IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-2720
[2013] NZHC 3057

UNDER	Section 290 of the Companies Act 1993
BETWEEN	CENATIO LIMITED Applicant
AND	PARAGON BUILDERS LIMITED Respondent

Hearing: 14 November 2013

Appearances: T Herbert for Applicant
D G Dewar for Respondent

Judgment: 14 November 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors:
Brandons Lawyers, Wellington, for Applicant
Thomas Dewar Sziranyi Letts, Lower Hutt, for Respondent

Counsel:
T Herbert, Auckland, for Applicant

[1] Cenatio Ltd has applied under s 290 of the Companies Act 1993 to set aside a statutory demand served on it. The relevant wording of the statutory demand is:

> TAKE NOTICE that Paragon Builders Ltd a duly incorporated company having its registered office at Miller Associates (Porirua) Ltd, Level 6, 14 Hartham Place, Porirua, hereby demands payment from you in the sum of Two Hundred and Two Thousand Six Hundred and Forty Dollars Sixty-Two cents ($202,640.62) being amounts determined in an arbitration award to be owed by Cenatio Ltd to Paragon Builders Ltd as follows:
>
> 1 The following monetary awards made by the arbitrator:
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> | | | |
> |---|---|---|
> | | | $166,482.00 |
> | | | $13,643.00 |
> | | | $180,125.00 |
> | 2 | Interest at 12.5% | $22,515.62 |
> | | **Total**: | **$202,640.62** |

[2] Also of relevance is that the demand contains an address for service for Paragon Builders Ltd. The address for service is at the offices of its lawyers. That address for service is also specified as the place at which payment should be made.

[3] The arbitration arose out of a construction contract under which Paragon Builders Ltd was to build Stage 1 of a development called "The Boundary" at 31 Hazelwood Avenue, Karori, Wellington. The arbitrator was Mr Keith Sanders. He gave the award in this case on 30 May 2013. The award contains reasons, which form part of the award. He calls it his "second interim award". Paragraph 4.2 of the award says:

> I find, order, and direct that:
>
> 1 In respect of the second matter, Paragon is entitled to be paid by Cenatio the sum of $166,482.00 plus GST for the time-related costs sought by Paragon Ltd in its final payment claim dated 18 November 2010; and
>
> 2 In respect of the contra-claims CO1, CO3 and CO4 which were considered in determination 13, Paragon is entitled to be paid by Cenatio the sum of $13,643.00 plus GST.

Paragraph 4.3 says:

> 4.3 As agreed by the parties, the questions of costs and outstanding interest claims do not form part of this interim award.

[4] The reasons are set out separately. Within the part giving reasons, paragraph 7.1 says:

> 7.1 As the parties have agreed that the question of any remaining interest claim and costs be left until all the substantive issues arising between the parties have been determined, these matters have not been considered in this interim award.

[5] At present Cenatio Ltd has not made any payments under that interim award. There has been no appeal against the award under clause 5 of the Second Schedule to the Arbitration Act 1996.

[6] Since that interim award was given, the arbitrator has given a final award. He delivered it on 8 November 2013. Paragon filed a late updating affidavit exhibiting a copy of that award. That award has obviously been given after Cenatio made its setting aside application. At the outset of the hearing there was discussion whether this recent affidavit should be admitted. Mr Herbert's case is that the validity of the statutory demand should be determined as at the date of the demand. He did not object to the affidavit being admitted on the basis that the fact that a further award has since been delivered does not stand in the way of his arguments as to the validity of the award as at the date of the statutory demand.

[7] I am prepared to consider this case on that basis as well, although I should mention that in his final award the arbitrator held that Cenatio was to pay Paragon Builders Ltd a further sum.

[8] The application to set aside the statutory demand sets out a number of grounds, but in his submissions Mr Herbert limited the case to two principal grounds:

(a) That the demand represents an abuse of process; and

(b) That the demand is defective and causes substantial injustice to Cenatio.

