JUDGMENT OF ASSOCIATE JUDGE ABBOTT : High Court New Zealand, Auckland Registry. 21st February 2008

[1] The defendant, Jed Rice Building Contractors Limited (Jed Rice), applies for an order restraining advertising and stay of an application for its liquidation brought by the plaintiff (Ms Spencer).

[2] This proceeding arises out of a dispute between the parties over renovation work which Jed Rice undertook on Ms Spencer's house in Devonport, Auckland. That dispute is currently before the District Court at North Shore with a claim by Jed Rice for $18,771.23 (the unpaid portion of invoices rendered for the work) and a counter-claim by Ms Spencer for $12,886.50 (for recovery of an overpayment calculated by reference to the estimate given for the work).

[3] Ms Spencer's application to liquidate Jed Rice is based on two awards of costs made in her favour in the District Court proceeding totalling $7,792.96. Jed Rice failed to pay this sum after being served with a statutory demand.

[4] Jed Rice accepts that it is liable for the costs. It resists outright payment on the grounds that it is solvent and that it would be unfair to require it to pay the costs without protecting it in the event of its ultimate success in the dispute. It says that it has put the necessary money aside and offers to pay it into Court or a solicitor's trust account to await the outcome of its District Court claim. It also contends that advertising the liquidation proceeding would damage it out of all proportion to the sum in dispute and says that Ms Spencer has abused the process of the Court by advertising prematurely.

[5] Ms Spencer says that the costs orders are not in dispute and that she should not be denied payment on the grounds of an unproven and uncertain claim. She argues that the District Court Rules contemplate immediate payment of costs. She points out that Jed Rice has not yet given security for the debt and there is no adequate evidence of solvency before the Court. She also disputes Jed Rice's claim that advertising will cause unwarranted harm, referring to inadvertent advertising and the absence of evidence of any adverse effect from it.

[6] The issue for the Court on this application is whether Jed Rice has demonstrated, on a balancing of interests, that there are clear and persuasive grounds for a stay.

Applicable principles

[7] The application is made in reliance on r 700K of the High Court Rules, which reads:

700K Power to stay liquidation proceedings

(1) Where an application for putting a company into liquidation is made by the filing of a statement of claim pursuant to rule 7000(1), the defendant company, or, with the leave of the Court, any creditor or contributory or shareholder, as the case may be, of that company, or the Registrar of Companies, may, within 7 days after the date of the service of the statement of claim on the defendant company, apply to the Court for an order restraining publication of any advertisement required by rule 7001 or any other information relating to that statement of claim and staying any further proceedings in relation to the liquidation.

(2) The Court shall deal with every application under subclause (1) as if it were an application for an interim injunction and, if it makes the order sought, may make it on such terms as the Court thinks fit.

(3) Nothing in this rule limits the inherent jurisdiction of the Court.

[8] The general principles on which the Court acts in exercising its discretion under that rule are well settled. The Court may use its inherent jurisdiction to restrain or stay a liquidation proceeding that is an abuse of the Court's process. R 700K regulates the procedure, empowers the Court to deal with it as if it were an application for interim injunction, and makes it clear that the rule does not limit the inherent jurisdiction of the Court: ***Taxi Trucks Ltd v Nicholson*** [1989] 2 NZLR 297.

[9] In ***Taxi Trucks*** the Court of Appeal was dealing with an application to stay where there was a dispute as to the underlying debt. It commented that the abuse of the Court's process consisted of using the liquidation proceeding (involving advertising and likely consequences of serious commercial damage to the company) as a means of obtaining payment of a genuinely disputed debt. It referred to its earlier decision in ***Exchange Finance Co Ltd v Lenunington Holdings Ltd*** [1984] NZLR 242 where it commented on New Zealand law being slightly more flexible than English law in dealing with possible disputes, and in which it had stated the general approach (at page 245):

Obviously the jurisdiction to restrain winding-up proceedings has to be exercised with that settled New Zealand law in mind. We think that the governing consideration can only be whether presenting or proceeding with a petition savours of unfairness or undue pressure. Whether that stigma attaches to a petition must depend on the particular facts.

