

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2013-404-1083
[2013] NZHC 1179**

UNDER Section 290 of the Companies Act 1993

BETWEEN ENERGY EFFICIENT HEALTHY
HOMES LIMITED
Applicant

AND GREENWOOD NATURAL LIMITED
Respondent

Hearing: 21 May 2013

Counsel: J D Turner for the Applicant
M R Taylor for the Respondent

Judgment: 21 May 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL
Application to set aside a notice under s 290 of the Companies Act 1993

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[1] Energy Efficient Healthy Homes Ltd has applied under s 290 of the Companies Act 1993 to set aside a statutory demand for \$27,609.32, including GST. The demand is said to be for amounts due under payment claims issued by Greenwood Natural Ltd under the Construction Contracts Act 2002 for work performed under a contract with Energy Efficient Healthy Homes Ltd on various properties. The statutory demand has attached to it copies of documents said to be the payment claims relied on in support of the debt.

[2] In this decision I am considering a procedural question. Greenwood Natural Ltd says that the application to set aside the statutory demand is a nullity because Energy Efficient Healthy Homes Ltd did not satisfy the requirements for service under s 290 of the Companies Act. In particular it did not meet the requirements for service specified in s 387(1) of the Companies Act. There are two questions:

- (a) When did Greenwood Natural Ltd serve its statutory demand on the registered office of Energy Efficient Healthy Homes Ltd? and
- (b) When did Energy Efficient Healthy Homes Ltd serve its setting-aside application on Greenwood Natural Ltd?

[3] I make a preliminary comment. In my view Greenwood Natural Ltd has taken a very technical stance in pursuing its objection. I pressed Mr Taylor whether he wanted to pursue the technical objection. He was clear that his instructions were to pursue the technical points he was raising. He also confirmed that he was aware of the consequences of his submissions being upheld.

[4] Section 290(2) requires that an application to set aside a statutory demand be made within 10 working days of the date of service of the demand, and it be served on the creditor within 10 working days of the date of service of the demand. It is common ground that these requirements must be met. In confirmation of that, s 290(3) provides that the court does not have power to extend the time for making or serving an application for setting aside a statutory demand although at the hearing

of the application the court can extend time for compliance with the statutory demand. That means that if the requirements of s 290(2) are not met, the application is a nullity. There is nothing on which the court can make orders.

[5] Energy Efficient Healthy Homes Ltd says that the date of service of the statutory demand was 15 February 2013. The date it filed its setting aside application in court was 28 February 2013, and on the same day it sent its application by email and fax to both Greenwood Natural Ltd and its lawyer, although it did not make physical delivery of the setting-aside application until 1 March 2013. If the statutory demand was served on 15 February 2013, then Energy Efficient Healthy Homes Ltd was within time.

[6] On the other hand, Greenwood Natural Ltd says that it served the statutory demand on 14 February 2013. It acknowledges that Energy Efficient Healthy Homes Ltd filed the setting aside application on the tenth working day, 28 February 2013. It says that it was not served with the application in accordance with s 387 of the Companies Act until 1 March 2013. It therefore contends that because the application was not served within 10 working days of the date of service of the demand, the application is a nullity.

When did Greenwood Natural Ltd serve the statutory demand on the registered office of Energy Efficient Healthy Homes Ltd?

[7] The current registered office of Energy Efficient Healthy Homes Ltd is at Woodside Avenue, Northcote, Auckland. However, in early February 2013 its registered office was at 27 Ewen Street, Hauraki, Auckland. That was the home of Neville and Judith Gibbs, the parents of Mr Nathan Gibbs, a director of Energy Efficient Healthy Homes Ltd.

[8] Greenwood Natural Ltd's process-server says that he served the statutory demand on the registered office by affixing the notice to the front door of the premises. He puts the time of service at approximately 12:15pm on 14 February 2013. At the time of service, he took a photograph, which is in evidence. It shows the notice attached to the front door of the premises. It is not possible from looking at that photograph to tell the time of day that the photograph was taken.

[9] Greenwood Natural Ltd filed a late affidavit to support the evidence given by the process-server. That late affidavit was by a manager of the process-serving company. It explains that the process-server is no longer in their employ. That affidavit gives hearsay evidence to support the time of service. By this stage, all the reply evidence of Energy Efficient Healthy Homes Ltd had been filed, including evidence from Mr and Mrs Gibbs. This was a last minute attempt to bolster the process-server's evidence. I regard it as late and out of sequence. I decline to admit that affidavit.

[10] Mr and Mrs Gibbs were not at home during normal work hours on 14 February 2013. Mrs Gibbs says that she returned home at about 5:30pm-6:00pm. When she arrived home she went to check the letter-box and in doing so passed the front door. She says that she entered the premises through the back door. There is a glass window through which she could view the front door. She says that if there was anything taped to the door she would have clearly seen it. She did not see any demand taped to the front door at that time. She says that no one knocked on the door or rang the door-bell on the evening of 14 February 2013. The next morning, on 15 February 2013, at approximately 7:30am-8:00am, before she left home she checked the letter-box and she noticed the demand taped on the front door. She contends that if the demand had been taped to the door on 14 February 2013 she would have seen it when she got home or when she checked the letter-box, or when she entered through the back door, as it would have been visible through the glass window. When she did see the notice she contacted her husband. He then uplifted the demand and promptly afterwards the solicitors for Energy Efficient Healthy Homes Ltd were instructed. It appears that the solicitors were instructed on the basis that the demand had been served on 15 February 2013.

