IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000568
[2015] NZHC 2490

UNDER	the Companies Act 1993
IN THE MATTER	of an application for putting EVOLVING PROJECTS LIMITED into liquidation
BETWEEN	HALEY CONSTRUCTION LIMITED Plaintiff/Respondent
AND	EVOLVING PROJECTS LIMITED Defendant/Applicant

Hearing: 28 September 2015

Appearances: K McMullen and S Cowan for Applicant (Defendant)
T J Twomey for Respondent (Plaintiff)

Judgment: 12 October 2015

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
AS TO STAY OF LIQUIDATION PROCEEDINGS

Introduction

[1] Evolving Projects Limited (Evolving) seeks a stay of a liquidation proceeding brought by Haley Construction Limited (Haley).

[2] Evolving won a fixed-price contract to build a multi-premises commercial building in Ilam, Christchurch. Haley was Evolving's carpentry subcontractor. The Construction Contracts Act 2002 applied to the subcontract.

[3] Haley undertook its work in relation to what the parties described as stages 1 and 2 pursuant to fixed-sum subcontracts documented in a Subcontract Agreement. Haley's payment claims in relation to stages 1 and 2 were met. The parties did not agree upon a fixed sum for stage 3. Rather, they agreed upon varied terms which

provided for agreed hourly rates (to be paid fortnightly as with the earlier stages) and timesheets to be signed daily by Evolving (through its director, Kevin Phillips).

[4] In June 2015, Haley obtained summary judgment in the District Court for $61,623.34 on the basis of unmet payment claims.[1] Evolving has not appealed that judgment.

[5] Haley then issued a statutory demand under s 289 Companies Act 1993 for the judgment sum and accrued interest. Evolving neither satisfied the demand nor applied to set it aside.

Application for stay

[6] Pursuant to r 31.11 High Court Rules, Evolving seeks both an order staying further proceedings in relation to its liquidation and an order restraining publication of advertising.

[7] Upon filing, Evolving's application was treated urgently.[2] The Court made an interim order restraining advertising pending this hearing.[3]

The issue

[8] The issue is whether, by reason of the counterclaim which Haley filed in the District Court in March 2015 for $199,070.78 (plus GST), the Court should stay the liquidation proceeding.

The stay jurisdiction

[9] In this case the Court is not dealing with an application for a stay pending the hearing of an appeal.

[10] The jurisdiction invoked arises both expressly under r 31.11 High Court Rules and as a matter of the Court's inherent jurisdiction.[4]

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1 *Haley Construction Ltd v Evolving Projects Ltd* [2015] NZDC 11641.
2 As required by High Court Rules, r 31.11(2).
3 *Haley Construction Ltd v Evolving Projects Ltd* [2015] NZHC 2279.

[11] The principles applicable in this jurisdiction are well settled by a number of authorities and have been repeatedly applied. Counsel accepted that the authorities identify the following principles:[5]

> (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 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.
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> (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.

The regime of the Construction Contracts Act

The provisions of s 79 of the Construction Contracts Act

[12] Section 79 of the Construction Contracts Act (CC Act) provides:

> **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.

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4 The inherent jurisdiction is expressly preserved by r 31.11(3).

5 As set out in *McGechan on Procedure* (online looseleaf ed, Thompson Reuters) at [HR31.11.02]; see also the authorities there referred to.

[13] Section 79 of the CC Act applies in this case because Evolving does not have a set-off for a liquidated amount. Furthermore, Evolving is unable to rely on a judgment already obtained or point to the absence of factual disputes between the parties in relation to such a claim.

The purpose of s 79 of the CC Act

[14] Section 3 of the CC Act identifies the Act's purposes:

> **Purpose**
>
> The purpose of this Act is to reform the law relating to construction contracts and, in particular, –
>
> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.