[10] Shortly before the Court of Appeal gave its decision in ***Taxi Trucks,*** this Court also reviewed the principles in ***Nemisis Holdings Limited v North Harbour Industrial Holdings Limited*** (1989) 1 PRNZ 379, 385:

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 that it has the status of a creditor (required by s 219 Companies Act 1955) or (in the case of proceedings relying upon s 218(a) - not relevant in the present case) that there has been neglect by the company to pay. The decisions make it clear that the jurisdiction to stay is an inherent one to prevent abuse of process and that there is no inflexible rule. The governing consideration is whether the proceedings savour of unfairness or undue pressure. It is, however, a serious matter to stay winding-up proceedings so that 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 it is usually appropriate to consider on an application for an interim injunction.

[11] These cases were all addressing claims of a genuinely disputed debt. Where there is no dispute over the debt, however, it will be far more difficult for an applicant for stay to show that there is an abuse of process: ***Re Julius Harper Ltd*** [1983] NZLR 215 and ***Anglian Sales Ltd v South Pacific Manufacturing Co Ltd*** [1984] 2 NZLR 249. Both of these cases involved applications for stay based on an alleged counter-claim. The Court of Appeal in Anglian commented on the distinction to be drawn between an application for stay based on a disputed debt and one based on an alleged counter-claim (at 252):

The differences between a disputed debt and an alleged counter-claim were discussed in ***Bryanston Finance Ltd v de Vries (No 2)*** *[1976] Ch 63. There Buckley LJ said at p 78:*

> *"It has long been recognised that the jurisdiction of the court to stay an action in limine as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same considerations must apply to a quia timet injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds. I recognise that the presentation of a petition may do great damage to a company's business and reputation, though I think that the potential damage in the present case may have been rather exaggerated. The restraint of a petition may also gravely affect the would-be petitioner and not only him but also others, whether creditors or contributories. If the presentation of the petition is prevented the commencement of the winding up will be postponed until such time as a petition is presented or a winding up resolution is passed. This is capable of far-reaching effects."* (p.78)

It follows that where the existence of the debt on which the petition is founded is unchallenged it cannot be said with the same confidence that the proceedings amount to an abuse of process merely by reason of an alleged counterclaim. Where therefore the debtor, while admitting the debt, advances a counterclaim in attempted answer to a petition, the latter should normally proceed to determination, with the Court retaining a discretion as to whether it ultimately makes a winding up order or not.

Considerations for exercise of discretion

[12] Jed Rice has raised two principal grounds for its application. The first is that it is solvent notwithstanding the statutory presumption of insolvency arising out of its failure to meet the statutory demand or have it set aside. The second is that it would be unfair to require it to pay these costs outright to Ms Spencer (rather than give security for them) when its District Court claim exceeds the costs and it will otherwise have to pursue Ms Spencer overseas to recover a successful judgment. It also says that the Court should take into account the fact that advertising has occurred in part.

[13] When considering these grounds it is important to keep in mind that the debt is not in dispute. Jed Rice's argument that it is solvent has to be considered in that light. Two questions must be answered in addressing this argument. One is whether Jed Rice has proved its solvency. The second is whether proven solvency should be a ground for stay. I will deal with these in reverse order.

[14] Although clear solvency is a factor that the Court can and will take into account in the exercise of its discretion to stay, it is usually raised in conjunction with a dispute over the debt or a counter-claim of substance. One commentator has suggested that solvency should not be accepted as a ground for setting aside a statutory demand on its own, arguing that to accept that proposition would allow a solvent debtor company to refuse to pay a demand for purely capricious reasons: Andrew Beck, Solvency & Statutory Demands [2006] NZLJ 100. I agree that something more than solvency alone should be required where there is an undisputed debt.

[15] Counsel for Jed Rice argued that the facts as to Jed Rice's solvency were such that a stay should be granted on the ground that the application for liquidation would be determined in its favour. He relied on evidence from its director that the company was solvent, that it had put the amount of the costs orders aside separately in the company's bank accounts, and was prepared to pay that sum either into Court or into its solicitor's trust account pending determination of the District Court proceeding and any subsequent appeal. He also said that Jed Rice would provide evidence that funds were properly available if required. Counsel also submitted that no other creditors had emerged as a consequence of the advertising that has occurred to date.

[16] In my view the solvency of Jed Rice is properly a matter for the hearing of the application for liquidation. At present Ms Spencer is entitled to proceed on the basis of the presumption of insolvency. Although Jed Rice may well be able to prove that it is solvent I do not accept the unsupported assertions of its director, nor the offers to provide further information or to lodge security as sufficient proof of that fact at this time.