[11] Mr Gibbs' affidavit broadly corroborates his wife's affidavit. He says that he came home on 14 February 2013 at about 4:30pm-5:00pm. He drove past the front door to get to the garage at the back of the house and he entered the house through the back door. He confirms that the front door is clearly visible through the glass panel at the end of the passage, and he went through that passage to enter the main area of the house. He and his wife were home during the evening. He says that he did not see the demand taped to the front door at that time. He has attached to his

affidavit photographs of the driveway, front door, back door, glass panel and passage to illustrate what he has said in his evidence. He says that he and his wife often receive courier packages at Ewen Street, and they can clearly see them when they are left at the front door. He says if the demand was taped to the door when he arrived home on 14 February 2013 he would have seen it. He says it would have been obvious that something was taped to the door as they move about the house and tend to check the door before going to bed about 9:00pm-9:30pm. He says that no one came to the house that evening. He says that he left for work the next morning at about 6:00am but it was dark at the time. He did drive past the front door on the way out but says the security light by the front door does not turn on when a car drives past. He did not see any statutory demand attached to the front door at the time.

[12] The service of a statutory demand is governed by s 388 of the Companies Act. It is not, by itself, a document in a legal proceeding although of course it can be used in evidence in later proceedings. Authority that service of a statutory demand is governed by s 388 of the Companies Act 1993 is *Arzan Investments Ltd v Beresford Apartments Ltd*.¹

[13] Under s 388, the methods of service set out in s 387(1)(a), (b), (c) and (e) of the Companies Act apply. Section 387(1)(c) allows for service by leaving the document at the company's registered office or address for service. In contrast with s 387(1)(a) and (b), service can be effective simply by leaving the document at the registered office without necessarily delivering it to either a director or an employee. Accordingly, the action of simply leaving the statutory demand taped to the front door of the premises was effective service under s 388(1).

[14] The question is: when did the process-server affix the notice to the door? On balance, I accept the version given by the process-server. I do so because there are difficulties in being able to accept the version given by Mr and Mrs Gibbs. If I were to accept their version I would have to accept that although the statutory demand was not affixed to the front door when each of them came home on 14 February 2013, a process-server had come and taped the notice to the door some time after they returned home but before Mrs Gibbs went out to check the letter-box

¹ *Arzan Investments Ltd v Beresford Apartments Ltd* (2003) 16 PRNZ 825 at [21].

at about 7:30am the next day. I have difficulty accepting that version because I find it improbable that a process-server, instructed to serve a statutory demand under the Companies Act on the registered office of a company, would go about that job during hours of darkness or in the early hours of the morning before people are up and about. A process-server instructed to serve a statutory demand on the registered office of a company is more likely to do so during normal work hours. While I do not doubt the genuineness of the evidence given by Mr and Mrs Gibbs, it appears to me that they were not on the alert to look for any documents affixed to their front door and it appears that unfortunately they failed to see the statutory demand. On the balance of probabilities I find that the statutory demand was served on 14 February 2013, not 15 February 2013.

[15] Mr Turner makes the point that the notice did not come into the actual knowledge of either the Gibbs or officers of the company until the next day. He has tendered copies of decisions: *Argyle States Ltd v Bowen Group Ltd*² and *ASB Bank v Infotouch Technologies Ltd*.³ The first case involved an application to set aside a judgment. In an application to set aside a judgment the court has a discretion to allow a judgment to be set aside to prevent a miscarriage of justice. In that event, even if there were irregularities of service but it came within the letter of the law, the court may still have the power to set a judgment aside. In that respect that decision is distinguishable from the present case where there is no room to exercise a discretion whatsoever. *ASB Bank v Infotouch Technologies Ltd*, a decision of Master Gambrill, did concern service of a statutory demand but it was a case where it was apparent that the company had no connection with the premises which were used as its registered office. Master Gambrill held that in the circumstances of that case there had not been effective service.

[16] Mr Turner also referred to cases where documents are left at premises which may be shared by different businesses and where simply leaving documents at an address is not by itself sufficient to ensure that it has actually reached the registered office of the company. I do not regard those cases as applicable here. 27 Ewen Street was the registered office of the company. They were not shared premises.

² *Argyle States Ltd v Bowen Group Ltd* (2003) 17 PRNZ 57 (HC).

³ *ASB Bank v Infotouch Technologies Ltd* (2000) 14 PRNZ 331 (HC).

The people occupying the premises did have a connection with Energy Efficient Healthy Homes Ltd, although they were not themselves officers of the company or employees of the company. For this case it was sufficient for the notice to be left at the premises as it was. That was valid and effective service on 14 February 2013.

