#155

IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CIV-2011-483-144
[2012] NZHC 383

IN THE MATTER OF	the Companies Act 1993
BETWEEN	GONVILLE SERVICE STN 1970 LIMITED Applicant
AND	PETROLEUM SOLUTIONS LIMITED Respondent

Hearing: 29 February 2012

Counsel: R Flynn for Applicant
C Matsis for Respondent

Judgment: 9 March 2012

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 3pm on the 9th day of March 2012.

RESERVED JUDGMENT OF MACKENZIE J

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[1] This is an application to set aside a statutory demand.

[2] The background is unusual and it is necessary to describe it in some detail. The applicant (GSS) had engaged the respondent (PSL) to carry out some building work on its service station premises. The contract was entered into in about May 2009, with a total contract price of some $464,000. Work proceeded through to late 2010, and progress payments were made from time to time. In late 2010, while work was ongoing, there was damage to the canopy on the site. GSS claims that the damage was caused by the respondent, and that it delayed the completion of the building work so that it was not possible for the service station to be re-opened by

Christmas 2010. In November and December 2010, the respondent issued two invoices for further progress payments for the work which it had carried out. GSS requested that some credits be allowed, and amended invoices allowing those credits were issued. These totalled $91,712.93. Those invoices constituted payment claims under the Construction Contracts Act 2002.

[3] The invoices were not paid and PSL cancelled the contract on 29 March 2011. It also issued a statutory demand under s 289 of the Companies Act 1993. GSS commenced this proceeding, a notice of application to set aside that statutory demand, in May 2011. At the same time, GSS paid the $91,000 claimed by PSL into GSS's solicitors' trust account.

[4] There was then a meeting between the parties, facilitated by GSS's petrol supplier, Mobil, on 1 July 2011. A way forward was agreed between the parties. There was still building work to be carried out at the service station, following the cancellation of the original contract. The parties agreed that they would enter into a new contract for that work, under the standard form of building contract, NZS3910. When PSL started work under that new contract, GSS would pay the $91,000 outstanding under the cancelled contract.

[5] Before PSL could start work under that new contract, GSS needed to take two steps:

(a) It needed to appoint an engineer to the contract, as required by NZS3910; and

(b) It needed to complete certain other work at the service station.

[6] The minutes of the meeting kept by the Mobil representative record that the engineer was to be appointed by 8 July. Allowing time for the completion of the preparatory work by GSS, the minutes record that PSL was to start work on 18 July 2011. Payment would, on that timetable, be made before the next Court date for this proceeding, 20 July.

[7] Unfortunately, those arrangements broke down. GSS's solicitor, Mr Unsworth, advised PSL's solicitor, Mr Matsis, on Friday 15 July, that GSS was yet to appoint an engineer but was following up. He accepted that the restart date could not be Monday 18 July and indicated that a payment of some $53,750 would be made "as a sign of good faith". That payment was made.

[8] This proceeding was adjourned on 20 July, to a further call on 14 September, to allow time for the settlement to be implemented. This did not happen. It was not possible to finalise the agreement which had been reached on the meeting on 1 July. The sticking point seems to have been the disposal of this proceeding, though the reasons why that should have presented a difficulty are not clear to me from the exchange of correspondence between the lawyers. Whatever the reason, the position at this stage is that no formal written agreement to record the terms of agreement recorded in the minutes kept of the meeting on 1 July has been entered into. No construction contract has been entered into. The final payment of the balance (after the part payment) of some $38,000 has not been made.

[9] The essence of the submission of counsel for GSS is that the dispute between the parties over the original building contract was settled by an agreement on 1 July 2011, and that in part payment of that settlement GSS has paid PSL the $53,000. He submits that the statutory demand was based on a Construction Contracts Act claim for $91,000 which is now settled, leaving a dispute over the terms of the 1 July 2011 settlement. Counsel submits that a statutory demand hearing is not the vehicle for resolving that dispute.

[10] I do not accept that submission. I do not consider that the agreement reached on 1 July 2011 had the effect of cancelling the debt due under the construction contract and creating a new debt. The arrangement agreed on 1 July would, if implemented, have addressed the issue of payment of the existing debt. I do not consider that the agreement, as recorded in the minutes, involved an agreement that the original debt would be cancelled and a new debt created.

[11] Furthermore, if there was an agreement on 1 July, then GSS is in breach of that agreement. It was required to nominate an engineer and carry out certain work,

so that PSL could commence work under the new construction contract by 18 July. It remains in breach of those obligations. GSS cannot, in those circumstances, rely upon the contention that the payment is not due until PSL commences work, when GSS is in breach of an obligation which is a necessary pre-condition to PSL commencing work.