[15] The provisions of the Act for payment of contractors manifest a "pay now, argue later" philosophy. Given the relevance of that philosophy to the issues before this Court, I find it appropriate to set out a little legislative background and judicial explanation of the regime. As Judge MacAskill has already done that in his judgment in June 2015, I gratefully adopt that portion of his judgment:[6]

> [3] The Construction Contracts Act 2002 was intended to speed up cashflow in the construction industry. The Law Commission Paper that led to the legislation, *Protecting Construction Contractors,* stated that the Act was "… to have as its purpose the ensuring of prompt cashflow to contractors …". A little earlier in the report, it was put more graphically:
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> > The basic intention is that instead of the cashflow being held up for weeks, months and years, pending a final solution, a decision, described as being 'quick and dirty' will be given to resolve the cashflow situation, leaving a final determination of financial rights and obligations to be arrived at later.
>
> [4] In *George Developments Ltd v Canam Construction Ltd*[7] the Court of Appeal said that an analysis of a construction contract must be undertaken with the purpose of the Act in mind:

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6 *Haley Construction Ltd v Evolving Projects Ltd*, above n 1, at [29] – [35] (select citations omitted).

7 *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA) at [41].

> 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) Ltd v Modern Engineering (Bristol) Ltd)*[8] said: "There must be 'cashflow' in the building trade. It is the very lifeblood of the enterprise".

[5] In *Marsden Villas Ltd v Wooding Construction Ltd*[9] Asher J said:

> The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of that procedure, and the quick resolution of disputes. The processes that it sets up are designed to sidestep immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cashflow.

[6] The Court of Appeal endorsed those comments in *SOL Trustees Ltd v Giles Civil Ltd*.[10]

[16] The considerations which gave rise to that philosophy were explained by Harrison J in *Willis Trust Co Ltd v Green*; adopted by the Court of Appeal in *Rees v Firth*:[11]

> [The CCA] was enacted following a series of high profile financial collapses in the construction industry in the 1980s and 1990s, causing substantial and widespread losses. ... [It] was designed to protect a contractor through a mechanism for ensuring the benefit of cashflow for work done on a project, thereby transferring financial risk to the developer. The scheme of the Act is to provide interim or provisional relief while the parties work through other, more formal, dispute resolution procedures.

Application of the CC Act in the District Court judgment

[17] In the District Court, Judge MacAskill summarised the "pay now, argue later" scheme as I have identified, and then referred to the process for payment disputes set out in ss 20 – 23 of the Act.

[18] His Honour rejected as unarguable Evolving's grounds of defence as to:

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8 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd)* [1974] AC 689,716 (HL) per Lord Diplock.

9 *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC) at [17].

10 SOL Trustees Ltd v Giles Civil Ltd [2014] NZCA 539 at [23] to [25].

11 *Willis Trust Co Ltd v Green* HC Auckland CIV-2006-404-000809, 25 May 2006 at [20], cited in *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [25].

(1) invalid payment claims;[12]

(2) irregular payment claims;[13]

(3) valid payment schedules in the form of email correspondence;[14] and

(4) the raising of a dispute prior to payment claims.[15]

[19] Finally, Judge MacAskill turned to Evolving's alternative ground of defence (now pursued as a basis of Evolving's stay application) that Evolving has an arguable counterclaim on the basis of overpayment.

[20] Evolving's counterclaim was summarised by Judge MacAskill in the following way:

> [27] The defendant counterclaims against the plaintiff for an alleged overpayment of $199,010.78 (plus GST), plus interest and costs. The counterclaim is based on an independent quantity surveyor's report that calculates the reasonable time for completion of the work that the plaintiff was contracted to complete. The defendant alleges that Haley Construction provided inexperienced and largely unsupervised staff and that this resulted in slow and inaccurate work and a significant amount of rework. Mr Phillips does not deny that Haley Construction worked the hours charged but disputes that the hours were reasonable, acceptable or necessary. Mr Phillips says that when he signed off the timesheets, he was not accepting the reasonableness or necessity of the time recorded.