[17] Even if I had done so, I agree with the view expressed in ***Walter Larsen & Sons Ltd v Department of Corrections*** (2006) 18 PRNZ 55 that that will not necessarily determine the matter. I must still consider the reasons advanced for declining to make the payment.

[18] That brings me to the second principal argument for Jed Rice, that it would be unfair to allow the application for liquidation to proceed in the circumstances of this case. As already mentioned the principal reason advanced for this argument is that Ms Spencer is residing overseas. Jed Rice contends that it should not be put to the cost,

trouble and uncertainty of seeking to recover under the judgment which it confidently expects to receive. Counsel argued that a stay on terms that Jed Rice lodge security for the debt was an appropriate balancing of interests.

[19] In my view this argument ignores the nature of the debt in this case. The essence of Jed Rice's argument is that payment of the costs should be postponed until it has succeeded in its District Court claim (or not as the case may be) and, if so, be available as a fund out of which to meet some part of any judgment. That proposition ignores both the statutory intention underlying costs orders, and the principle set out in ***Anglian v South Pacific*** that it will not be an abuse of process to pursue a liquidation proceeding based on an undisputed debt in the face of an alleged counter-claim.

[20] R 47E(1) of the District Court Rules 1992 provides that unless there are special reasons to the contrary, costs on opposed interlocutory applications must be fixed when the application is determined, and become payable when they are fixed. Jed Rice does not dispute that the costs orders have been validly made and are now payable. The issue that I must consider is whether it is appropriate for this Court, in effect, to defer payment of those awards.

[21] Counsel for Ms Spencer referred me to two cases where similar arguments were advanced as grounds for applying to set aside statutory demands. In ***Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd*** (2005) 18 PRNZ 97 an adjudicator under the Construction Contracts Act 2002 made an award in favour of Dempsey. Dempsey issued a statutory demand for the amount of the award. Volcanic applied to set aside the demand on the ground that it was entitled to a set off for losses as a result of delays by Dempsey in carrying out the work. Randerson J found that s 79 of the Construction Contracts Act 2002 prevailed over the discretion under s 290(4)(b) of the Companies Act 1993 so as to preclude the Court giving effect to any set off in the liquidation proceeding. He found there was a clear statutory intent that payments due under construction contracts should be paid promptly, with limited opportunity for further dispute. He commented (at para [33]):

To permit an unproven set off to be raised as a means of avoiding payment of an established debt would be inconsistent with the purpose and intentions of the Construction Contracts Act.

The effect of his finding was that Volcanic had to pursue its set off in separate District Court proceedings that were already under way.

[22] In **Wiseline Corporation Ltd v Hockey** (HC Auckland CP143-SD99 26 July 2002, Nicholson J), noted in [2002] BCL 818, Wiseline Corporation Ltd applied to set aside a statutory demand issued by Mrs Hockey to recover an award of costs on an application for removal of a caveat. The caveat application was linked to other proceedings between the parties. Wiseline sought to resist payment of the statutory demand until its separate proceeding had been determined. Nicholson J declined to set aside the statutory demand on the basis that r 48E of the High Court Rules (which is in the same terms as r 47E of the District Court Rules 1992) required costs to be paid when fixed. He found that it would be unfair on Mrs Hockey to defer such payment of such costs until Wiseline's proceeding was determined:

[63] In accordance with the general principle stated in r 47(a) that a party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds and the provision in r 48E that unless there are special reasons to the contrary, costs on an opposed interloctory application become payable when they are fixed, I consider that Wiseline should pay the costs awarded against it in proceedings relating to its dispute with Mrs Hockey as soon as such costs are awarded. To defer payment of such costs until the ultimate issue of liability between them is decided would be to give Wiseline an unjustified and unfair advantage over Mrs Hockey. I am not satisfied that the existence of Wiseline's claim in the original proceedings is a sufficient ground for the exercise of the Court's discretion to set aside the statutory demand.

[23] The clear intention of r 47E of the District Court Rules is that unless the Court is satisfied that there are good reasons to direct otherwise, costs on interlocutory applications are payable as soon as they are fixed. I accept the submission of counsel for Ms Spencer that to defer payment in face of an unproven cross-claim would be inconsistent with the purpose and intention of r 47E (on similar reasoning to that applied in ***Volcanic v Dempsey***).

