**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2013-404-426**
**[2013] NZHC 320**

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|---|---|
| UNDER | Section 241 of the Companies Act 1993 |
| IN THE MATTER OF | an application to put DTB Construction Limited into liquidation |
| BETWEEN | DTB CONSTRUCTION LIMITED<br>Applicant |
| AND | ANDREW NICHOLAS HOLDGATE<br>Respondent |

Hearing: 19 February 2013

Appearances: G M Sandelin and S F Pearson for Applicant
D J Barr and M A Powell for Respondent

Judgment: 26 February 2013

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**JUDGMENT OF PETERS J**

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This judgment was delivered by Justice Peters on 26 February 2013 at 12 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

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## Introduction

[1] The Respondent ("Mr Holdgate"), has commenced proceedings ("proceedings") seeking an order to wind up DTB Construction Limited ("DCL"). The order is sought on the basis that Mr Holdgate is a creditor of DCL and that it is just and equitable that the order sought should be made.[1]

[2] DCL now applies for orders restraining Mr Holdgate from advertising the proceedings and staying any further proceedings in the liquidation. DCL's application ("application") is made pursuant to High Court Rules, r 31.11, which reads as follows:

> **31.11 Power to stay liquidation proceedings**
>
> (1) If an application for putting a company into liquidation is made under rule 31.3, the defendant company, or, with the leave of the court, any creditor or shareholder of that company or the Registrar of Companies, may, within 5 working days after the date of the service of the statement of claim on the defendant company, apply to the court—
>
> (a) for an order restraining publication of an advertisement required by rule 31.9 or any other information relating to that statement of claim; and
>
> (b) for an order staying any further proceedings in relation to the liquidation.
>
> (2) The court must treat an application under subclause (1) as if it were an application for an interim injunction and, if it makes the order sought, it may do so on whatever terms the court thinks just.
>
> (3) The inherent jurisdiction of the court is not limited by this rule.

[3] The application is made on the grounds that there is a genuine and substantial dispute as to whether DCL is indebted to Mr Holdgate and, if so, in what sum; that DCL is solvent; and that there is a real risk of irretrievable prejudice to DCL if the application is refused. Affidavits in support of the application have been sworn by Mr Douglas Owen Taylor, a director of DCL, and Mr Brent Mark Hempel, an accountant.

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[1] Companies Act 1993, s 241(4)(d).

[4] Mr Holdgate opposes the application and has sworn an affidavit in opposition.

[5] At the conclusion of the hearing before me, I made an interim order in terms of the application. For reasons given below, however, that order will lapse at 5 pm, 27 February 2013.

**Principles to be applied**

[6] The principles by which the application falls to be determined are not in dispute and were summarised in *Canam Construction Ltd v Ormiston Hospital Investment Ltd* as follows[2]:

> a) A winding up order will not be made where there is a genuine and substantial dispute as to the existence of a debt such that it would be an abuse of the process of the court to order a winding up;
>
> b) In such circumstances, the dispute, if genuine and substantially disputed, should be resolved through action commenced in the ordinary way and not in the companies court;
>
> c) The assessment of whether there is a genuine and substantial dispute is made on the material before the court at the time and not on the hypothesis that some other material, which has not been produced might, nonetheless be available;
>
> d) The governing consideration is whether proceeding with an application savours of unfairness or undue pressure;
>
> e) The rule directs the court to deal with the application as if it were an application for an interim injunction;
>
> f) Rule 31.11 enables the court to impose terms on any order it makes; and
>
> g) Such applications are interlocutory in nature and accordingly it would be wrong to express a concluded view of the merits of the dispute.

[2] *Canam Construction Ltd v Ormiston Hospital Investment Ltd* HC Auckland CIV-2010-404-291, 10 August 2010 at [7].

**Background**

[7] DCL was engaged by 35A Veronica Street Limited ("Principal") to carry out works at 35A Veronica Street, Auckland. Mr Holdgate was subcontracted to carry out some of those works. One matter in dispute between the parties, and to which I refer below, is whether DCL or another company, DTB Operations Limited ("DOL"), engaged Mr Holdgate. The same entity holds all the shares in DCL and DOL and Mr Taylor and Angela Louise Taylor are the directors of each company.