[21] Judge MacAskill referred to s 79 of the CC Act before holding (inevitably) that Evolving's counterclaim did not fall within the exceptions to s 79 and therefore had to be pursued apart from Haley's application for summary judgment.

[22] The judgment of the District Court on these matters is a final judgment.[16] It has not been appealed and the time for appeal has passed. Issue estoppel prevents Evolving from challenging the District Court's material findings.

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12 At [29] – [35].
13 At [36] – [40].
14 At [41] – [57].
15 At [58] – [60].
16 The use of 'final judgment' denotes the finality of the judgment *itself*. It does not contain any suggestion that all issues of liability under the Subcontract Agreement have been determined. They have not.

Subsequent progress of Evolving's issues

[23] Evolving has sought to have its counterclaim brought on for hearing in the District Court.

[24] Evolving has also filed in the District Court an application for an order staying execution of the District Court judgment pending resolution of its counterclaim.

[25] It has transpired that Evolving's stay application cannot be heard before 15 December 2015 which at this point is a backup fixture date only.

[26] There have been discussions between counsel as to the possibility of a judicial settlement conference in the District Court or the adoption of the dispute procedures under the Subcontract Agreement. Arrangements between the parties in that regard would be sensible, but the parties in the meantime are entitled to a judgment on the application before this Court.

Does r 31.11 (High Court Rules) override s 79 of the CC Act

[27] It has been determined by the Court of Appeal in *Laywood v Holmes Construction Wellington Ltd* that a Court is prohibited, when exercising its stay jurisdiction under r 31.11 High Court Rules, from giving effect to any counterclaim, set-off or cross-demand except in the limited circumstances identified in s 79 itself.[17] The Court endorsed the conclusions of Randerson J in *Volcanic Investments Limited v Dempsey & Wood Civil Contractors Limited.*[18]

[28] In *Volcanic Investments,* it was a company which applied to have a statutory demand set aside under s 290 Companies Act 1993. In *Laywood v Holmes Construction,* it was an individual who applied to have a bankruptcy notice set aside.

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[17] *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243. Leave to appeal to the Supreme Court was declined by that Court which found the Court of Appeal judgment compelling and considered that the proposed appeal had no prospect of success on any of the grounds advanced – [2009] NZSC 44, [2009] 2 NZLR 259.

[18] *Volcanic Investments Limited v Dempsey & Wood Civil Contractors Limited* (2005) 2 NZCCLR 370.

[29] In *Laywood v Holmes Construction,* Arnold J (delivering the judgment of the Court of Appeal) expressly limited the ambit of the Court's conclusion. In explaining the Court's preference for the conclusion in *Volcanic Investments,* Arnold J noted:

> [61] We emphasise at this point the distinction between an application to set aside a bankruptcy notice or a statutory demand on the one hand and an adjudication of bankruptcy or order to wind up a company on the other. The question we are asked to resolve concerns the former. In that context, we prefer the view expressed by Randerson J in *Volcanic Investments*. ...
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> ...
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> [65] We emphasise again that we were asked to consider only the first of the two stages referred to at [61] above. It may be that different considerations arise at the point that the court must determine whether it will exercise its discretion to adjudicate a judgment debtor bankrupt or order the liquidation of a company (see *AMC Construction Limited v Frews Construction Limited* [2008] NZCA 389 at [7]). But that is a point on which we express no opinion.

[30] The relevant issue raised in this case (as to the relationship between the stay jurisdiction relating to a liquidation proceeding and s 79 CC Act) is at the second stage of proceedings. The Court of Appeal chose to "express no opinion" on the law applying to the second stage although the Court observed that different considerations might arise at that point.

[31] Both before and since the Court of Appeal judgment in *Laywood v Holmes Construction* there have been decisions of this Court in which the "second stage" has been involved. It has been held that a liquidation application is a proceeding "for the recovery of a debt under s 23" and the Court's stay jurisdiction (under r 31.11 High Court Rules or its predecessor r 700K(1)) is excluded because the Court is not permitted to give effect to a counterclaim, set-off or cross-demand.[19] Counsel did not identify or make submissions in relation to these authorities.

