#63

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2008-463-566

UNDER	the Companies Act 1993
BETWEEN	NZ WINDFARMS LIMITED Plaintiff
AND	CONCRETE STRUCTURES (NZ) LIMITED Defendant

Hearing: 26 March 2009

Appearances: Mr R G Smedley for plaintiff
Mr W Lawson for defendant

Judgment: 7 April 2009 at 10.30 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***07.04.09 at 10.30 a.m.**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:

Anthony Harper Lawyers, P O Box 2646, Christchurch

Lance Lawson, P O Box 2279, Rotorua

Background

[1] The plaintiff filed liquidation proceedings against the defendant in or about September 2008. The defendant has filed an application for interim orders:

a) Restraining the advertisement of the substantive liquidation proceedings; and

b) Staying those liquidation proceedings.

These latter applications are the subject of this judgment.

[2] The parties entered into an agreement for the building of parts of wind turbines on sites in the Manawatu. The plaintiff was the principal under the contract and the defendant the contractor. Their contract was entered into on 7 March 2006. The contract was in the standard form NZS 3910:2003. The firm of Connell Wagner was engaged to provide engineering services. Mr Murray Fletcher of that firm became the engineer to the contract.

[3] After completion of construction the engineer issued a final payment schedule 26 October 2007 claiming that the defendant was required to pay to the plaintiff the sum of $109,522.78. That is to say, the contractor was required to pay money back to the principal. The defendant did not accept this state of affairs. A number of items of correspondence were exchanged which it is not necessary to repeat in detail. A meeting took place on 4 December 2007 at which the parties attempted to resolve their differences. The defendant eventually invited the engineer to issue a formal decision under clause 13.2.4 of the Contract. The engineer did this on 6 March 2008.

[4] On 14 March 2008 the defendant sent a facsimile to the engineer advising that the final payment schedule was not accepted. The facsimile said that, in terms of the contract, the matter now had to be referred to mediation pursuant to clause 13.3. In the same facsimile, the defendant said that given that a 'quasi Mediation' had taken place in December 2007, it was the defendant's view that the parties could

now proceed to arbitration. The letter concluded 'please advise whether you are in agreement with this or whether you wish to proceed to a formal Mediation'.

[5] Clause 13.4 of the contract made provision for the parties to arbitrate disputes, including where either of them was dissatisfied with the formal decision of the engineer (as that term is defined in clause 13.2.4). A party wishing to initiate arbitration is required to give notice to that effect. That notice 'shall be in writing and shall be given by the Principal or the Contractor to the other of them' within certain time limits. The relevant time limit in this case, the parties agree, was one month from the date when the engineer issued his formal decision on 6 March 2008.

[6] Section 15 of NZS 3910 contains the following provision:

> 15.1.2 Any document which is to be served upon the Principal, the Contractor or the Engineer under the contract shall be sufficiently served if it is handed to the Person, or to their appointed representative, or delivered to their address as stated in the Contract Document or as subsequently advised in writing. Except for payment claims, or for a notice given to the Principal under 13.3, 13.4 or 14.3.3, or any notice under the Construction Contracts Act 2002, every notice to the Principal shall be sufficiently given if it is given to the engineer.

[7] The notice here was one of those specifically mentioned in s 15.1.2. That is, it was a notice requiring arbitration and it therefore comes within s 13.4 of the contract.

Stay principles

[8] If the debt on which the liquidation application is based, is the subject of a genuine dispute which is of a substantial nature, the Court will normally be prepared to stay proceedings: *Nemesis Holdings Limited v North Harbour Industrial Holdings Limited (1989)* 4 NZCLC 65,084. In his judgment in *Nemesis* Wallace J, after referring to *Exchange Finance Co Ltd v Lemmington Holdings Ltd* [1984] 2 NZLR 242, *Anglian Sales Ltd v South Pacific Mfg Co Ltd* [1984] 2 NZLR 249 and *Fletcher Development & Construction Ltd v New Plymouth Hotels Holding Ltd* unreported, 24 July 1986 CA63/86, stated:

> The Court has an inherent jurisdiction to stay windingup proceedings where the debt upon which such proceedings are founded is the subject of genuine dispute. In those circumstances the plaintiff cannot show that it has the status of a creditor (required by s 219 Companies Act 1955) or (in the case of proceedings relying upon s 218(a) — not relevant in the present case) that there has been neglect by the company to pay. The decisions make it clear that the jurisdiction to stay is an inherent one to prevent abuse of process and that there is no inflexible rule. The governing consideration is whether the proceedings savour of unfairness or undue pressure. It is, however, a serious matter to stay winding-up proceedings so that 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 it is usually appropriate to consider on an application for an interim injunction.

[9] I intend to be guided by Wallace J's summary of the principles. My approach will be to determine whether there should be a stay and the outcome of that application will be treated as determinative of the application to restrain advertising.

The notice requiring arbitration

[10] As I understand Mr Lawson's position for the defendant, it was that he did not dispute that a notice requiring referral of the dispute to arbitration had to be given timeously. He said this had actually occurred. He also submitted that the document that the defendant sent to the engineer on 14 March 2008 constituted effective notice to the plaintiff that the defendant required the dispute to be arbitrated.

[11] This submission was contested by Mr Smedley for the plaintiff. Mr Smedley emphasised that the notice was required in terms of clause 13.4.2 of the contract to be sent directly to the other party. He submitted that the evidence was clear that the defendant had sent the notice to Mr Murray Fletcher of Connell Wagner, instead of sending it directly to NZ Windfarms Limited as the contract required. He pointed out that the contract had different requirements as to where notices were to be sent, depending on the type of notice concerned. Mr Smedley said that it was true that some notices could be sent to the engineer while others (and the giving of notice requiring arbitration was a specifically included in this latter group) were to be given to the appropriate party to the contract.

[12] Mr Lawson attempted to meet this submission by pointing out that a number of notices had been sent to the engineer, some of which concerned the plaintiff's role in the contract. As I understand, it Mr Lawson was attempting to make the point that the strict requirements of the contract as to where notices should be sent had become blurred in actual practice and for that reason, while the contract may have required a notice of arbitration to be sent directly to the plaintiff, sending a notice to the engineer would suffice because the engineer was 'the agent' of the plaintiff.

[13] In response to that, Mr Smedley said that the role of the engineer was explicitly recognised in the contract as involving two separate functions. By clause 6.2.1 it was provided:

> 6.2.1 The dual role of the Engineer in the administration of the contract is:
>
> (a) As expert advisor to and representative of the Principal, giving directions to the Contractor on behalf of the Principal and issuing Payment Schedules on behalf of the Principal at due times; and
>
> (b) Independently of either contracting party, fairly and impartially to make the decisions entrusted to him or her under the Contract Documents, to value the work and to issue certificates.

[14] Mr Smedley said that it was not correct to say that the parties had treated the engineer as agent for the employer for all purposes under the contract so that he had become the agent of the principal for purposes including receipt for the notice that an arbitration was to be convened.

[15] I agree with Mr Smedley's submission. His analysis makes it clear that the role of the engineer was not for all purposes to function as the agent of the principal. The fact that the defendant may have mistakenly sent a notice to the engineer when he should have sent it directly to the plaintiff does not, of course, operate to vary the terms of the contract or create an agency by agreement which has the effect of binding the plaintiff to accept the actions of the engineer in receiving the notice as being the actions of the plaintiff. The contract was clear as to where the notice was to be sent. I conclude that the defendant's notice was not sent to the required recipient, which was the plaintiff.

[16] I also consider that there is merit in Mr Smedley's alternative submission that the document which Concrete Structures sent to the engineer 14 March 2008 was equivocal in its terms. That is because it left open the possibility of either arbitration or mediation, which are, of course, quite different procedures. Further, it asked for the plaintiff's views on whether arbitration or mediation was preferred: see paragraph [4] above.