When was the application to set aside the statutory demand served on Greenwood Natural Limited?

[17] The question here goes to mode of service of the proceeding. It is common ground that the mode of service is governed by s 387(1). Rule 6.12 of the High Court Rules allows service of proceedings on a company to be in accordance with section 387, but not otherwise.

[18] Mr Turner submits that the applicant was entitled to send the proceeding to counsel for Greenwood Natural Ltd. He points out that after the statutory demand was served he had written to Mr Taylor inviting him to take instructions to withdraw the statutory demand. In his letter he pointed out that the statutory demand had been served on 15 February 2013. Mr Taylor's reply confirmed that he had instructions.⁴ But Mr Turner tries to derive out of that exchange of correspondence that there was an agreement under s 387(1)(e) of the Companies Act under which Greenwood Natural Ltd had given Mr Taylor instructions that he could accept service of the proceedings.

[19] I do not accept that the correspondence is capable of bearing that interpretation. It is one thing for lawyers under clients' instructions to correspond with each other over some dispute. It is another thing again for the lawyers to be instructed to accept service of documents. The question arises whether originating documents can be served on a lawyer's office. The standard practice is to make enquiries and ascertain whether the lawyer has instructions to accept service. The lawyer is in no way bound to accept service. It will always be the case that he ought to have established from his client whether he has authority to accept service of the proceedings or not. Simply instructing the lawyer and allowing the lawyer to

⁴ Incidentally, Mr Taylor noted that the statutory demand would have to be complied with by 7 March 2013, which is consistent with the demand having been served on 14 February. That was at best an oblique way of warning Mr Turner as to the actual date of service of the demand.

correspond with the lawyer for the other side does not by itself give a lawyer authority to accept service of the proceedings on behalf of the client.

[20] Such authority should not be assumed by the other side. Whether the lawyer has authority may turn very much on the nature of the instructions that the lawyer has received. It cannot be taken for granted that that lawyer will have been instructed to accept service. It cannot even be assumed that instructions will be ongoing.

[21] Accordingly, sending the documents to Mr Taylor on 28 February 2013, even by email, was not an effective and valid manner of service.

[22] Mr Turner accepted that service by fax and email to Greenwood Natural Ltd on 28 February 2013 was not effective service. Service by fax to a telephone number may be valid service under s 388(1)(c), which relates to service of other documents – that is, other documents than legal proceedings – but that provision has not been incorporated into s 387(1). Parliament has made no allowance for service by email at all. The only provision for service by fax is for other documents, but not for legal proceedings.

[23] Accordingly, Greenwood Natural Ltd was only effectively served on 1 March 2013. As the statutory demand was served on 14 February 2013, service of the application was unfortunately one day late.

[24] That means that I am constrained to uphold the submission for Greenwood Natural Ltd that this application to set aside is a nullity because it was not served within time under s 290(2)(b) of the Companies Act. The application was served correctly but one day late, even though it had already been informally brought to the notice of Greenwood Natural Ltd and its lawyers the day before. Section 290(3) prevents the court extending time for service.

What are the consequences of the application being a nullity?

[25] Because the application is a nullity, the court cannot extend time for compliance with the notice under s 290(3). It also means that the court does not have power to set aside the statutory demand. The court does not have the power to make any of the orders under s 291 of the Companies Act, because those powers can be exercised only on the hearing of an application.

[26] Because there has not been a valid application to set aside the statutory demand, the statutory demand has taken effect. That means that Energy Efficient Healthy Homes Ltd had 15 working days to comply with the demand. Those 15 working days expired on 7 March 2013. On that date, Energy Efficient Healthy Homes Ltd became presumed unable to pay its debts under s 287(a) of the Companies Act. However, that presumption only lasts for 30 working days. Under s 288(1) a creditor may rely on that presumption only if an application for a liquidation order is made within 30 working days after the last day for compliance with the demand. I calculate that those 30 working days expired on 22 April 2013.

[27] I have made enquiries with the registry. Greenwood Natural Ltd did not file an application for a liquidation order during those 30 working days. It is now too late for Greenwood Natural Ltd to apply for a liquidation order relying on that application. If it wishes to prove that Energy Efficient Healthy Homes Ltd is unable to pay its due debts, it will have to rely on other evidence.

[28] The aim of an application to set aside a statutory demand is to prevent the statutory demand being used as a tool to test a company's ability to pay its due debts. The upshot here is that the statutory demand cannot now be relied upon to support a case that Energy Efficient Healthy Homes Ltd is not able to pay its due debts. Accordingly, although it may not have been the way that it intended, Energy Efficient Healthy Homes Ltd has in fact been successful today.

[29] Energy Efficient Healthy Homes Ltd has been successful, although in an unintended way, and it is entitled to have costs on the application.

[30] I make these orders:

- (a) I declare that the application to set aside the statutory demand is a nullity; and
- (b) Greenwood Natural Ltd will pay costs to Energy Efficient Healthy Homes Ltd. Costs will be category 2, band B. I record the hearing as being a quarter of a day rather than half a day. If there are any issues as to costs, memoranda may be filed.

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Associate Judge R M Bell