[32] I am mindful of the caution identified by the Court of Appeal in not making obiter observations in relation to the second stage of liquidation and bankruptcy proceedings given that other considerations may arise at that point. As I am

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[19] See, for instance, *Kizer Builders Limited v OEC Construction Limited* HC Wellington, CIV-2006-485-2287, 16 November 2006 at [14] – [17] per Associate Judge Gendall; *DTB Construction Limited v Holdgate* [2013] NZHC 320 at [32] – [34] per Peters J.

satisfied, for reasons I will come to, that the stay application must be dismissed on its merits, I will not base this judgment partially on a conclusion as to the stay jurisdiction. I note but one point in relation to an adjudication application which might weigh against applying the (*Laywood v Holmes Construction*) first stage finding to the second stage. In *Pioneer Insurance Company Limited v White Heron Motor Lodge Limited,* the Court of Appeal described the nature of a statutory demand:[20]

> A statutory demand is issued to obtain payment for a debt. If payment is not made, the demand fulfils a secondary purpose, namely to provide a basis upon which the debtor's inability to pay its debts as they fall due may be proved, if liquidation proceedings were brought.

[33] This passage in *Pioneer Insurance* indicates, at the least, that there is room for argument against the proposition that the stay application has been trumped by s 79 of the CC Act. The argument is that, when the second stage is reached, the usual primary purpose of the statutory demand (debt collection) falls away with the focus now on liquidation (or bankruptcy). The argument would thus run that the liquidation proceeding is not a proceeding for the recovery of a debt.

Consideration of a stay under r 31.11 High Court Rules

The basis of consideration

[34] I consider the exercise of the Court's jurisdiction in relation to a stay on an assumption (not a finding) that the jurisdiction exists.

Evolving's grounds of application

[35] Ms McMullen gathered her submissions under four headings:

(a) Evolving's counterclaim.

(b) Will a counterclaim be thwarted or rendered nugatory if a stay is not granted.

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[20] *Pioneer Insurance Company Limited v White Heron Motor Lodge Limited* [2008] NZCA 450, [2009] NZCCLR 14, at [24].

(c) The lack of impact on third parties.

(d) The overall balance of convenience.

[36] I will follow those headings but will include additional matters which fall for consideration under the principles I have identified (at [11] above).

Evolving's counterclaim

[37] Evolving's counterclaim is central to this application.

[38] Evolving's counterclaim is said to arise in the way I quoted from Judge MacAskill's judgment (above at [20]). In short, Evolving asserts that while Haley's workers worked the hours charged (now the subject of the District Court judgment), the work was slow and inaccurate and required significant rework.

[39] I have not been provided with a copy of Evolving's counterclaim as filed in the District Court. There is, however, through the terms of the Subcontract Agreement, scope for allegations of breach of contractual duties in relation to requirements such as "reasonable diligence".

[40] Evolving's evidence as to the conduct of Haley's workers is provided by its director, Kevin Phillips. He deposes that as stage 3 of the project progressed it became obvious to him that progress was slow due to the inexperience of Haley's workers. He observed the ratio of experienced to inexperienced staff at most times as one to four, often with only one site manager overseeing a number of inexperienced apprentices, hammer-hands and labourers. He refers to discussions with Haley's site foreman and says he made requests for more experienced staff on site. He refers to having had to work many additional hours on site himself because of Haley's lack of supervision and support of its staff, and the need for rework. He documented his concerns in an email to Haley's director, Simon Haley, on 2 July 2014. The email identified the concerns which Mr Phillips records in his affidavit. In the email he requested Mr Haley's comments, asking him to:

> … let me know what you are prepared to offer in your next claim in 2 weeks time which should be the final claim.

