IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-003125
[2013] NZHC 1968

BETWEEN	WILBUR TRUST LIMITED Applicant
AND	SANDRA LOUISE MOXHAM Respondent

Hearing: 6 August 2013

Appearances: V Ammundsen for applicant
M Colthart for respondent

Judgment: 6 August 2013

(ORAL) JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors:
Ayres Legal, Auckland
Daniel Overton & Goulding, Auckland

Counsel
Mark Colthart, Barrister, Auckland

[1] This is an application to set aside a statutory demand served on Wilbur Trust Ltd (Wilbur) by the respondent, Sandra Moxham (Ms Moxham).

[2] The sum demanded is $8,500. It represents the sum awarded to Ms Moxham in a determination of an arbitration.

[3] Wilbur has applied to set aside the demand on the grounds that there is a genuine dispute as to whether it owes the money. In essence its contention is that the money is not due because the arbitrator had no jurisdiction to undertake the arbitration, and hence to award the costs. It also says that it is both balance sheet solvent and meeting all other expenses as they arise, and that that is a factor to be taken into account in determining this application.

The basis for the demand

[4] Wilbur, Ms Moxham and another party are joint lessors of a cross-leased property at 53 Trafalgar Street, Royal Oak. Each of the three lessors is also lessee of part of that property under their individual cross-leases.

[5] In 2012 Wilbur erected a deck and a fence on common property adjoining Wilbur's separately leased area. This led to a dispute with Ms Moxham. Ms Moxham took steps to have the dispute resolved under an arbitration clause in the cross-leases. She obtained the name of an arbitrator, and initiated the processes under the Arbitration Act 1996 to have the arbitrator appointed. Wilbur did not respond formally to the steps initiated by Ms Moxham, leading to the arbitrator being appointed by default (again pursuant to the provisions of the Arbitration Act 1996).

[6] Wilbur initially embarked on correspondence both with Ms Moxham and with the proposed arbitrator in which it contended that because Ms Moxham alone had referred the matter to arbitration, the arbitrator did not have jurisdiction (the third lessor/cross-lessee having made it clear that it did not wish to be part of the process, although it appears to have been supportive of Ms Moxham's position).

[7] The arbitrator dealt with Wilbur's challenge to his jurisdiction initially in a preliminary award issued on 4 February 2013. He determined that he had been validly appointed in accordance with the provisions of the Arbitration Act. In the course of his preliminary award he addressed the various arguments advanced in correspondence by Wilbur.

[8] Wilbur continued to dispute the arbitrator's jurisdiction, but took no formal steps to challenge the preliminary award. The arbitrator proceeded to set a process for the arbitration (initially in a minute dated 13 February 2013), and then determined the dispute in an award issued on 21 March 2013. The latter award was expressed to be an interim award, to allow for the possibility that orders made to remove the deck, restore the fencing and return the common area in front of Wilbur's unit to its prior condition, were not complied with.

[9] As part of the award, the arbitrator also made an order that Wilbur pay costs to Ms Moxham of $8,500. That sum is the subject of the statutory demand.

[10] Wilbur remained dissatisfied with the process, but rather than challenge the interim award of 21 March 2013 under the procedures in the Arbitration Act, it commenced a proceeding in the Disputes Tribunal. Although that application is not in the evidence before the Court, I understand from counsel that it sought a determination that the arbitrator did not have jurisdiction.

[11] The Disputes Tribunal dismissed Wilbur's claim on 17 June 2013.[1] It ruled that it did not have jurisdiction:

> ...to hear a matter that has been determined already in another Tribunal.

[12] Wilbur has taken two steps to try to resurrect the matter. First, it filed an appeal to the District Court against the dismissal by the Disputes Tribunal. Secondly, it applied to the Disputes Tribunal for a re-hearing. I understand through counsel that the District Court has taken no steps on the appeal pending

[1] *Wilbur Trust Ltd v Moxham*, D.C. Auckland, CIV 2013-094-000650, 17 June 2013.

determination of the application for re-hearing. I am informed by counsel that the application for re-hearing has been given a date of hearing in about two weeks time.

[13] In the meantime, Ms Moxham has sought payment of the costs, including by issuing the statutory demand. The demand was served on 29 May 2013. Wilbur filed the present application on 12 June 2013.

[14] When the Disputes Tribunal dismissed Wilbur's application on 17 June 2013, Ms Moxham (through her counsel) made a further demand for payment. Wilbur responded (through its solicitor) advising that it was not able to meet the statutory demand by the date of expiry of the demand (20 June 2013) but offering to put its property on to the market for sale and pay it from the proceeds of sale.

The law

[15] The application is brought under s 290 of the Companies Act 1993. Under s 290(4) a Court may grant an application to set aside a statutory demand is if it is satisfied that there is a substantial dispute whether or not the debt is owing or is due (as well as on other grounds which are not being advanced on this application).

[16] The principles that the Court applies in determining these applications are well known. It is sufficient at this stage to summarise the main principles of relevance here:

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

(b) Mere assertion of a genuine and substantial dispute is not sufficient. Material, short of proof, is required to support the contention.

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

Grounds for application and opposition

[17] Wilbur contends that there is a genuine and substantial dispute as to whether or not the debt is owing or due. It relies on the contention that it has made from the outset that the arbitral process has not been properly followed (saying that Ms Moxham did not have authority to bind the lessors to arbitration) and accordingly it says it is not bound by the award, including the order for costs.