Abuse of process

[9] For its abuse of process argument, Cenatio Ltd relies on s 290(4)(c) of the Companies Act 1993, that is, that the court has the power to set aside a statutory demand if it is satisfied that there are "other grounds". That provision follows earlier provisions which allow for setting aside if the debt is the subject of a substantial dispute or if there is a counterclaim, set-off or cross demand for an amount basically equal to or more than the amount in the statutory demand.

[10] Cenatio's argument is that the award of 30 May 2013 is an interim one. Mr Herbert refers to paragraph 7.1 of the reasons of the arbitrator. He says that that shows that there were still substantive issues between the parties requiring resolution, including interest and costs. His basic approach is that an award ought not to be the subject of a statutory demand until the entire arbitration has been completed. In other words, the issue of an award might constitute an interim finding, but the creditor who has succeeded in an arbitration ought to hold his hand until a final award has been issued and the ultimate outcome of the arbitration overall has been determined.

[11] As part of his argument, Mr Herbert referred to a decision of Associate Judge Abbott, *Bioneutral Laboratories Ltd v Novelle*.[1] In that case an employee had served a statutory demand on an employer, seeking payment of wages and other sums allegedly due under the contract of employment. Associate Judge Abbott set the statutory demand aside, primarily because the amounts claimed by the employee were disputable, but he also addressed an argument that the matter should in any event go to the Employment Relations Authority. While he noted that that was appropriate, his decision has to be read in the context of his having found that the debt claimed by the employee was disputable under s 290(4)(a).

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1 *Bioneutral Laboratories Ltd v Novelle* HC Auckland CIV-2007-404-4368, 21 May 2008.

[12] Before addressing Mr Herbert's argument, it may be useful to outline the approach taken by the court when a company relies on the "other grounds" limb of s 290(4).

[13] The only significant authority in New Zealand on that question is *Commissioner of Inland Revenue v Chester Trustee Services Ltd*.[2] The relevant passage in the judgment of Baragwanath J is:[3]

> [60] It will also be legitimate for the court to use s 290(4)(c) to prevent an abuse of the statutory demand process. Where a statutory demand is being used for a purpose that is not contemplated by the Companies Act it will be appropriate for the court to set aside the demand, notwithstanding the company's insolvency.

It can be seen from that passage where Mr Herbert has drawn his argument as to abuse of process.

[14] There is, however, guidance from outside New Zealand. There is a helpful decision of the English Court of Appeal in *Re A Debtor.*[4] Under the English Insolvency Act 1986 Insolvency Rules have been promulgated. They also provide for statutory demands – see r 6 of the Insolvency Rules 1986. The provisions in our Companies Act 1993 closely, but not exactly, follow r 6 of the English Insolvency Rules. Rule 6.5(4) of the English Rules sets out the cases where the court in its discretion may make an order setting aside a statutory demand. The grounds in the English rules are four. First, that the debtor has a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt in the statutory demand. Second, that the debt is disputed on grounds which appear to the court to be substantial. The third applies where a creditor holds some security for the debt and the court is satisfied that the value of the security equals or exceeds the full amount of the debt. Fourth, the court is satisfied "on other grounds" that the demand ought to be set aside. It can be seen that apart from the ground based on security, the grounds in the English Rules, r 6.5(4), broadly match the grounds under s 290(4) of our Companies Act 1993.

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2 *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA).
3 At [60].
4 *In re A Debtor* [1989] 1 WLR 271 (CA).

[15] In *Re A Debtor*, Nicholls LJ said:[5]

> The question arising on this appeal concerns the exercise by the court of its power to set aside a statutory demand "on other grounds" within sub-paragraph (*d*). In my view, the right approach to paragraph (4) of rule 6.5 is this. Under the Act, a statutory demand which is not complied with founds the consequence that the debtor is regarded as being unable to pay the debt in question or, if the debt is not immediately payable, as having no reasonable prospect of being able to pay the debt when it becomes due. That consequence, in turn, founds the ability of the creditor to present a bankruptcy petition because, under section 268(1), in the absence of an unsatisfied return to execution or other process, a debtor's inability to pay the debt in question is established if, but only if, the appropriate statutory demand has been served and not complied with.
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> When therefore the rules provide, as does rule 6.5(4)(d), for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied that the demand "ought" to be set aside, are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The court's intervention is called for to prevent that injustice.