[41] The issues raised by Mr Phillips were not resolved. Evolving instead issued what the District Court has found to have been valid payment claims. Evolving now has judgment on those claims. Through the counterclaim Evolving seeks to recover what it says it has overpaid Haley. The alleged overpayments relate to stage 3 only.

[42] Mr Phillips explains his concerns in relation to the hours charged by Haley through a table in his affidavit, which I reproduce:

Stage	Tender Amount	Approved Variations	Total hours Recoverable From Creyke	Actual Labour Hours	Difference /Loss to Evolving
1	771.8	76.5	848.3	946.86	98.56
2	656	0	656	946.64	290.64
3	1,798.2	370.5	2,168.70	4,969.5	2,800.8

(Creyke was Evolving's principal).

[43] I note again that Evolving was working for its principal on a fixed-price contract. Mr Phillips refers to the table in this way:

> It can be seen that the first two stages were completed largely in accordance with the tendered hours plus approved variations, but on stage 3 there was a significant increase in irrecoverable hours.

[44] Evolving also supports its application by an affidavit of Kelli Tammett, a quantity surveyor, provided when Evolving filed its District Court proceeding. She qualifies as an expert. She deposes that she was instructed to prepare a carpentry labour only take-off report for the work done on the Ilam Road project. She exhibits what she describes as "a report on the carpentry labour only work" which she prepared in March 2015, which comprises four pages of work items and attributed hours. She estimates the reasonable and necessary hours of work required for the project as:

Stage 1	611
Stage 2	665
Stage 3	1,782
	3,057

[45] Ms Tammett deposes that the hours spent and charged by Haley were "far in excess of what [she] would consider necessary or reasonable, particularly for stage 3".

[46] Mr Haley replied to Evolving's evidence, including that of Ms Tammett. Mr Haley deposed:

> The labour only contract meant that the defendant (Mr Phillips) became responsible for the management of the plaintiff's personnel for stage 3 and coordinating the work i.e. supervising the building work, hiring and liaising with subcontractors, supply of materials and meeting building code requirements. Mr Phillips was the project manager for stage 3. He signed off the plaintiff's weekly timesheets and when payment claims were served on Evolving, the defendant (Mr Phillips) ignored the claims for payment. His response was to pay $35,000.00 on account of a payment claim and when the plaintiff's outstanding debts were referred to Undercontrol Credit Management Limited, Mr Phillips failed to attend a meeting on 19 September 2014 to discuss the debt recovery. Although Mr Phillips had raised concerns (which at the time and subsequently I steadfastly denied as I believed that it was a "set up" to avoid payment), Evolving did not file any formal proceedings against the plaintiff which I would have expected if a claim of $200,000.00 had any substance. The counterclaim did not arise until the defendant was required to file a statement of defence to the plaintiff's application for summary judgment; the defendant's counterclaim did not emerge until 17 March 2015. As I have stated, I do not believe that the defendant has any factual basis for pursuing a counterclaim against the plaintiff.
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> I do not accept the retrospective assessment of labour rates set out in the Red Quantity Surveying report. Ms Tammett's report refers to work carried out for stages 1 and 2 which have already been costed, accepted and paid by the defendant. At paragraphs 10 and 12 of his affidavit, Mr Phillips deposes that stage 1 and stage 2 works were completed according to the subcontracting agreement without incident. My QS advice is that some of the labour constances in the Red QS breakdown are one half of what they should be. The plaintiff will provide rebuttal evidence of the Red Quantity Surveying assessment.

Discussion – counterclaim

[47] I assume (but only for the purpose of this discussion) that the Court has jurisdiction to stay this proceeding notwithstanding that it relates to a construction contract debt for which Haley has judgment. The "pay now, argue later" philosophy of the CC Act still looms over Evolving's stay application and must be accorded substantial weight. Haley performed its work in mid-2014. The last of the payment claims for which it has judgment was rendered more than a year ago. In the meantime, Evolving has pursued payment claim arguments and has failed in those arguments. At the same time it pursued its counterclaim argument and failed in that. These were consequences of Evolving's failures to deal with matters in terms of the CC Act.