[8] Mr Holdgate commenced work on site on 18 September 2012. He rendered three invoices:

(a) 5823 dated 28 September 2012 for $9,200 including GST, of which $500 plus GST was in respect of an earlier, unrelated job. This invoice was addressed to "DT Builder Construction Ltd".

(b) 5824 dated 5 October 2012 for $14,375 including GST, addressed to "DT Builder Constr Ltd".

(c) 5825 dated 26 October 2012 for $34,057.25 including GST, addressed to "Doug the Builder Ltd".

[9] These invoices total $57,057.25 including GST.

[10] Mr Holdgate left the site either in late October 2012 or early November 2012.

[11] DOL, not DCL, paid Mr Holdgate $15,525 on 11 October 2012 and a further $10,000 on 23 November 2012, these sums totalling $25,525. In his affidavit, Mr Taylor states that DOL's payment on 11 October 2012 was for partial payment of 5823 and 5824, and that DOL's payment on 23 November 2012 was for partial payment of 5825.[3] Mr Taylor's evidence is that DCL made partial payment because not all work required had been undertaken.

[3] Affidavit of Douglas Owen Taylor sworn 14 February 2013 at [25].

[12] Mr Holdgate's evidence is that he assumed the payments he received were from DCL but it appears from the evidence that they were from DOL.

[13] On or about 18 November 2012 Mr Holdgate posted a payment claim,[4] addressed to "Doug the Builder Construction Ltd" at "P O Box 20 Bombay Auckland 2675".[5] That claim was expressed to be in respect of work completed up to 16 November 2012 and claimed a balance of $43,603 by 17 December 2012.[6]

[14] As I have said, Mr Holdgate was subsequently paid a further $10,000 (23 November 2012). There was, however, no response (or no *further* response on Mr Holdgate's view of it) to the payment claim, whether by DCL serving a payment schedule[7] or by a further payment. Mr Holdgate's case is that the effect of those omissions was to render DCL liable to pay the amount claimed 20 working days after the date of service of the payment claim and that thereafter he, Mr Holdgate, became entitled to recover the amount claimed as a debt due to him.[8]

[15] DCL's case is that there is no such debt and that Mr Holdgate is not a creditor of DCL's. It submits that Mr Holdgate was not entitled to serve a payment claim as DCL was not a party to a "construction contract" with Mr Holdgate. DCL also submits that the payment claim was not served in accordance with the Act or at all, because DCL did not receive the document.

[16] Putting those issues to one side for the moment, on 19 December 2012 Mr Holdgate served a statutory demand ("demand") at DCL's registered office.[9] Mr Taylor accepts the demand came to his attention that day. The demand referred to Mr Holdgate's payment claim, with the relevant part reading as follows:

> **TO: [DCL]**
>
> **ANDREW NICHOLAS HOLDGATE (TRADING AS J R CONSTRUCTION)** of 23 Fairfax Avenue, Penrose, carrying on business providing construction services **DEMANDS** from you payment in the sum of **THIRTY THREE THOUSAND, SIX HUNDRED AND THREE**

[4] Construction Contracts Act 2002, s 20.
[5] Affidavit of Andrew Nicholas Holdgate sworn 15 February 2013 at [13].
[6] Affidavit of Douglas Owen Taylor sworn 14 February 2013, exhibit "F".
[7] Construction Contracts Act 2002, s 21(1).
[8] Ibid, ss 22 and 23.
[9] Companies Act 1993, s 289.

> **DOLLARS AND ZERO CENTS** ($33,603.00) (being money due and owing for demolition, drainage and excavation works at 35A Veronica Street, for which a payment claim has been issued under section 20 of the Construction Contracts Act 2002, full details whereof have been supplied to you) ...

