IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2005-485-1362

IN THE MATTER OF	The Companies Act 1993
BETWEEN	BROOKLYN HOLDINGS LIMITED Plaintiff
AND	ABLE HANDYMAN SERVICES LIMITED Defendant

Hearing: 12 September 2005

Appearances: A.R. Davie for Plaintiff
D. Jenkins for Defendant

Judgment: 13 September 2005

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

Introduction

[1] In this proceeding the plaintiff seeks an order that a statutory demand issued by the plaintiff claiming the sum of $8,672.90 be set aside. This represents payment claimed for three invoices, numbers 4547, 4548 and 4549 for construction work undertaken by the defendant from March to May 2005.

[2] The application is opposed by the defendant.

[3] The application is made under s290(4) Companies Act 1993, which provides as follows:

> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that –

(a) There is a substantial dispute whether or not the debt is owing or is due; or

(b) The company appears to have a counterclaim, set-off, or cross demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross demand is less than the prescribed amount; or

(c) The demand ought to be set aside on other grounds.

[4] As Brookers Company and Securities Law at paragraph CA290.02 makes clear:

CA290.02 Setting aside a statutory demand

(1) ***General principles***

The general principles applicable to applications under s290(4) are now well established. These principles, which can be discerned from cases such as *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447; (2001) 9 NZCLC 262,605 (CA); *Fletcher Homes v Ellis* 23/7/99, Master Faire, HC Auckland M471IM99; *Forge Holding Ltd v Kearney Finance (NZ) Ltd* 20/6/95, Tipping J, HC Christchurch M149/95, *Queen City Residential v Patterson Co-Partners Architects Ltd (No 2)* (1995) 7 NZCLC 260,936; *Rennie v Prospect Resources* Ltd 3/11/95, Tipping J, HC Greymouth M14/95; and *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297; (1989) 1 PRNZ 390 (CA), are as follows:

(a) The applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt.

(b) The mere assertion that a dispute exists is not sufficient. Material, short of proof, is required to support the claim that the debt is disputed.

(c) If such material is available, the dispute should normally be resolved other than by means of proceedings in the Companies Court.

(d) An applicant must establish that any counterclaim or cross demand is reasonably arguable in all the circumstances.

(e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

[5] It is a commonly accepted principle that if the recipient of a statutory demand satisfies the Court that it is arguably insolvent, the demand must be set aside pursuant to s290(4)(c) – *Medisys Limited v Getinge Castle Limited* (HC AK,

unreported, 9 February 2001, M1426/00, Master Kennedy-Grant) and *Rocklands Park Limited v Logan Samuel Limited* (2004) 9CLC 263, 535.

[6] In the instant case, the plaintiff contends that even if it is legally obliged to meet the debt claimed to be due by the defendant, it is solvent and in a position to do so. That said, it is appropriate to consider this issue of solvency first, because if the plaintiff's contentions on this point are upheld, the statutory demand is set aside irrespective of whether the debt described is the subject of a genuine and substantial dispute.

Solvency of the Plaintiff

[7] As I have already noted, solvency of an applicant company is a proper ground for setting aside a statutory demand.

[8] The words of Master Kennedy-Grant in *Medisys Ltd* at paragraph [12][b] are apposite here:

> As the purpose of serving a statutory demand on a company is to create the basis (if the demand is not complied with) for the coming into existence of the presumption of inability to pay debts created by s287 of the Act, if there are matters known to the Court before the time for complying with the statutory demand expires which would make it inappropriate to allow that presumption to come into existence, the statutory demand should be set aside. Solvency is such a matter.

[9] In the past there has been wide acceptance too that the statutory demand procedure should be used as a means to establish a presumption of insolvency of a company rather than to recover commercial debts: *Environmental Solutions Ltd v Jesco Dosiertechnik GMBH & Co KG* (1999) 8 NZCLC 261,854 Master Gambrill; and *Gateway Cargo Systems Ltd v Airborne Freight Ltd* (HC AK, CIV 2003-404-7207, 16 March 2004, Master Faire).

[10] Accordingly, the logical and natural progression from that principle is that if the recipient of a statutory demand satisfies the Court that it is arguably solvent, the demand ought to be set aside: *Medisys Limited v Getinge Castle Ltd* and *Rocklands Park Limited v Logan Samuel Limited*. As I see the position, it does not matter that

solvency is not expressly included in the s 290(4) list. That is, after all, the purpose of Parliament enacting the s 290(4)(c) catch-all provision.