[48] In considering the possible exercise of its discretion to order a stay of the liquidation proceeding the Court must accord weight to the fact that Haley has taken the appropriate steps under the CC Act while Evolving has not.

[49] I have regard also to the manner in which Evolving has raised and subsequently pursued its counterclaim. In the first instance, Mr Phillips, through his July 2014 email, raised it essentially as a negotiation item.[21] When Haley issued its payment claims and insisted upon full payment, Evolving did not raise issues in response either through payment schedules or through the disputes procedures available under the Subcontract Agreement. Somewhat jarringly, Ms McMullen, in the course of her submissions, levelled a degree of criticism at Haley for not now agreeing to engage in the disputes procedures under the CC Act, a course which was open to Evolving more than a year ago.

[50] I do not disregard the fact that Evolving has tried to achieve progress on its counterclaim in the District Court in recent months but faces significant delay in that regard. Against the earlier history of this matter, I do not place great weight on the delay which Evolving now faces. It had opportunities to progress its issues at a much earlier point.

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[21] Above at [40].

[51] In turning to the substance of Evolving's counterclaim, the Court can have only an impression of the merits. I recognise that Evolving has adduced evidence from a person with expertise in quantity surveying in order to support the sum sought through the counterclaim. As Ms Tammett's affidavit indicates, her exercise involved a take-off report based on architectural drawings, specifications, engineering drawings and engineering specifications only. In reaching her conclusion as to what were reasonable and necessary hours of work she did not have access to information as to how the project progressed on the ground.

[52] Ms Tammett apparently did not have regard to the hours which Mr Phillips says he took into account when settling his fixed-price contract with his principal. It is appropriate that she did not as there is no evidence as to the reliability of Mr Phillips' own allowances. Yet the difficulty of an estimate "on the papers" is illustrated by the differences in the hourly totals arrived at by Ms Tammett and those used for pricing purposes by Mr Phillips. For instance the 848 hours allowed by Mr Phillips exceed by 39% the 611 hours calculated by Ms Tammett. This may serve to illustrate a difficulty in accurate assessment through a take-off exercise. That said, the figures assessed by Ms Tammett provide at least a foundation for a significant sum as representing the loss to be claimed by Evolving on its counterclaim.

[53] At the trial of the counterclaim Evolving must face significant litigation risk. The risk will attach particularly to Mr Phillips' credibility in relation to his involvement with the project, and his daily supervision and knowledge of Haley's work. As I have quoted it,[22] Mr Haley's evidence identifies conduct on Mr Phillips' part from 2004 which does not fit neatly with the extent and seriousness of concerns which a $200,000 claim suggests. When Mr Phillips filed his affidavit in support of the present application, he chose to refer to Mr Haley's District Court affidavit in relation to some of its content but not in relation to the passages I have quoted in which Mr Haley attacks the bona fides of the counterclaim. Those passages remain unanswered in the evidence.

[54] In summary, Evolving may have a basis for counterclaim of some amount. But the claim cannot be dismissed as being without any prospect of success. The

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[22] Above at [46].

fairest assessment, on general impression, is that it is a counterclaim whose prospects of success for any substantial sum are far from certain.

[55] In the context of this application and against the background of the philosophy of the CC Act, Evolving is not entitled to have anything other than modest weight attached to its desire to pursue its counterclaim.

Will the counterclaim be thwarted or rendered nugatory if a stay is not granted?

[56] Ms McMullen submitted that should the Court refuse to grant a stay and should liquidation ensue, Evolving's counterclaim will be rendered nugatory.

