#21

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-2287

UNDER	the Companies Act 1993
BETWEEN	KIZER BUILDERS LIMITED Plaintiff
AND	OEC CONSTRUCTION LIMITED Defendant

Hearing: 14 November 2006

Appearances: J.L. Williams for Plaintiff
E. Horner for Defendant

Judgment: 16 November 2006 at 10.30am

In accordance with r540(4) I direct the Registrar to endorse this judgment with a delivery time of 10.30am on the 16th day of November 2006.

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

Introduction

[1] On 9 October 2006 the plaintiff filed a Statement of Claim seeking an order to place the defendant company into liquidation. The grounds for this were that the defendant had failed to comply with a statutory demand served on the defendant on 31 August 2006 for $78,380.08, which represented payment said to be due to the plaintiff under a construction contract pursuant to the Construction Contracts Act 2002.

[2] This sum of $78,380.08 was also the subject of a judgment which the plaintiff had obtained against the defendant from the District Court at Wellington on 13 July 2006. The judgment was obtained by default, as the plaintiff took no steps in the District Court proceedings.

[3] On 1 November 2006 the defendant in reliance on r700K High Court Rules applied for an order staying the plaintiff's liquidation proceedings, and restraining the advertisement of these proceedings. This application was initially made on an ex-parte basis. An interim order was made on 1 November 2006 staying advertising of the proceeding until further order of this Court.

[4] The substantive application by the defendant for stay and for restraint of advertising came before me on 14 November 2006.

[5] In its Statement of Defence to the plaintiff's liquidation application, the defendant says that:

a) The debt of $78,380.08 is disputed; and

b) Through inadvertence on the part of the defendant company caused by a change in responsibility for legal matters within the company at the operative time when the statutory demand was served, it was not properly dealt with then; and

c) The defendant intends to apply to the District Court to set aside the default judgment obtained there.

[6] Given these matters, the essential issue before the Court in the present application is whether s79 Construction Contracts Act 2002 means that this Court cannot stay the advertising and/or liquidation proceeding as the plaintiff seeks.

Counsel's Arguments and My Decision

[7] The present application is made pursuant to r700K High Court Rules. Rule 700K(1) states:

> **700K. Power to stay [[liquidation]] proceedings**
>
> [[(1) Where an application for putting a company into liquidation is made by the filing of a statement of claim pursuant to rule 700C(1), the defendant company, or, with the leave of the Court, any creditor or contributory or shareholder, as the case may be, of that company, or the Registrar of

> Companies, may, within 7 days after the date of the service of the statement of claim on the defendant company, apply to the Court for an order restraining publication of any advertisement required by rule 700I or any other information relating to that statement of claim and staying any further proceedings in relation to the liquidation.]]

[8] The principles to be applied in considering applications under r700K were outlined in *Nemesis Holdings Limited v North Harbour Industrial Holdings Limited* (1989) 1 PRNZ 379 at p385. There, Wallace J summarised the principles in the following way:

> (a) The Court has an inherent jurisdiction to stay winding-up proceedings where the debt upon which such proceedings are founded is the subject of a genuine dispute. In those circumstances the plaintiff cannot show it has the status of a creditor or that there has been neglect by the company to pay.
>
> (b) The jurisdiction is an inherent one to prevent abuse of process. There is no inflexible rule.
>
> (c) The governing consideration is whether the proceedings suggest unfairness or undue pressure.
>
> (d) It is a serious matter to stay winding-up proceedings, so the decision to do so is never made lightly. The onus is on the applicant and it is normally necessary to demonstrate 'something more' than the balance of convenience considerations which are usually considered on an application for interim injunction. If the defendant company has had an opportunity to file appropriate affidavits, such defendant is required to establish a strong prima facie case of the existence of a genuine dispute on substantial grounds, or show that there are clear and persuasive grounds for a stay.

- See McGechan HR700K.02.

[9] Here, s79 Construction Contracts Act 2002 needs to be considered. Section 79 states:

> **79. Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the Court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if –
>
> (a) judgment has been entered for that amount; or

(b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[10] The purpose of the Construction Contracts Act was noted in the Court of Appeal in *George Developments Limited v Canam Construction Limited* (CA244/04, 12 April 2005) at paragraph 31 in the following way:

> The purpose provision of the Act includes the fact that the Act was to facilitate regular and timely payments between the parties to a construction contract. The importance of such regular and timely payments is well recognised. Lord Denning (quoted in *Gilbert-Ash (Northern) Limited v Modern Engineering (Bristol) Limited* (1973) 3 AllER 195, 214 (HL), Lord Diplock) said:
>
> > There must be a 'cashflow' in the building trade. It is the very lifeblood of the enterprise.

[11] And in *Salem Limited v Top End Homes Limited* (CA169/05, 27 September 2005) the Court of Appeal again reiterated this in the following words:

> The whole thrust of the Act is to ensure that disputes are dealt with promptly and payments made promptly, because of the disastrous effects that non-payment has, not only on the head contractor, but also on its employees, subcontractors and suppliers...It is relevant to note, for instance, that employers cannot set up counterclaims, set-offs or cross-demands as a bar to the recovery of a debt under s23 of the Act, unless the employer has a judgment in respect of its claim, or there is not in fact any dispute between the parties in relation to the employer's claim (s79). The fundamental position under the Act is that, if a progress claim is made and the employer does not respond within the period stipulated in the construction contract or, by default, within the time specified in the Act, the amount of the claim becomes payable forthwith.

