

Introduction

[1] Mr Butler has applied for an order that Gill Construction Company Limited (Gill) be put into liquidation on the basis of an unsatisfied statutory demand. The statutory demand has been issued in respect of an amount ordered as payable pursuant to an adjudication under the Construction Contracts Act 2002 (CCA). The application for an order appointing a liquidator is scheduled to be heard on 12 November 2009 and must be advertised not later than five working days before that. Before me is Gill's application to restrain the advertising of, and to stay, Mr Butler's liquidation application. An interim restraining order until further order of the Court is presently in place.

Background

[2] Mr Butler carried out work for Gill in 2007 on a gravel pit. His invoices were paid by Gill with the exception of the last invoice of \$24,456 (inclusive of GST). Gill disputed the invoice. Mr Butler filed a District Court proceeding to recover the amount but then decided to bring a proceeding in the Building Disputes Tribunal pursuant to the CCA. On 15 June 2009 the adjudicator under the Building Disputes Tribunal ruled in favour of Mr Butler and determined that the amount should be paid within two days. Mr Butler issued a statutory demand in respect of the amount of the adjudication and no application to set it aside was made.

[3] Gill says there is a dispute as to whether it owes the amount ordered by the adjudicator. It says that the adjudicator got it wrong. (Gill is said to be genuinely stunned at the adjudicator's decision which it says made credibility findings against it which were not supported on the documents.) It says that Mr Butler must obtain a judgment in the District Court to enforce the adjudicator's determination. It says that in such proceedings Gill would dispute the debt via a counterclaim for the full amount. Gill says that there is therefore a genuine dispute that it owes the sum claimed in the statutory demand. It says that, because no judgment has yet been entered against it, the statutory demand could have been set aside, and that it would

have made an application to do so had Gill's counsel realised it was able to do so within the required statutory timeframe for making such an application.

[4] Gill has paid the amount of the statutory demand into its solicitors' trust account and has offered to transfer that amount to, and to be held in, Mr Butler's solicitors' trust account pending the final resolution of the dispute. Gill does not wish to pay the amount pending the determination of the counterclaim because it is concerned that it will be irrecoverable from Mr Butler.

[5] Gill has produced evidence of its solvency. It says that a solvent company should not be liquidated. It says that because its solvency is clear, the continuation of Mr Butler's liquidation proceeding, the next step of which is the advertisement of the proceeding, can only be to embarrass Gill. It submits that this is an improper use of liquidation proceedings.

[6] Mr Butler's position is that the liquidation proceeding is a legitimate means to enforce the adjudicator's determination and that there is no exceptional reason that would warrant a stay of the proceeding. He says that the issue of Gill's solvency and whether that is in and of itself sufficient to avoid the liquidation are issues properly determined at the 12 November 2009 hearing.

Statutory provisions

The CCA regime

[7] An adjudicator has the power to determine whether or not a party is liable to make a payment under a construction contract (s 48 CCA). The adjudication is binding on the parties and is of full force and effect even where any other proceeding relating to the dispute has been commenced (s 60 CCA). The amount of the adjudication is recoverable as a "debt due ... in any court" (s 59(2)(a) CCA) or an application can be made for the adjudication to be entered as a judgment in accordance with the procedures for that in the CCA (s 59(2)(c) CCA). There are only limited grounds on which the entry of judgment can be resisted and they do not

include that a party disagrees with the adjudicator's view as to liability (s 74(2) CCA)

[8] However, an adjudication does not necessarily finally resolve matters as between the payer and the payee. A party remains able to submit the dispute to a court (or other dispute resolution procedure) (s 26(1) CCA). The result is that a party can successfully obtain an enforceable adjudication under the CCA but separately have a judgment entered against them for the same amount. This can only occur if the court proceeding is determined after the adjudication, because an adjudicator must terminate its proceedings if the court (or other dispute resolution) proceeding is determined first (s 26(3)). Providing the dispute is referred promptly to an adjudicator, this is unlikely to occur very often because the CCA procedure is subject to strict timeframes and few formalities.

[9] A determination under the CCA therefore provides a mechanism by which payment of disputed amounts can be promptly required and enforced, even though the payer is able to separately contest that the payment was owing under the contract between the payer and the payee. If the payer's position is upheld in separate proceedings then the payee will be required to pay back the money that he or she received from the payee as a result of the CCA process. For this reason the CCA has been described as a "pay now, argue later" regime and as giving rise to a "temporary" debt (eg. *Laywood v Holmes Construction* [2009] 2 NZLR 243 at [52]). Nevertheless, because it is a debt that may be enforced, it has been held that a statutory demand can be issued in respect of it: *Volcanic Investments Limited v Dempsey & Wood Civil Contractors Limited* (2005) 18 PRNZ 97.

The statutory demand regime

[10] On application made within the required timeframe, a statutory demand may be set aside if there is a substantial dispute whether or not there is a debt owing or due (s 290(4)(a) Companies Act 1993), the company appears to have a counterclaim, set-off or cross demand (s 290(4)(b)) or the demand ought to be set aside on other grounds (s 290(4)(c)).