[17] DCL had 10 working days (as defined in s 2, Companies Act 1993) from the date of service in which to apply to set aside the demand.[10] DCL did not comply with the demand nor apply to set it aside within the time available. Mr Taylor's evidence is that DCL's failure to apply resulted from (incorrect) legal advice to the effect that no response to the demand was required until after the middle of January 2013, when in fact time in which to apply to set aside expired on or about 11 January 2013. (The solicitor said to have given this advice is not acting in this proceeding.) Mr Taylor's evidence is that he did not learn the solicitor's advice was incorrect until too late.[11]

[18] Whatever the position may have been, there appears to have been no communication with Mr Holdgate or his solicitors until 29 December 2012, when Mr Taylor emailed Simpson Grierson as follows:

> Dear Sirs
>
> Re 35A Veronica Street New Lynn
>
> We have just received your notice and advise as follows:
>
> 1. The original invoice for the work the subject of your notice dated 19 December 2012 has never been received;
> 2. The amount in question is disputed as your client is aware;
> 3. Your notice is issued against the wrong company.
>
> We are happy to take this matter up directly with Mr Holdgate but will strenuously defence any attempt to liquidate DTB.

[19] Also in evidence is subsequent correspondence between the parties' solicitors which in my view adds little to the dispute.

[20] Mr Holdgate commenced his proceedings to wind up DCL on 29 January 2013. DCL has since filed a statement of defence and made this application.

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[10] Ibid, s 290(2)(a).
[11] Affidavit of Douglas Owen Taylor sworn 14 February 2013 at [8].

**Genuine and substantial dispute as to the existence of a debt such that it would be an abuse of the process of the Court to order a winding up**

[21] There is no dispute that DCL is to be treated as indebted to Mr Holdgate if Mr Holdgate was entitled to serve a payment claim and did so. It is clear that DCL would be liable under the Construction Contracts Act 2002 if the payment claim was served. Counsel for DCL submits that it was not served for the following reasons.

*No construction contract*

[22] DCL disputes that Mr Holdgate was entitled to serve a payment claim as it contends that there is no construction contract between the two parties.

[23] Mr Holdgate disputes this submission and relies on an email from Mr Taylor to him dated 5 September 2012,[12] setting out the prices that he, Mr Taylor, had allowed for Mr Holdgate's work and which email was signed off, electronically, "Doug Taylor DTB Construction Limited", that is DCL.

[24] In response, Mr Taylor's evidence is that the affairs of DCL and DOL are structured so that DCL is the company which contracts with the principal on any site and DOL the company which contracts with subcontractors such as Mr Holdgate. Mr Taylor's evidence is that he told Mr Holdgate several times that Mr Holdgate had been engaged by DOL and that he should address his invoices accordingly. There is also the fact that DOL paid Mr Holdgate. Mr Taylor also submits that it should have been apparent to Mr Holdgate that he had contracted with DOL because of the DOL uniforms worn by others on site.

[25] I cannot resolve this dispute. However, the email from Mr Taylor referred to above, and signed off as I have said, supports Mr Holdgate's case that he was engaged by DCL. The fact that Mr Holdgate was paid by a different company and the uniforms worn on site does not alter that fact.

*Service*

[12] Affidavit of Andrew Nicholas Holdgate sworn 15 February 2013, exhibit "A".

[26] DCL also takes issue with service of the payment claim.

[27] Mr Holdgate's evidence is that he posted the payment claim to DCL and that constitutes good service under s 80(c) of the Construction Contracts Act 2002 ("Act") which reads as follows:

> **80 Service of notices**
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> Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if—
>
> (a) the notice or document is delivered to that person; or
>
> (b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
>
> (c) the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or
>
> (d) the notice or document is sent in the prescribed manner (if any).

[28] DCL says that it did not receive the payment claim and that receipt is an essential element of service. Mr Holdgate disputes that DCL did not receive the claim. He refers me to DOL's payment of $10,000 shortly after DCL could have been expected to receive the payment claim in the ordinary course of post. He also refers me to the following exchange of emails in January 2012, in which Mr Holdgate's solicitors said:

> ...
>
> No payment schedule has been issued. Therefore the outstanding sum is recoverable as a debt due regardless of any underlying dispute; and

To which Mr Taylor responded:

> No payment schedule could be made as we are still awaiting invoices for the work that was rectified.