[12] Section 79 was considered in *Volcanic Investments Limited v Dempsey & Wood Civil Contractors Limited* (2005) 2 NZCCLR 370. In that case, Justice Randerson was faced with an application to set aside a statutory demand issued for an adjudicated Construction Contracts Act progress payment debt. The application was made under s290(4) Companies Act 1993. Randerson J considered the statutory scheme under the Construction Contracts Act 2002 and in particular, he discussed the meaning of s79 and whether s290(4) Companies Act 1993 overrode s79. His Honour concluded that s79 prevailed and this section precluded the Court from giving effect to the set-off claimed by the defendant company in that case.

[13] That decision in *Volcanic Investments* has been applied since in a number of decisions including *Sci Development & Construction Limited v NZ Built Limited* (HC AK, 23 December 2005, CIV-2005-404-3656, Associate Judge Abbott), *10 Gilmer Limited v Tracer Interiors and Construction Limited* (HC WN, 6 December 2005, CIV-2005-485-2009, Associate Judge Gendall), and *Freemont Design & Construction Ltd v Natures View Joinery Limited T/A Nebulite Waikato* (HC Hamilton, CIV-2006-419-269, 26 July 2006, Associate Judge Faire).

[14] Before me, however, counsel for the defendant endeavoured to argue that the principle in *Volcanic Investments* should not apply in the present case, as this is not a case involving an application to set aside a statutory demand under s290(4) Companies Act 1993. Rather, as an application to stay liquidation proceeding and restrain advertising it is brought in terms of r700K High Court Rules.

[15] In my view, this argument is quickly disposed of.

[16] In *Volcanic Investments* Randerson J stated at paragraph 20:

> Where the debtor is a company, there is nothing in the Act to suggest the issue of a statutory demand under the Companies Act is not a proceeding contemplated by s79 for recovery of a debt. It is an integral step in the winding up process and is the usual preliminary to a winding-up application under Part 9A of the High Court Rules...An application to wind up a company is also a proceeding under the High Court Rules (rr700A and 700C). I conclude that recovery of a debt by the lawful process of the issue of a statutory demand and the bringing of winding up proceedings against a debtor company are 'proceedings' contemplated by s79...
>
> (emphasis added)

[17] In my view, these comments from Randerson J in *Volcanic Investments* are apposite here. He concluded that the meaning of s79 is plain, and that in any proceedings for recovery of a debt (which includes a statutory demand matter and company liquidation proceedings), the Court in terms of that section is prevented from giving effect to any counterclaim, set-off or cross-demand raised by a party to the proceedings. The only exceptions to this are where judgment has been entered for a liquidated amount in favour of the party claiming the set-off, or where there is in fact no dispute between the parties in relation to the claimed set-off. Neither of those situations applies here.

[18] I conclude, therefore, that although the decision in *Volcanic Investments* did relate to an application to set aside a statutory demand under s290(4), the principles enunciated in that decision apply equally to the present case. That said, and noting that the debt before the Court in the present case is indisputably an unpaid amount due in terms of the Construction Contracts Act procedures, s79 therefore precludes the defendant here from setting off against the debt the amount which it says is owed to it by way of counterclaim or set-off.

[19] I am reinforced in this view, as I see it, by two additional factors. The first is the fact that in this case, the plaintiff has taken the additional step and precaution of obtaining a District Court judgment against the defendant for the debt in question. No defence was raised to that District Court proceeding, and judgment was obtained by default.

[20] And the second is the fact that the defendant has taken no steps to apply to set aside the statutory demand when it was served upon it on 31 August 2006.

[21] With all these matters and the principles of the Construction Contracts Act 2002 firmly in mind, I am satisfied that the situation before the Court is one precisely envisaged by s79 and the Act generally, an Act which has the stated purpose to ensure that consequences follow if construction contract payments are not made in a timely fashion.

[22] And, I am satisfied too that the principles outlined in *Volcanic Investments* and followed in subsequent cases relating to applications to set aside statutory demands apply equally to the present application.

[23] Before me, counsel for the defendant referred to *Re Capon* (2004) 18 PRNZ 97 in support of her contention that the present application should succeed.

[24] *Re Capon*, however, was an application by a judgment debtor to set aside a bankruptcy notice pursuant to s19(1)(d) Insolvency Act 1969. That section differs from r700K High Court Rules which is before the Court in the present application.

[25] In so far as it may be necessary to do so, I therefore distinguish the decision in *Re Capon*. The growing line of authority established by *Volcanic Investments* with respect to enforcement of construction debts and company liquidation matters is to be followed here.

[26] And, given these findings, as I see it, for the purposes of the application before me, issues of solvency of the defendant company do not arise here.

[27] Whether it may be appropriate for the Court ultimately to appoint a liquidator of a company such as the applicant here in a situation where it has failed to pay construction contracts claims and the company proves simply to be financially unable to do so, is an issue for another day.

[28] But, in any event, on the present application there is no significant evidence before the Court as to the defendant's solvency. In the affidavit of Mr Ka-yu (John) Chow filed 1 November 2006 in support of the defendant's application, he deposes at paragraph 18 that:

> However, to the best of my knowledge the company is solvent, and I would have expected Price Waterhouse Coopers to have alerted me to any problems if the company was insolvent and they had not done that.

[29] This appears to be the only reference to the solvency of the company in any material before the Court. Given the nature of the current application before me, on any view of the matter, that reference is not sufficient to affect the outcome of this application in any way.

[30] For the reasons I have outlined above, the defendant's application for a stay of this proceeding and restraint of advertising must therefore fail.

[31] An order is made cancelling the interim order made on 1 November 2006.

[32] The interim stay is lifted. The plaintiff is free to proceed with advertising of this liquidation application.

[33] Costs are awarded to the plaintiff, together with disbursements, if any, as fixed by the Registrar.

[34] This matter is to be listed for call in the Associate Judge's List on 4 December 2006.

Associate Judge D.I. Gendall

Solicitors:
Sladden Cochrane & Co, Wellington for Plaintiff
Morrison Kent, Wellington for Defendant