[57] Ms McMullen places reliance upon nugatory outcomes seemingly because of their consideration as a factor in determining whether to grant a stay of judgment or execution pending appeal.[23] The context of this case is well removed from the appeal setting in which the correctness of the underlying judgment or liability is impugned. In this case the applicant does not seek to impugn the District Court judgment. The concept of preserving an applicant's position so that an appeal can be effectively pursued does not arise.

[58] To the extent that the applicant is concerned that its right to counterclaim may be rendered nugatory, the Court can attach little weight to that concern given the "pay now, argue later" philosophy which Parliament built into the structure of the CC Act, particularly through s 79 with its express provisions in relation to counterclaims. I therefore examine only briefly the particular financial concerns raised by Mr Phillips.

[59] Mr Phillips produced what he referred to as "Evolving's latest financial statements". The document attached was in fact a management report headed "Balance Sheet" showing assets and liabilities over the four financial years 31 March

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[23] Ms McMullen referred to my judgment in *Sol Trustees Ltd v Giles Civil Ltd* [2014] NZHC 2008, in which the applicant sought a stay of proceedings pending appeal (under r 20.10 High Court Rules). I granted a stay of the earlier judgment in *Sol Trustees Ltd v Giles Civil Ltd* [2014] NZHC 1813, partly because Sol's appeal rights were likely to be rendered nugatory if a stay was not ordered. This was notwithstanding that the stay related to enforcement of a judgment declining to set aside statutory demands issued pursuant to liability under the payment claim regime under the CC Act.

2013 to 31 March 2016 (the figures for the last year being clearly a projection given that the year is only half complete).

[60] Mr Phillips had deposed in his District Court affidavit that Evolving does not have sufficient funds to prosecute its counterclaim if it has to pay the judgment sum owing to Haley. In this Court, Mr Phillips (having attached the balance sheet document) stated, by reference to it, that Evolving has assets in excess of liabilities of $252,377.82 but limited cash reserves.

[61] Mr Phillips chose not to produce a statement of financial performance which would have shown precisely how Evolving is trading. To the extent that Mr Phillips says that Evolving has limited cash reserves I am not satisfied that the balance sheet document on which he relies establishes a difficulty either in paying to Haley the judgment debt or, indeed, in funding future litigation. The document produced does not provide a proper evidential foundation for the conclusion Mr Phillips invites. A single illustration will suffice. The balance sheet document indicates that Mr and Mrs Phillips owed Evolving on account of drawings $44,839.57 as at 31 March 2014. By March 2015 the debt for drawings had risen to $430,268.76. That debt appears to be offset to some extent by other items (there is a reference to Mr and Mrs Phillips having introduced funds by March 2015 of $238,430.96). But the balance sheet document still indicates both that the company has been significantly funding Mr and Mrs Phillips personally and would be able to recover from them more than enough to discharge the judgment debt to Haley and to fund other litigation.

[62] Even were it appropriate for the Court to attach significant weight to the prospect that the counterclaim will be rendered nugatory (which it is not), the evidence relied upon by Evolving does not support the underlying factual premise.

Effect on other parties

[63] Ms McMullen accepted, particularly in the context of liquidation proceedings, that the Court should have regard to whether a stay of the proceeding will affect other parties. Ms McMullen stated from the bar that she understands that the only creditor with an interest in Evolving's liquidation is Haley itself. Mr Twomey did not suggest otherwise.

[64] In these circumstances I do not find that any particular interest of a third party needs to be taken into account.

Abuse of process

[65] Although Ms McMullen did not address detailed submissions to the point, in its application Evolving asserted that Haley is using the liquidation proceeding as a debt collection measure and/or to exert undue pressure on the defendant pending the resolution of the counterclaim.

[66] Nothing in what Haley has done has involved an abuse of the process of this Court. Haley can point to Court of Appeal authority for the proposition that a statutory demand may be used for debt collection purposes.[24] Once Evolving elected not to pursue the setting aside of the statutory demand, Haley was fully justified in filing a liquidation application.