[24] I also reject the argument based on unfairness. The District Court Judge awarded increased costs on both costs judgments. He clearly took the view that Jed Rice's actions had unreasonably increased costs incurred by Ms Spencer. I cannot reconcile that with Jed Rice's argument that it would be unfair to require payment of the costs at this time. Moreover, the perceived unfairness to Jed Rice presupposes that it will be successful in the District Court claim. There is no evidence before me to allow me to assess whether or not that is so. I do note, however, that the claim is not only strongly contested, but that Ms Spencer has made a counter-claim. The merits of the District Court proceeding are a neutral factor for this application.

[25] The last matter which I must address is Jed Rice's argument that the Court should stay the proceeding for breach of the restriction on advertising in r 700J of the High Court Rules. That rule stipulates that no person shall, unless the Court otherwise directs, publish any advertisement or other information relating to the statement of claim until at least seven days after the date of service on the defendant company.

[26] The application in this case was served on 3 December 2007. Ms Spencer was precluded by r 700J from advertising the application until at least 10 December 2007 (seven days after the date of service). Jed Rice filed its application for restraint of advertising and stay mid afternoon on 10 December 2007. The application was served late in the afternoon of 10 December 2007. There was no prior advice from Jed Rice's solicitors to Ms Spencer's solicitors that the application was to be made, nor any request for advertising to be deferred.

[27] In the meantime, on the afternoon of 10 December 2007, a solicitor in the firm acting for Ms Spencer prepared advertisements. They were placed in the post to the New Zealand Gazette and the New Zealand Herald before the application to restrain advertising was served. Earlier the following morning the solicitor contacted both the New Zealand Herald and the New Zealand Gazette and asked that the advertising be withdrawn. She was informed that the advertisements had not reached either of them (to the knowledge of the persons taking the calls) and would be returned. The solicitor followed up in writing to the New Zealand Gazette the same day, and to the New Zealand Herald the following day (and spoke again to the New Zealand Herald by telephone on the same day as the follow up letter, after receiving a proof of the advertisement). She was again told by the New Zealand Herald that the advertisement would be cancelled. The advertisement did not appear in the New Zealand Gazette but, for an unexplained reason, the advertisement appeared in the New Zealand Herald on 15 December 2007.

[28] Counsel for Jed Rice submitted that the fact that steps to withdraw the advertisement had failed was immaterial, and that Ms Spencer should be held accountable for instigating the advertising ahead of the seven day period.

[29] A clear breach of r 700J would be an abuse of process. A party who advertises a proceeding in breach of that rule is at risk of having the proceeding struck out: **Body Corporate 162791 v Mid City Apartments Ltd** (2004) 17 PRNZ 289.

[30] I do not regard the advertisement in the New Zealand Herald on 15 December 2007 as an abuse of process in the circumstances of this case. Although the solicitors for Ms Spencer were perhaps over zealous in posting their instructions prior to expiry of the seven day period, that alone does not constitute advertising within the seven day period. The application was made late on the seventh day. There was no prior notice of it, let alone any request to withhold advertising. Furthermore, I am satisfied that the solicitor acted promptly and reasonably in endeavouring to withdraw the advertisement, and understood that that had occurred. On these facts I do not accept that there has been an abuse of process.

[31] It is also significant that Jed Rice produced no evidence to show that it has been prejudiced in any way by the appearance of the advertisement. Indeed, its counsel relied on the fact that no other creditors have emerged to support his argument that Jed Rice was solvent.

Decision

[32] Weighing all of these matters I come to the view that the application for restraint and stay must fail. In light of the fact that there is an undisputed debt, and having regard to the nature of the debt (Court ordered costs), I consider that matters such as Jed Rice's solvency and its alleged counter-claim are for the Court's discretion on the liquidation application.

Costs

[33] Counsel for Ms Spencer asked for costs to be determined by memoranda. I would hope that counsel can agree costs based on my findings (having regard to yet further costs involved in preparation of memoranda and the modest sums involved in this dispute generally). In case that proves to be impossible I direct that Ms Spencer file any memorandum seeking costs by 5 March 2008 and Jed Rice file any reply by 14 March 2008. I will determine costs, if required to do so, on the memoranda filed.

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