. The plaintiff had applied to set aside the demand on the ground it was entitled to a set-off for losses as a result of delays by Dempsey in carrying out the work. Randerson J found that s 79 of the Construction Contracts Act trumped s 290(4)(b) Companies Act 1993. His reasoning was that there was a clear intent that payments under the Construction Contracts Act regime should be paid promptly with limited opportunity for further dispute.

[10] After referring to the observation of Nicholson J in *Wiseline* at [63]:

> [63] In accordance with the general principle stated in r 47(a) that a party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds and the provision in r 48E [now r 14.8] that unless there are special reasons to the contrary, costs on an opposed interlocutory application become payable when they are fixed, I consider that Wiseline should pay the costs awarded against it in proceedings relating to its dispute with Mrs Hockey as soon as such costs are awarded. To defer payment of such costs until the ultimate issue of liability between them is decided would be to give Wiseline an unjustified and unfair advantage over Mrs Hockey. I am not satisfied that the existence of Wiseline's claim in the original proceedings is a sufficient ground for the exercise of the Court's discretion to set aside the statutory demand.

Abbott AJ in *Jed Rice*, "on similar reasoning to that applied in *Volcanic v Dempsey*", found that to defer payment of costs in the face of an unproven costs claim would be inconsistent with the purpose and intention of the costs rules. In my view, the same reasoning should not apply. The scheme of the Construction Contracts Act is to provide a mechanism where disputes are adjudicated in a timely way, sums quantified and payments made into the contract structure, thus allowing the parties to continue business. As Randerson J said in *Volcanic* at [32]:

> Secondly, there is a clear statutory intention that payments due under construction contracts should be paid and disputes resolved quickly. It is intended that the recovery of debts found to be due following an adjudication or which become payable under ss 23 and 24 of the Act, should be promptly recoverable with very limited opportunity for further dispute:...

[11] For example, s 79 of the Construction Contracts Act provides that the Court must <u>not</u> give effect to any counterclaim, set-off or cross-demand other than a set-off of a liquidated amount, and then <u>only</u> if there has either been judgment for the amount or there is no dispute in relation to the claim for that amount.

[12] Rule 14.8 High Court Rules (and certainly r 53CA(C)R) does not have the same purpose as the Construction Contracts Act.

[13] Analysis of *Wiseline* also shows that the observations of Nicholson J were in fact the exercise of the residual discretion, rather than authority for the principle that Court-awarded costs assume some extra importance when compared to other debts that are due and payable.

[14] In *Waimarie* the Court did not consider an unquantified counterclaim or a potential costs recovery should outweigh (and was inconsistent with) an award under the costs provisions of HCR which contemplated immediate payment.

Merits of plaintiff's substantive claim

[15] Section 290(4)(b) of the Companies Act provides that the Court may set aside a statutory demand if it is satisfied that the debtor company "appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount".

[16] The substantive litigation seeks repayment of deposits totalling $266,500 (ie a liquidated amount); the threshold of s 290(4)(b) is thus crossed.

[17] The defendant submits the test is that set out in *Covington Railways Ltd v Uni-Accommodation Ltd* [2001] 1 NZLR 272 (CA) at [11]:

> Where a company which is the subject of a liquidation application is indisputably in debt to the applicant creditor, it may nonetheless be able to show that it has a claim against the applicant which reduces the net balance owing to the creditor or even off-sets it altogether. Where there are liquidated sums due each way, that is simply an arithmetical exercise. It is more difficult if, on the applicant's side, there is an indisputable liquidated sum, but the other party's claim is for an unliquidated sum with liability and/or quantum in dispute. Then, in order to impeach the statutory demand and overcome the presumption in s287(a) that the company is unable to pay its debts when it has failed to comply with the demand, it must be able to do more than merely assert that there is an available set-off. It must be able to point to evidence before the Court showing that it has a real basis for the claimed setoff and that accordingly the applicant's claim to be a creditor is, to the extent of the set-off, seriously in doubt. In the words of Buckley LJ in

> *Bryanston Finance Ltd v De Vries (No.2)* [1976] Ch 63, 78, it must show that there are "clear and persuasive grounds" for the set-off claim. Where this can be done, the party who has issued the statutory demand against the company will be shown to be using the statutory demand and liquidation procedures improperly because there is a "genuine and substantial dispute" about the net amount of the company's indebtedness (*Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297, 299). The dispute should then be resolved in the ordinary way — except as to any undisputed balance — rather than upon the hearing of a liquidation application.

[18] In *Covington* the Court was dealing with appeals from applications for orders restraining the advertising of a liquidation proceeding and stay, and an application for an order that another statutory demand be set aside.

[19] The defendant says there is no "clear and persuasive grounds" for the counterclaim in this case.

[20] The facts in this case are:

i) Proceedings have been filed in relation to the plaintiff's claim.

ii) The amount sought is a liquidated sum.

iii) The plaintiff obtained judgment in this Court.

iv) Whilst the judgment of the Court of Appeal setting the judgment aside has narrowed the ultimate issue, the Court of Appeal has not opined upon the strength of the case.

[21] In my view, scrutiny by two Courts means the plaintiff has shown there are clear and persuasive grounds for its substantive claim. The fact that two Courts have come to different conclusions (albeit on the preliminary issue of summary judgment) is significant, but goes no further than saying the plaintiff cannot show the defendant does not have an arguable case. The defendant accepted that the Court of Appeal has not opined on the strength of the plaintiff's case. The affidavits in support of the application for summary judgment (which the defendant accepts can be read in this application) shows the plaintiff has a real basis for the claim it makes in the substantive litigation. There is something to be litigated.

[22] I also agree with the plaintiff's submission, contrary to that of the defendant, that the threshold for setting aside a demand is a lower threshold than that of an application to restrain advertising, as in *Jed Rice*.

Discretion

[23] Whilst the plaintiff has shown that it appears to have a counterclaim, there remains a residual discretion.

[24] The only other factor in consideration of the exercise of that discretion is delay. Unlike *Wiseline* and *Jed Rice*, I am not of the view that any delay between now and the ultimate outcome of the substantive action is such that I should not exercise my discretion to set aside the demand. In my view, this is no different to any other case. Many counterclaims would not even be this far advanced at the stage of an application such as this one. Section 290(4)(b), in allowing such claims or setoffs to be a factor, carries with it the inherent spectre of delay. In this case the competing interests are equal – that is, even though the original debt is due and payable, why should the plaintiff have to pay the debt when it is well and truly extinguished by the value of its arguable extant claim?

[25] I find the defendant's criticism that the plaintiff has adduced no evidence of solvency unfounded. The plaintiff has not relied on its solvency as a ground to set the demand aside, nor was the issue raised in the defendant's opposition. In those circumstances there is no evidence one way or another from which a reasonable inference could be drawn. From the point of view of the exercise of my discretion, the matter is neutral.

[26] The application is granted. I order the statutory demand be set aside. Costs are awarded to the plaintiff on a schedule 2B basis, together with disbursements as set by the Registrar.

Solicitors:
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