[11] There has been a difference in view as to whether a statutory demand issued in respect of an adjudication under the CCA could be set aside on the basis of a counterclaim, set-off or cross demand. In *Laywood v Homes Construction* at [55] to [64] the Court of Appeal referred to the competing views and expressed a preference for the view that a statutory demand should not be set aside on this basis. It noted that the statutory demand procedure was an important enforcement mechanism, and that if a statutory demand could be set aside on this basis it would recreate similar problems to that which had led to the enactment of the CCA.

[12] There has also been a difference in view as to whether the solvency of a company can be a basis on which a statutory demand can be set aside. The issue arises because the statutory demand procedure enables a creditor to take advantage of the statutory presumption that if a statutory demand is not met the company is presumed to be unable to pay its debts (s 287 Companies Act). An inability to pay debts in turn provides a ground on which a court may appoint a liquidator (s 241(4)(a) Companies Act). However, because an unsatisfied demand gives rise only to a presumption, which is rebutted if the company proves otherwise, the argument is that if it is clear that a company is solvent a liquidation proceeding should not proceed and the demand should be set aside.

[13] In *AMC Construction Limited v Frews Contracting Limited* (2008) 19 PRNZ 13; [2008] NZCA 389 at [7], which did not concern a statutory demand issued on a CCA adjudication, the Court of Appeal took the view that if a debt was indisputably owing it should be paid. It considered that the statutory demand process should not be able to be avoided at the statutory demand stage by a company proving that it is solvent. It did not entirely reject the possibility that some particular circumstances could arise which would lead to a different view, but whatever these circumstances might be, they were not present in the case before the Court. The Court of Appeal considered that if a liquidation proceeding was commenced the company would have the opportunity on that proceeding to rebut the statutory presumption by proving its solvency.

[14] In *Laywood* (at [61] and [65]) the Court of Appeal, in the context of discussing whether a statutory demand issued on a CCA adjudication should be set

aside on the basis of a counterclaim, set-off or demand, referred to the distinction between an application to set aside a statutory demand and an adjudication to wind up a company. It said that it may be that different considerations arise when a Court is exercising its discretion to order a liquidation (referring here to *AMC Construction*) than when considering whether a statutory demand should be set aside, but also said it was a point on which no opinion was expressed.

[15] If a demand has not been set aside and a liquidation proceeding has been commenced, the Court can order a stay of the proceeding (r 31.11 High Court Rules and the High Court's inherent jurisdiction). The authorities are to the effect that the jurisdiction is one to prevent an abuse of process and the governing consideration is whether the proceedings suggest unfairness or undue pressure: eg. *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297 at 299, *Nemisis Holdings Ltd v North Harbour Industrial Holdings Ltd* (1989) 1 PRNZ 379 at 385.

[16] This power is ordinarily invoked where there is a genuine dispute as to the debt. It is considered an abuse for a company to suffer the commercial harm attendant on an advertised application for the appointment of a liquidator where the debt is genuinely disputed. There is competing authority as to whether the solvency of a company is in and of itself grounds to grant a stay. In *Spencer v Jed Rice Building Contractors Ltd* CIV-2007-404-007539 21 February 2008 (HC) at [16] the view was taken that solvency is not a reason to restrain advertising and stay the proceeding because the solvency is to be considered at the hearing. Conversely, in *McCallum Petterson and Company v Unity Mutual Financial Services Limited* M 39/95 30 May 1995 (HC) at p 4 the view was that a stay would be granted if a company was solvent, although in that case the Court had other concerns about the continuation of the liquidation proceeding.

My assessment

[17] At the hearing before me there was a difference of view as to the current status of matters in the District Court. Subsequent memoranda were filed by counsel. In the memorandum for Mr Butler reference was made to an application for the adjudicator's determination to be entered as a judgment. It was said that the

application was served on Gill and the time for opposing that application had now expired. The memorandum for Gill responded that the appropriate course was to bring proceedings to enforce the adjudicator's decision in accordance with s 59 of the CCA and that no such request for judgment had been made.

[18] As a result of those memoranda I requested a copy of the application referred to. The position is that on 9 September 2009 an application was made to enforce the adjudicator's determination by entry as a judgment. That application complies with r 461ZZJ of the District Courts Rules 1992 (it is in the required form) and that rule provides the mechanism by which s 59(1)(c) is given effect to. Gill has not opposed the application and, at the request of Mr Butler, the entry of judgment could now occur. I understand Gill therefore to be saying only that Mr Butler has not yet asked that judgment be entered on the basis of its application.

[19] Once judgment is entered, it could then be enforced using the enforcement mechanisms provided by s 79 of the District Courts Act 1947 (for example execution against the goods and chattels of Gill). However, although these enforcement methods are potentially available to Mr Butler, I consider that he is able to utilise the statutory demand procedure instead, or in advance of those enforcement methods.