[11] Furthermore, since the issuing of a statutory demand is a very serious matter involving a fast-tracked process with serious statutory consequences in the event of a failure to comply with the demand, it is clear that the process must at all times be properly used by a creditor and appropriately constrained by the Court – *Keystone Ridge Limited v City Sales Limited* (HC AK, M549/02, 9 July 2002, Heath J) and *Sports Services Ltd v AGC Corp NZ Limited* (1995) 8 PRNZ 653.

[12] Turning to consider the present case, I need to say at the outset that the present application, in my view, can be quickly disposed of based on this question of solvency.

[13] After considering submissions made to me by counsel, and having taken into account the limited solvency evidence before the Court, I am satisfied, but only by a fine margin, that the plaintiff has done enough here to show that it is arguably solvent. That is, in terms of the s4 Companies Act 1993 "solvency test", it can be said the plaintiff is able to pay its debts as they become due in the normal course of business, and that its assets outweigh its liabilities.

[14] I say this bearing in mind the uncontradicted statements made by Lance Christopher James, the director of the plaintiff company, in his affidavit dated 24 August 2005 to the following effect:

> 3. The plaintiff company was set up to develop 90 building sites, including the building of 90 homes, above Brooklyn in Wellington.
>
> 4. The following sales are expected from each of the 3 stages relating to the development:
>
> (a) First stage: $16,000,000
>
> (b) Second stage: $17,000,000
>
> (c) Third stage: $17,500,000
>
> 5. Currently 21 houses are near completion and will be part of the settlement of sales at the end of January. I note that at this stage there are contracts on 17 of those 21 houses. It is expected that these sales will bring in approximately $11,000,000.

6. The company has a facility through Lombard to enable it to pay its debts as they fall due. All such debts have been paid. I wish to advise the Court there is no other creditor action against the plaintiff.

7. The plaintiff undertakes monthly draw downs. For example, the draw down this month to settle all outstanding invoices will be approximately $800,000.

8. Of the Lombard facility there is approximately $6,000,000 still to draw down. Naturally the plaintiff is hopeful that all of that sum will not be required.

9. Unfortunately the plaintiff's accounts for the year ended 31 March 2005 are still with its accountant Curtis McLean.

10. I wish to advise however that there has been no difficulty whatsoever with the plaintiff settling any accounts thus far on this job and that it is certainly in a position to settle its debts as they fall due.

11. To that end I have instructed the company's solicitor to pay the sum in dispute into the High Court at Wellington to show that the company is solvent and able to pay its debts.

[15] Before me today Mr Davie for the plaintiff confirmed that the amount in question here being $8,672.90 has been paid into his solicitor's Trust Account and is held pending resolution of the dispute between the parties.

[16] Along with this, the other solvency evidence before the Court is not extensive, but it is broadly to the point. I say this bearing in mind particularly that the amount of the debt here in question is only $8,672.90.

[17] In considering solvency, the Court is entitled to consider whether facilities other than available cash such as banking accommodation are available to the company to assist it to meet its debts when they fall due. Here, the evidence before the Court is that the plaintiff company has approximately $6,000,000 undrawn of a Lombard loan facility but still available for drawdown.

[18] The level of funds available to the plaintiff supports the conclusion that it is in a position to pay its debts generally and this $8,672.90 as they become due.

[19] So far as the plaintiff's asset and liability position is concerned, the evidence of Mr James is that sale contracts on 17 of the plaintiff's 21 houses currently under

construction in its Brooklyn subdivision will bring in approximately $11,000,000. In addition, he deposes to income from other stages of the plaintiff's developments of approximately another $30,000,000. Although, unfortunately, no accounts for the plaintiff company have been placed before the Court, I am satisfied that the plaintiff's argument that it is solvent in the sense that its assets exceed its liabilities also appears to have substance.

[20] In weighing up all these matters, as I have noted earlier, I have reached the view that the plaintiff has done enough, but only by a fine margin, to show that it is arguably solvent. The statutory demand must therefore be set aside upon this ground alone. An order to this effect will follow.

[21] For the sake of completeness, however, I will briefly consider the other two grounds put forward by the plaintiff.

[22] These are to the effect, first, that the debt is disputed and the plaintiff has a substantial counterclaim, and secondly, that the attempted use of the liquidation procedure by the defendant is an abuse of process.