[67] The appropriateness of a liquidation application is further supported in this case by the incomplete financial information provided by Evolving. While Mr Phillips deposes that Evolving's assets exceed its liabilities by $252,377.82, the balance sheet document casts doubt on that conclusion. For instance the largest of Evolving's assets includes the debt owed by Mr and Mrs Phillips for drawings. There is no evidence as to the timeframe within which Mr and Mrs Phillips can repay that debt, assuming they can. Another asset listed is "work in progress" which is identified as precisely the same sum ($184,688.73) for each of the years ending 31 March 2014, 31 March 2015 and 31 March 2016. There is no evidence as to the recoverability of that figure. There is, accordingly, no compelling evidence that Evolving has balance sheet solvency.

[68] Mr Phillips did not adduce evidence in relation to cashflow solvency. He did not produce a statement of financial performance. Mr Haley's evidence, as I have quoted it, included his statement that Mr Phillips ignored the claims for payment in relation to stage 3 of the project.[25] Such conduct points to the possibility that at least

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[24] See *Pioneer Insurance Company Limited v White Heron Motor Lodge Limited* above n 20, for the proposition that a statutory demand may be used for debt collection purposes

[25] Above at [46].

in that period a reason for non-payment may have been that Evolving was unable to meet its debts as they fell due.

[69] Rather than supporting a conclusion that Haley's liquidation application is abusive, the financial evidence relating to Evolving suggests that the presumption of inability to meet debts (which arises through Evolving's failure to meet the statutory demand) might on detailed analysis be supported by the financial facts. The final conclusion in that regard is for another day but the current state of information falls well short of rebutting the presumption of insolvency.

The overall balance of convenience

[70] As the authorities indicate, the onus to establish a case for staying a liquidation proceeding is on the applicant.[26] It is usually necessary that the applicant demonstrate something more than the balance of convenience considerations considered on an interim injunction application.[27]

[71] Ms McMullen emphasises that Evolving's legal status is at risk through the liquidation proceeding. That is, of course, inherent in a company's liquidation. Haley has the right to pursue its liquidation application because Evolving has not paid the debt which has been adjudged to be owing. Mr Phillips' evidence indicates that Mr Phillips prefers to use Evolving's funds to fund the counterclaim (a significant expenditure) rather than to meet the District Court judgment. The likelihood must be that if Mr Phillips chose to put Evolving's funds towards meeting the debt ($63,606.86 at the time of statutory demand) he would be able to do so. I do not find there to be significant (let alone clear and persuasive) grounds for a stay of Haley's liquidation application.

Costs

[72] Costs must follow the event. My preliminary view is that Evolving should pay increased costs pursuant to rr 14.6(3)(b)(ii) and 14.6(3)(d). Under sub-r 3(b)(ii), Evolving's application and arguments have ultimately been found to lack merit. In

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[26] *Calvert v Reynolds* [2015] NZHC 1469 at [6].
[27] *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

terms of sub-r 3(d), a further reason exists in that the legislative scheme (under the CC Act) is intended to provide cashflow to contractors and to have payments due to the contractor made without argument. Evolving has prevented the operation of that scheme of payment by its District Court defence and now this application. Contractors, when their position is vindicated, are entitled to seek from the Court a larger measure of financial protection (by way of costs) than applies in the normal run of cases.

Orders

[73] I order:

(a) The interim order dated 18 September 2015 is rescinded.

(b) The application of the defendant dated 17 September 2015 is dismissed.

(c) The defendant is to pay the plaintiff the costs of the application, the quantum of which I reserve, together with disbursements, to be fixed by the Registrar. In the event of disagreement as to quantum, submissions (no longer than four pages) are to be filed, plaintiff's within five working days and defendant's within 10 working days, whereupon the Court will fix the costs on the papers.

(d) I extend the time for the filing of the defendant's Statement of Defence to five working days after the date of this judgment.

(e) The proceeding remains adjourned to the list at 10.00 am, 29 October 2015.

Associate Judge Osborne

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