[20] At present the adjudication in his favour means that he has a debt that is enforceable in the courts. He does not need to have judgment entered in his favour in order to issue a statutory demand in respect of it (just as the creditor had not in *Volcanic Investments*). In *Laywood* the creditor had obtained judgment for the adjudication, but in my view that does not make any difference to the position here. It is not contended by Gill that any of the grounds on which a judgment can be resisted would be made out here. In any event the entry of judgment under the CCA is just one way that the adjudicator's determination can be enforced. Applying the view expressed in *Laywood*, any counterclaim which Gill has and intends to bring is not a ground for setting aside the statutory demand.

[21] If Gill's asserted counterclaim is not a basis for setting aside the statutory demand, it cannot in my view be a basis for preventing the liquidation application from proceeding to a hearing. There is an unsatisfied statutory demand and

Mr Butler is entitled to proceed absent anything unfair or improper about the proceeding. The prospect that the liquidation proceeding will be advertised may well provoke Gill to pay the demand, but Gill's asserted counterclaim does not make that unfair or improper. The CCA is a pay now, argue later regime. Gill has been required to pay the adjudicated amount since 17 June 2009 and it has not done so. It is no answer to say that Gill is able to pay the amount and has put aside the amount in a solicitors' trust account. Mr Butler is entitled to the money now.

[22] I acknowledge Gill's concern about paying the amount to Mr Butler now if later Gill succeeds in its claim against Mr Butler and Mr Butler is not then in a financial position to repay the sum. In an affidavit filed in this court Mr Butler has deposed that:

As a result of Gill Construction's refusal to pay the amount determined by the Adjudicator, I am now facing personal bankruptcy. Times are very tough in the building industry and it has been a struggle to make ends meet week to week.

[23] That does raise a concern about Mr Butler's financial ability to repay the sum if that is the ultimate outcome of this dispute (which contrasts with the position in *Walter Larsen & Sons Ltd v Department of Corrections* (2006) 18 PRNZ 55 at [26]). However, I consider that this is not a basis on which Gill can resist paying the money to Mr Butler. Mr Butler says it is Gill's refusal to pay that has put Mr Butler in this position. It may be that personal bankruptcy will be avoided if Gill makes the payment that is now due. More importantly, the possible inability to recover the sum later is not a ground for resisting the payment now. In accordance with the legislative policy of the CCA, Mr Butler is now entitled to the benefit of the cashflow. If it is subsequently determined that Mr Butler is required to repay the sum and if he does not or is unable to do so, Gill will then have to pursue whatever enforcement mechanisms are available to it.

[24] That leaves me to consider Gill's solvency. The affidavit from Gill's accountant makes it clear that Gill is able to pay its debts. It has immediate access to \$2 million in cash. A normal month's trade creditors are around \$136,000 and Gill has no contingent liabilities. That starkly raises the question of whether the prospect of advertising the liquidation proceeding should be allowed to proceed to effectively

embarrass Gill into paying the debt presently due to Mr Butler even though, if the proceeding goes to a hearing, on the information before me now it seems quite unlikely that a liquidator would be appointed.

[25] I consider that if the solvency of a company is not a basis for setting aside a statutory demand, then it is also not a basis for staying the liquidation proceeding that has been issued on the basis of an unsatisfied statutory demand. Gill has two choices. It can decide not to pay the statutory demand, suffer whatever embarrassment or financial harm attaches to the advertised proceeding and then successfully defend the application to appoint a liquidator on the basis of its solvency. Mr Butler will then need to proceed to have the adjudication entered as a judgment and pursue alternative enforcement mechanisms. Alternatively Gill can pay the sum it presently owes Mr Butler and avoid the advertisement and the liquidation hearing altogether. Either way, Gill can separately pursue whatever claim it has under the contract with Mr Butler and in respect of which it will seek repayment of the adjudicated amount.

[26] If Gill chooses the former of the two alternatives, the advertisement is not unfair or improper because Gill has chosen not to pay a debt which is presently payable under the CCA. If putting Gill in this position were viewed as unfair or improper, then solvent companies could avoid what is an effective statutory mechanism for paying amounts that are established as due.

Result

[27] Mr Butler is presently owing the amount claimed in his statutory demand which has not been set aside. He is entitled to proceed. However, it is clear that Gill can pay the amount and will be able to show that a liquidator should not be appointed. Gill should be given the opportunity to satisfy the statutory demand before the advertising proceeds. Accordingly, the interim restraint presently in force until further order of the court will remain in place until 5 pm tomorrow, 3 November 2009. That will enable Gill to pay the amount it owes to Mr Butler and to avoid the advertisement if it wishes to do so. If Gill pays the amount by this time the restraint will remain in effect from that time and a stay is granted. If it does not

pay the amount by that time then the restraint expires, the stay is declined and the advertising and the hearing can proceed.

Mallon J

Solicitors:

D Clark, Wisheart Macnab & Partners, ph: 03 578 7259, fax: 03 578 0173, email: david@wmp.co.nz

V Whitfield, Solicitor, ph: 07 839 0900, fax: 07 839 0300