The debt is disputed and the Plaintiff has a substantial counterclaim - Section 79 Construction Contracts Act 2002 does not preclude a counterclaim defence

[23] These defences are provided for in s290(4)(a) and (b) Companies Act 1993. The defendant contends they cannot apply here because of the provisions of the Construction Contracts Act 2002 which apply to the contract between the parties. The defendant says that sections 23 and 79 Construction Contracts Act 2002 preclude any such defences, as the plaintiff here did not comply with the Act, in that it did not as required issue any s21 payment schedules for the disputed amounts when confronted with the defendant's s20 Payment Claims, and as such, s23 precludes any argument that the debts may not be due.

[24] Section 79 Construction Contracts Act 2002 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.

[25] Here, the plaintiff contends that the uncontradicted evidence before the Court contained in the affidavits of Mr Faletolu and Mr Whakatihi filed on behalf of the plaintiff is that the defendant's work was of a very "poor quality" and that there can be no dispute that the plaintiff was put to the cost of procuring rectification work which has totalled $53,879.98.

[26] The plaintiff's position is that given that this $53,879.98 counterclaim is uncontradicted, in terms of s79(b) Construction Contracts Act 2002, therefore, it constitutes:

> "a set-off of a liquidated amount if...
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[27] Mr Jenkins for the defendant disputes this. He refers to the earlier 25 May 2005 letter of demand from the defendant and a letter from its lawyer dated 5 July 2005. He was unable, however, to point to any response on the part of the defendant to the detailed affidavit evidence provided for the plaintiff, in particular by Mr Whakatihi, who was the independent tradesman who carried out the rectification work.

[28] Given my finding with respect to the solvency issue, there is no need for a definitive finding with respect to whether s79(b) here may enable the plaintiff to set up, albeit rather belatedly, what it says is an undisputed cross-demand against the payment claims made by the defendant.

[29] Notwithstanding that, and without making any finding as to this point, I would simply comment that at first glance there does seem to be something in this argument raised by the plaintiff here.

Abuse of process – The statutory demand process and liquidation procedure has been used as a debt collection service and for this and other reasons it is "just and equitable" to set it aside

[30] As to this, the plaintiff argues first, that the statutory demand and liquidation proceedings are not "proceedings for the recovery of a debt" and therefore the plaintiff's counterclaim, set-off or cross demand for the rectification costs does not fall foul of s79 here. The plaintiff says that these proceedings are not for debt recovery, but are about liquidation of insolvent companies.

[31] Linked to this argument, the plaintiff referred to Brookers Insolvency Law at paragraph CA290.03 where the learned authors state:

> The use of the statutory demand as a debt collection service is an abuse of court. See *Procorp International Limited v Maximax Limited* (HC AK, 2 September 1999, M787/IN99, Master Faire).

[32] Although I need not decide this issue here, as I see it, there is little in this argument. The issue of a statutory demand, in part at least, must always involve an element of debt collection, given that the debts in question are required to be outstanding.

[33] The final argument advanced by the plaintiff before me was that as an "other ground" in terms of s290(4)(c), it was "just and equitable" for the statutory demand to be set aside here.

[34] Counsel contended that the plaintiff's counterclaim here was one of true substance, and that said, how could it be just and equitable for a defendant in issuing a statutory demand to rely on invoices for a little over $8,000.00 when on the evidence its work had led to the plaintiff incurring rectification costs of over $50,000.00.

[35] The plaintiff contends that there are adequate remedies apart from liquidation open to the defendant with respect to the $8,672.90 claim. It says that they are not acting reasonably in seeking to have the company liquidated instead of pursuing

those other remedies – be they summary judgment or normal action through the Disputes Tribunal or the District Court.

[36] Finally, counsel for the plaintiff contended that it was an extreme step to liquidate a successful and prosperous company, particularly over a debt where it had been paid into a solicitor's Trust Account and was, in any event, small relative to the value of the company's overall assets and undertaking.

[37] Whilst I have some sympathy for the plaintiff in these arguments, again, given my finding on the solvency question, I need make no definitive findings with respect to these additional grounds advanced by the plaintiff.

Conclusion

[38] It will be apparent from what I have outlined above that the plaintiff's application to set aside the statutory demand succeeds.

[39] An order is made setting aside the statutory demand issued by the defendant against the plaintiff for $8,672.90.

[40] As the plaintiff has been successful, it is entitled to an order for costs, which are awarded on a category 2B basis, together with disbursements as fixed by the Registrar.

Associate Judge D.I. Gendall

Delivered at _____ on 13 September 2005.

Solicitors:
A.R. Davie, Wellington for Plaintiff
Becker & Co, Wellington for Defendant