[29] For my part, I do not place any reliance on this exchange because it is possible that in fact Mr Taylor was referring to the demand. On the principal point, however, I agree with Bell AJ in *Donovan Drainage and Earthworking Ltd v*

*Kaipara District Council*[13] that service is effected under s 80(c) when the document is posted, not upon receipt. A lack of receipt may be evidence of a lack of service but at present I proceed on the basis that Mr Holdgate's evidence that he posted the document is correct.

[30] DCL further submits that s 80(c) requires posting to the place of business or residence and that a post office box is neither. For reasons given by Fogarty J in *Bills v Arnold Jensen (2005) Ltd*,[14] I consider that posting to a post office box is sufficient service under s 80(c) at least in the circumstances of this case where there is no suggestion that Mr Holdgate was told that he should post to a different address. Mr Holdgate also referred me to two invoices from DCL to the Principal dated 8 and 29 October 2012 seeking progress payments (both of those invoices state on their face that they are also payment claims under the Act).[15] The only address that DCL has included for itself on those invoices is its post office box. At the very least that evidence suggests that DCL was using its post office box as its postal address.

[31] The next issue which arises as to service is that Mr Holdgate may have written the wrong postal code (2675 instead of some other number) on the envelope in which the payment claim was posted. I do not have a copy of the envelope but the address shown on the payment claim itself included the incorrect code and so it may well have been shown on the envelope. I should add that 2675 was the correct code at some time and in fact that code appears on the two invoices from DCL to the Principal (Mr Taylor's evidence is that he informed the Principal separately that the post code on the invoices was incorrect).[16] Regardless, there is no evidence that the inclusion of an incorrect post code might have affected or prevented delivery of the payment claim to DCL's post office box. On the evidence before me I am not willing to accept that the payment claim was not served because the incorrect post code may have been shown on the envelope.

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[13] *Donovan Drainage and Earthworking Ltd v Kaipara District Council* HC Whangarei CIV-2010-488-319, 18 August 2010 at [25].
[14] *Bills v Arnold Jensen (2005) Ltd* HC Christchurch CIV-2008-409-1349, 10 October 2008 at [26]-[28].
[15] Affidavit of Andrew Nicholas Holdgate sworn 15 February 2013, exhibits "B" and "C".
[16] Ibid.

[32] The next issue which arises concerns DCL's allegation that Mr Holdgate's work was unsatisfactory. Mr Holdgate disputes this allegation but I accept his counsel's submission that s 79 of the Act makes it unnecessary for me to enquire further. Section 79 provides:

> **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.

[33] I agree with the view taken in *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd*[17] and consider that Mr Holdgate's application to wind up is a proceeding "for the recovery of a debt under section 23" for the purposes of s 79. In *Volcanic* Randerson J said as follows:

> [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 s 79 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 set aside a statutory demand is a "proceeding" under the High Court Rules. It is brought as an originating application under r 458D(1)(a)(vi) and falls within the definition of a proceeding under r 3. An application to wind up a company is also a proceeding under the High Court Rules (rr 700A 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 s 79. Indeed, it was not submitted otherwise.
>
> [21] In my view the meaning of s 79 is plain. In any proceedings for the recovery of a debt under the identified sections, the Court is forbidden from giving effect to any counterclaim, set-off or cross demand raised by a party to the proceedings except a set-off of a liquidated amount and then, only if judgment has been entered for that amount or there is no dispute in fact between the parties in relation to the claim for that amount.
>
> [22] In summary, Volcanic's claim to a set-off against the amount of the statutory demand cannot have any effect unless:
>
> a) The amount of the set-off is a liquidated amount **and**;

[17] *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 18 PRNZ 97; (2005) 11 TCLR 256; (2005) 2 NZCCLR 370 (HC).

b) Judgment has been entered for that amount **or** there is not in fact any dispute in relation to the claim for that amount.