[16] On that approach, the discretion under s 290(4)(c) is directed only at the statutory demand and the enquiry is whether there would be any injustice in allowing the statutory demand to give rise to the presumption of insolvency under s 288 if the demand is not complied with. That means that the court does not have to consider whether it would be appropriate to make a liquidation order. An enquiry whether to make a liquidation order involves a much wider discretion. That discretion is only exercised on the hearing of a liquidation application, not at the stage of an application under s 290.

[17] Now to consider the effect of the interim award.

[18] Under Article 35 of the First Schedule of the Arbitration Act an arbitral award, once it has been made, must be recognised as binding. That means that the effect of the award when it results in one party being able to recover money from the other, is that it creates a debt payable by the unsuccessful party in favour of the successful party. That debt can be the basis for the successful party to issue a statutory demand. That is because there is a debt owing under s 289 of the Companies Act, the statutory demand section.

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5 At 276.

[19] It is common experience that arbitrators may give more than one award during an arbitration. In this case the arbitrator has made an award on substantive issues, while signalling that costs and interest have also to be determined. In paragraph 7.1 of the award he also signals that there might be other substantive issues to be determined, although Mr Freeman submitted that in fact no such issues, barring costs and interest, did have to be decided. The basis for Mr Herbert's argument is that because there was a possibility that more substantive issues had to be decided, it would be wrong to rely on the award as a basis for forming a statutory demand. That is because of the possibility that later awards might alter the effect of the interim award.

[20] That submission ignores the effect of Article 35. An award, when issued, is binding. It does not cease to be binding because another award might be issued later. If an unsuccessful party, against whom an arbitration award has been made, wishes to contend that the award ought not to be enforced by means of a statutory demand because there could be adjustment to the sum payable because of some further awards, that would form the basis for applying to set aside under s 290(4)(b). That is, the fact that the arbitration is not completed and that there are still further issues to be determined which might go in favour of the unsuccessful party, would be the subject of a set-off or counterclaim or cross demand under s 290(4)(b). If the company wishes to rely on that provision it has to show that there is some evidential basis for the claim that a future award might adjust the net balance between the parties to its advantage. In this case the company has not adduced any evidence at all to show that the later award might have created some adjustment in the net balance in its favour. As the subsequent award shows, the result was to the contrary. There was a further sum held payable to Paragon Builders Ltd.

[21] I also note this. It is open to the parties during an arbitration to submit to the arbitrator how he should make his awards. The arbitrator can consider whether to give interim awards or one final award. The fact that there has been this interim award, given while leaving costs and interest to be determined, follows a conventional practice followed by arbitrators. It does not create any injustice if the award is allowed to be enforced by way of a statutory demand.

[22] Mr Herbert developed an argument that enforcement of the statutory demand could potentially inhibit the company in the ongoing arbitration. That pre-supposes that the company is in fact insolvent and unable to meet the demand. If anything, that submission accepts the fact of insolvency. There can be no injustice to the company in a presumption of insolvency arising if, in fact, the company is suffering solvency problems. Moreover, that issue, the company's ability to continue an arbitration when facing a threat of liquidation, is more properly to be considered in the court's exercise of its discretion on the hearing of a liquidation application, not at the stage of an application to set aside a statutory demand under s 290.

[23] For these reasons I have come to the view that in terms of the approach of Nicholls LJ in *Re A Debtor*,[6] there is no injustice to Cenatio Ltd in allowing the statutory demand to stand on the basis that if the demand is not complied with then the presumption of insolvency will arise. I do not regard the statutory demand as an abuse of process. I find against Cenatio Ltd on that ground.

Is the statutory demand defective?