[17] On one view the arguments for the plaintiff focussed on technical matters rather than the merits of the claim. Against that, the procedures in this case have been specifically agreed upon by the parties to the contract. They no doubt had good reasons for adopting the notice provisions contained in NZS 3910. Doubtless, one of those reasons was that each party to the contract had to know with certainty whether the opposite party had taken steps initiating procedures under the contract. The plaintiff was entitled to know one way or the other whether an arbitration or mediation had been specified. The notice actually given, on a reasonable reading, does not convey that an election has been made for mediation or arbitration.

[18] The non-compliance with the requirement that a notice requiring arbitration be sent to the plaintiff rather than to the engineer cannot be treated as a harmless technical breach. Having regard to the nature of the provisions of the contract which are under consideration, exact compliance was required in respect of how referral to arbitration was to be communicated. If there were exact compliance, a party to the contract will quickly know if there is to be a dispute and the resolution procedures will be invoked promptly. The other party will know within a period of a month whether or not there is to be a dispute and, if no notice is received, it can regard all aspects of the contract as having been concluded. Unless there is a clear and unambiguous procedure prescribed under the contract and followed by the parties, such certainty, which is desirable, will be absent.

[19] For all those reasons, the interpretation advanced by the plaintiff is to be preferred. The approach that Mr Lawson submitted would subvert certainty.

[20] In my judgment, a notice with the defects that were present in this case cannot be treated as an effective notice for the purposes of the contract. As a result

of the defects in the notice, the defendant cannot now challenge the decision of the engineer.

Solvency

[21] The next issue concerns the solvency of the company. In my view, the defendant has not sufficiently satisfied the Court that it is arguably solvent. It is insufficient for the defendant to file an affidavit from a chartered accountant which sets out his opinion the company 'meets the solvency test as set out in s 4 of the Companies Act 1993' and that the defendant 'has adequate resources to meet the plaintiff's claim …'.

[22] It is the Court which has to come to a conclusion on the matter of solvency. The Court cannot abdicate its function of assessing solvency by uncritically adopting a witness's views about that critical matter. That observation has greater force when it is remembered that the witness did not set out the process of reasoning by which he came to the conclusion that the company meet the solvency test.

[23] I accept that some material was provided, purportedly in support of the solvency point. But the information that was produced - consisting as they do of extracts from the company's bank statement – are not helpful. Solvency cannot be established by referring to one element of the company's property only, namely its current assets in its bank account. That is because information about current assets tells only one part of the story. It says nothing about the company's other liabilities. It is possible that the company's assets are sufficient to meet its current liabilities, but then, it is equally possible that they are not. One would have thought it was not a particularly demanding or time-consuming job for a company officer to produce accounts – if necessary in abbreviated form - which show the main components of the company's financial circumstances so that the Court can be properly assess if there is an acceptable basis for concluding that the company is indeed solvent.

[24] In my view, because of the absence of acceptable evidence on the point, there must be a doubt about the company's solvency in the light of the presumption of insolvency arising from the service of the section 287 notice.

Postscript

[25] After I had prepared this judgment in draft, but before I completed it, counsel for the defendant filed a brief memorandum with two judgments of the High Court annexed. I did not reserve leave to either party to make further submissions. Nor do there seem to be any special circumstances present that would entitle the parties to make submissions after the hearing had concluded. In this circumstance I decline to refer to the additional material.

Conclusion

[26] In order to establish a substantial dispute, the defendant was required to show that it is reasonably arguable that it had properly invoked the arbitration procedure which the parties agreed to in their contract. If it did not take effective steps to do so, it could not call into question the plaintiff's entitlement to the $109,522.78 which is the subject of the statutory demand. It has not succeeded in doing so. It is not therefore a misuse of the liquidation procedures to allow the proceedings to continue to a hearing.

[27] The application is therefore dismissed.

[28] The parties ought to be able to reach agreement on the issue of costs. If they cannot, I shall hear submissions from them on that matter at a time to be notified by the registrar.

[29] The Registrar is to list the liquidation proceeding in the first available liquidation date and advise the parties of that date.

J.P. Doogue
Associate Judge