[18] Ms Moxham says that there is no genuine dispute that the debt is owing and due. She relies on the award itself, and the fact that it has recently been entered (on 29 July 2013) as a judgment of this Court.[2] She contends that all of the issues raised by Wilbur have been addressed in the preliminary and interim awards, Wilbur has not taken any of the steps available to it under the Arbitration Act 1996 to challenge those awards (including the arbitrator's assumption of jurisdiction) and accordingly there can be no genuine dispute.

Is there arguably a genuine dispute?

[19] There can be no argument over the fact that the arbitrator has made a determination (indeed two determinations) on the point that Wilbur now raises as the basis for the dispute, namely the arbitrator's jurisdiction. He has given fully reasoned decisions in each award.[3]

[20] Wilbur's case relies upon its still unresolved claim application for rehearing before the Disputes Tribunal (and the appeal process it has commenced in respect of the earlier Disputes Tribunal decision). Counsel submitted that this was a dispute over a property right, over which the Disputes Tribunal had jurisdiction. She expressed the dispute as the failure of Ms Moxham to follow the procedure laid down in clause 26 of the cross-lease.[4] As I understand counsel's argument, it was

[2] *Moxham v Wilbur Trust Ltd*, HC Auckland, CIV 2013-404-3360, 29 July 2013.
[3] In particular, paragraphs [9] to [19] of the interim award of 21 March 2013.
[4] Which provides a mechanism for determining differences on proposed action by way of a majority decision.

that the decision to invoke arbitration fell under clause 26 (rather than clause 25), and could only be achieved by a majority decision.[5]

[21] I do not accept this is a basis for a genuine dispute. Whilst it is true that clause 26 provides a process which can only be exercised by majority decision, that process is in respect of the inability of any lessor or lessors to agree on matters or things to be done by the lessors. In other words it is looking at prospective actions. I do not read it as requiring that process to be followed in respect of the dispute in this case (a breach of terms of the cross-lease). I consider that clause 25 is the operative clause.

[22] Clause 25 provides:

> THAT if any question or difference whatsoever shall arise between the parties to the Lease or their respective representatives or assigns or between one of the parties hereto and representatives of the other of them touching these presents or any clause herein contained or the construction hereof or as to duties or liabilities of either party in connection with the premsies then and in every such case the matter in difference shall be referred to arbitration in accordance with the Arbitration Act 1908 and its amendments.

[23] The arbitration process stipulated in clause 25 is now governed by the first and second schedules to the Arbitration Act 1996 (which applies in place of the Arbitration Act 1908). Under article 34 of the first schedule, it is clear that in the event of any dispute over an arbitral award, the sole recourse of the disputing party is by way of application to the High Court to set aside the award. There is an alternative process under clause 5 of the second schedule, which permits an appeal on a question of law, but only if leave to appeal is given.[6] In each case, the challenge must be brought within three months of the award.

[24] Article 5 of the first schedule, dealing with the extent of court intervention is also apposite. It provides that no Court shall intervene except in accordance with the processes under the Act.

---

[5] In this regard Wilbur relies on the third lessee's decision not to take any part in the process.
[6] In the absence of agreement.

[25] Both the preliminary award and the interim award were susceptible to an application to set aside under article 34. Wilbur has not taken either step. It is now out of time for doing so.

[26] I also take into account that the award has now been entered as a judgment of this Court.[7] This followed an application for entry of judgment which was served on Wilbur. It did not take any steps to challenge entry of the judgment.

[27] I have not overlooked Wilbur's contention that it is arguably solvent. Solvency is a factor that I can take into account in determining whether there is a genuine dispute. However, I do not need to take the matter any further given the finding I have made. In particular, I do not consider that the persisting challenge in the Disputes Tribunal is a circumstance which I should take into account in my discretion on this application, because Wilbur is potentially solvent. Any argument to that effect is met by the decision of the Court of Appeal in *AMC Construction Ltd v Frews Contracting Ltd*:[8]

> If there is no dispute as to the company's liability, so that para (a) or (b) cannot be invoked, it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid. If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed. If it is not met, and an application for liquidation is filed, in reliance on the presumption in s 287(a) that the company is unable to pay its debts, then the company will have an opportunity on the liquidation application to rebut the statutory presumption, which applies "unless the contrary is proved". There might be circumstances in which it is appropriate to advance the inquiry as to solvency to the s 290 stage, but that would require some particular circumstance not present in this case.

[28] For the reasons given, I find that there is not an arguable dispute over Wilbur's debt to Ms Moxham.

---

[7] N 2 above.
[8] *AMC Construction Ltd v Frews Contracting Ltd* (2008) 19 PRNZ 13 at [7].

Determination

[29] I find that Wilbur has not made out grounds for setting aside the statutory demand. Its application is dismissed.

[30] Ms Moxham, in her notice of opposition, has sought an order under s 291 of the Companies Act 1993, putting Wilbur into liquidation unless it pays the debt. Ms Moxham has an application for liquidation of Wilbur pending (its first call is tomorrow, and counsel inform me that that application has not yet been advertised). I am not persuaded that an order putting Wilbur into liquidation now is appropriate, particularly having regard to counsel's advice that it has put aside sufficient funds to meet this demand (should the application be unsuccessful) and simply needs more time to raise the funds needed to meet any order for costs.

[31] I make an order extending the time for compliance with the statutory demand to 20 August 2013.

[32] As the successful party, Ms Moxham is entitled to costs on the application. Counsel are agreed that it is appropriate to order costs on a scale 2B basis. I order accordingly. I direct that those costs also be paid by 20 August 2013.

_____

Associate Judge Abbott