[24] The other ground concerns two matters that Mr Herbert alleged were defects in the demand. The first concerns the fact that the award required Cenatio Ltd to pay a sum of $166,482.00 plus GST and a further sum of $13,643.00 plus GST. The demand, however, shows that what is payable is those two sums plus interest at 12.5 per cent. There is clearly an error in the demand in that the GST component is referred to as "interest" rather than as GST. Barring that element, there is no error in the amounts claimed, including the total amount demanded. There has been a correct calculation of the sums due under the award. The award makes an unmistakable reference to these sums being payable under an arbitration award. While one component in the total amount of the debt is misdescribed as interest rather than as GST, overall the demand is not misleading and is not invalid.

[25] Section 290(5) and (6) says:

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6 At n 5.

> **290 Court may set aside statutory demand**
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> ...
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> (5) A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.
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> (6) In subsection (5) of this section, **defect** includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.

[26] Under subsection (5), I do not regard the misdescription of the GST component as "interest" as giving rise to any substantial injustice.

[27] The other matter that Cenatio Ltd relies on is the reference to Paragon Builders having its registered office at "Miller Associates (Porirua) Ltd, Level 6, 14 Hartham Place, Porirua". Cenatio Ltd points out that when the demand was issued in July 2013, that was not the registered office of Paragon Builders Ltd. Its registered office is in fact at 36 Tukanae Street, Strathmore Park, Wellington. Centatio Ltd contends that this has placed it in an embarrassing position because it cannot identify the creditor to whom it should make the payment under the demand. It submits that it risks paying the wrong party.

[28] That objection is frivolous. The fact that Paragon Builders Ltd used its former registered office rather than its current registered office does not create any substantial injustice. The demand specifies that payments under the demand are to be made at the offices of Paragon's lawyers. If Cenatio Ltd intended to comply with the demand it could do so by tendering payment to the lawyers as was indicated in the statutory demand. It would, in any event, have been obvious to Cenatio Ltd when it received the demand to whom it should pay the money. Cenatio Ltd had been involved in a significant building project in which Paragon Builders Ltd was the builder. That had been followed by a long-running dispute and an arbitration in which Cenatio Ltd took an active part. The award had only recently been issued. Cenatio Ltd must have known who the person was that issued the demand. I also note that the name of any company registered under the Companies Act is a unique name. There could not have been two Paragon Builders Ltd.

[29] It is true that after the demand was served there was clarification and correspondence between the lawyers as to the registered office of the company. But that does not change the position that, even as the demand was originally issued, the irregularity did not cause a substantial injustice.

[30] For fullness, I also consider the combined effect of the two irregularities identified by Mr Herbert. Even combined, they would not have misled Cenatio Ltd. It would have known full well who it was required to pay, how much it was required to pay, and that that liability arose out of the award that had been issued in May 2013.

[31] Paragon Builders Ltd cited *Markham 2000 Ltd v Max & Co Ltd*,[7] where the correct name of the company was Max & Co Services Ltd. Associate Judge Sargisson held that that defect did not give rise to a substantial injustice. In this case I regard the error is even more trifling. Quite properly, Mr Freeman referred to *Astor Construction Ltd v Mega Merger Interiors Ltd*[8] which might be considered as a case going against him, but I accept his submission that that case is different because that involved a question under s 25 of the Companies Act – a matter that is not relevant relevant in this case.

Outcome

[32] To sum up the matter. Overall, I see no grounds for setting aside the statutory demand. I dismiss the application. I make an order under s 291 of the Companies Act that Cenatio Ltd is to pay Paragon Builders Ltd the sum of $202,640.62 by **28 November 2013**. If the company does not pay that sum by that time then under s 291(2) it will be presumed to be unable to pay its debts.

Costs

[33] Counsel have helpfully conferred as to costs. It is agreed that Paragon Builders Ltd is entitled to costs on its application. Counsel have agreed that the amount of costs is to be $8,656.50 plus disbursements of $200.00 making a total of

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7 *Markham 2000 Ltd v Max & Co Ltd* (2005) 9 NZCLC 263,735 (HC).

8 *Astor Construction Ltd v Mega Merger Interiors Exteriors Ltd* (2002) 16 PRNZ 273 (HC).

$8,856.50 while reserving the question of costs and disbursements on sealing for later, if that is required.

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Associate Judge R M Bell