[34] For reasons given above, I am not satisfied that there is a genuine and substantial dispute as to the existence of the debt claimed by Mr Holdgate.

[35] Having reached the above conclusion, I proceed with this application as if a debt is due.

**Would proceeding with the application to wind up savour of unfairness or undue pressure?**

[36] Counsel for DCL raises a number of matters for consideration.

[37] The first is that DCL is solvent and that it has paid the sum claimed into Minter Ellison Rudd Watts' ("MERW") trust account.

[38] Mr Hempel has given evidence that DCL is solvent. Although this evidence is given in reliance on unaudited management accounts, I am willing to accept for present purposes that the company is solvent. With respect, however, I do not consider that to be particularly relevant to determination of DCL's application to stay. There is no dispute that one purpose of the Act is to facilitate prompt payment of sums claimed in the construction industry and that, to that end, the Act adopts a "pay now, argue later" philosophy.[18] That DCL is solvent cannot justify the risk of thwarting the purpose of the Act, particularly given that the proceedings are based on the "just and equitable" ground.

[39] The fact that the funds have been paid into MERW's trust account will be some comfort to Mr Holdgate but it does not give him the use of funds now. There is no evidence before me that Mr Holdgate is unlikely to be able to repay the funds if he should be ordered to do so at a later time.

[40] Counsel for DCL referred me to *Laywood v Holmes Construction Wellington Ltd* in which the Court said the case before it was not one "where a creditor has

[18] *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 (CA) at [52].

sought to use bankruptcy or liquidation proceedings to recover a small amount from a person or company which can plainly afford to pay it".[19]

[41] For the reasons given above, however, and on the evidence before me I am not satisfied that there is a genuine dispute. Nor am I satisfied that the debt claimed is a "small amount". The debt which Mr Holdgate contends he is owed exceeds the amount for which DCL invoiced the Principal in one of the invoices to which I have referred. If the debt is small by DCL's standards, that is all the more reason to try to resolve the dispute in the context of the proceedings that Mr Holdgate has brought, rather than requiring him to issue yet more proceedings for, say, summary judgment.

[42] It is of concern that DCL may not have received the payment claim. I would be more concerned on that score had DCL raised the matter of non receipt on 19 December 2012 or promptly thereafter, that is before Christmas. But it did not. It was not until 29 December 2012, by email to Mr Holdgate's solicitors, that DCL referred to a lack of receipt of "the original invoice for the work the subject of your notice".[20]

[43] There is no contemporaneous evidence before me that DCL, or DOL for that matter, advised Mr Holdgate that his work was unsatisfactory or gave him written advice as to why his invoices were not paid in full. DCL's own invoices to the Principal seek payment immediately and in any event within seven days thereafter. DCL's own requirements of prompt payment confirm what is well known in any event, namely that cash-flow is critical.

[44] I am also not satisfied that there will be irretrievable prejudice to DCL if the stay is not granted. Mr Holdgate's solicitors indicated that it would be open to DCL to pay Mr Holdgate on terms that allowed DCL to seek reimbursement if it can establish that it is not liable at all or for the entire sum. I accept that DCL's position may be prejudiced if the proceedings are advertised but that is a consequence of the advertising requirements.

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[19] Ibid, at [62].
[20] Affidavit of Douglas Owen Taylor sworn 14 February 2013, exhibit "D".

[45] For the reasons above, I am not satisfied that there is a genuine and substantial dispute as to the existence of the debt and nor am I satisfied that the proceedings to wind up constitute an abuse of process. It will be for Mr Holdgate to persuade the Court that it should make the order to wind up that he seeks. On the evidence before me, however, I am not persuaded to stay his proceedings or restrain advertising so as to prevent him having that opportunity. I decline this application accordingly.

[46] Mr Holdgate having succeeded, he is entitled to costs. I trust the parties can agree on the matter of costs but they may submit brief memoranda if they are unable to do so.

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M Peters J