[12] Alternatively, it is clear from the actions of the parties following the meeting of 1 July that it was intended that the agreement at that meeting would be subject to finalisation of a formal settlement agreement. That has never been achieved. On that view of the position, the original debt remains payable, as no other payment arrangements have been agreed.

[13] I accordingly reject the proposition that the statutory demand has been settled leaving a new dispute over the terms of the 1 July 2011 settlement.

[14] I also reject the submission that there is a dispute between the parties over the original building contract, which should lead to the setting aside of the statutory demand. In his original affidavit in support of this application, Mr Mooney, the director of PSL, said that: "In November and December 2011 the respondent issued the applicant with invoices which were disputed, but payment was offered for correct invoices." As I have noted above, amended invoices were subsequently issued. There is no evidence which supports the existence of some other dispute about the original debt. I am accordingly not satisfied that there is a substantial dispute whether or not the debt is owing or is due, in terms of s 290(4)(a) of the Companies Act 1993.

[15] Mr Mooney further says that GSS expected PSL to have completed its contracted works to allow the service station to be opened by Christmas 2010 and that did not occur. There is no evidence of any claim by GSS for delay. No such claim has ever been made, or quantified, so far as the evidence shows. There is accordingly no basis upon which the Court could be satisfied that GSS appears to have a counterclaim in terms of s 290(4)(b).

[16] Counsel for GSS also submits that the demand should be set aside because GSS is solvent. He submits that the question of solvency is answered by the payment of $91,000 into the trust account in May 2011.

[17] The principles applicable to an assertion that a demand should be set aside on the grounds that the company is solvent are as described by the Court of Appeal in *AMC Construction Ltd v Frews Contracting Ltd*:[1]

> The first question is whether the solvency of a company can of itself constitute a ground why the demand ought to be set aside under s 290(4)(c). The solvency of a company will very often be relevant to a consideration of the grounds in subs (4)(a) and (b). The Court must evaluate whether there is substantial dispute or a cross-claim. The Court must make an assessment whether the case is one where, as frequently occurs, the account is disputed as a means of buying time to pay, or whether the grounds for the dispute are genuine. An examination of the company's solvency will often be a useful aid in determining whether the refusal to pay is the result of a *bona fide* dispute as to liability or whether it reflects an inability to pay.
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> In cases such as that solvency is relevant not as a separate ground under subs (4)(c), but as a relevant consideration under subs (4)(a) and (b). In this case, the appellant, in addition to relying on paras (a) and (b), seeks to elevate the question of the company's solvency to an independent ground of which the notice ought to be set aside, under para (c). In *Medisys*, Master Kennedy-Grant accepted a submission (which was not challenged) that the solvency of an applicant company under s 290 can constitute a ground for setting aside a statutory demand against it. He further held that it is well established that the standard of proof of the existence of a dispute as to the debt, or of a counterclaim, set off, or cross demand, is the establishment of an arguable case and that there is no reason in principle why the same standard of proof should not apply in respect of the grounds under s 290(4)(c).
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> We would not wish to rule out the possibility that the solvency of the company might constitute a stand alone ground for setting aside a notice under para (c). However, we consider that such cases are likely to be extremely rare. If there is no dispute as to the company's liability, so that para (a) or (b) cannot be invoked, it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid. If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed. If it is not met, and an application for liquidation is filed, in reliance on the presumption in s 287(a) that the company is unable to pay its debts, then the company will have an opportunity on the liquidation application to rebut the statutory presumption, which applies "unless the contrary is proved". There might be circumstances in which it is appropriate to advance

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1 *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, (2008) 19 PRNZ 13 at [5]-[7].

the inquiry as to solvency to the s 290 stage, but that would require some particular circumstance not present in this case.

[18] I have already addressed the grounds for setting aside under s 290(4)(a) and (b). I do not consider that the payment into the trust account assists the applicant's position under those paragraphs, in the light of the absence of any evidence of a dispute as to the debt, or the existence of a cross-claim. To the extent that solvency is relied upon as a standalone ground under s 290(4)(c), the payment into a trust account does not satisfy the evidential burden on the applicant to prove that it is solvent.

[19] For these reasons, the application to set aside the statutory demand is dismissed.

[20] The respondent is entitled to costs on this proceeding, which I fix on a 2B basis, together with disbursements, to be fixed if necessary by the registrar.

"A D MacKenzie J"

Solicitors: Horsley Christie, Wanganui for Applicant
Gault Mitchell Law, Wellington for Respondent