IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-002623

IN THE MATTER OF	Section 289 of the Companies Act 1993
BETWEEN	BRAVE DESIGN LTD Applicant
AND	HENDRIK VAN KAN AND WILHELMINA VAN KAN SEEGERS Respondents

Hearing: 9 August 2010

Appearances: L Herzog for Applicant
A Swan for Respondents

Judgment: 9 August 2010

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

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L Herzog, PO Box 1001, Shortland Street, Auckland
A M Swan, PO Box 5444, Wellesley Street, Auckland

[1] This is an application under s 290 of the Companies Act 1993 to set aside a statutory demand. The grounds for the application are that:

a) there is no debt between the applicant and the respondents;

b) the applicant has a counterclaim which exceeds the amount demanded; and

c) the debt is said to be subject to a substantial dispute.

[2] The statutory demand is dated 19 April 2009 but the respondents say that it was served on 21 April 2009. The demand requires the applicant to pay the sum of $16,229.33 for rental arrears of premises at 1/94 Henderson Valley Road, Henderson, up to 31 March 2010. In its form, the statutory demand complies with the requirements of the Companies Act.

[3] The respondents have taken a preliminary procedural point. The application to set aside the statutory demand was filed in Court on 30 April 2010. It was within time under s 290 but when it was filed, there was no affidavit filed with the application and the applicant's first affidavit was not filed until 11 May 2010.

[4] The respondents say that an application under s 290 must be filed within 10 working days of service of the demand. They say that under the High Court Rules an application must be accompanied by an affidavit. Mr Swan has referred to r 19.10 of the High Court Rules which says that rules concerning interlocutory applications apply with all necessary modifications to proceedings commenced by originating application. He also refer to r 7.20 which states that any affidavit in support of an application must be filed at the same time as the application itself.

[5] An application to set aside a statutory demand is an originating application under Part 19 of the High Court Rules. Mr Swan submits that the present application is a nullity because there was no affidavit filed in time. In my judgment, that submission overlooks r 1.5 of the High Court Rules. Rule 1.5(1) says:

> A failure to comply with the requirements of these rules –

(a) must be treated as an irregularity; and

(b) does not nullify any proceeding; or any step taken in the proceeding; or any document, judgment or order in the proceeding.

[6] That rule in turn is subject to r 1.5(2) which gives the Court a discretion to set aside a proceeding because of a failure to comply with the rules. But I note that r 1.5(3) says:

> The Court must not wholly set aside any proceeding or the originating process upon which the proceeding was begun on the ground that the proceeding was required by the rules to be begun by an originating process other than the one employed.

[7] That rule gives guidance as to the exercise of the discretion in this case. If the applicant in this case had started its proceeding to have the statutory demand set aside by way of a notice of proceeding and statement of claim, not accompanied by an affidavit, r 1.5(3) directs the Court not to set the proceeding aside. In this case, the applicant's error is less serious than that. The applicant got it right in beginning the proceeding by originating application, but failed to comply with the rules by not filing an affidavit at the same time as it filed its originating application. If the proceeding could be upheld under 1.5(3), then it would, in my judgment, be wrong to exercise my discretion not to allow the present proceeding when the error is less serious, being simply delay in filing the affidavit. I make it clear, however, that the delay by the applicant in filing its affidavit is not a course to be followed and in future cases could result in extra costs being awarded against a dilatory applicant. However, in this case I see little prejudice to the respondents arising from the late filing of the affidavit. The respondents have been able to reply effectively and have not suffered any prejudice from the late filing of the applicant's first affidavit. I accordingly decline to set aside the proceeding for non-compliance with r 7.20.

[8] The respondents' first affidavit has attached to it a schedule showing how the debt is arrived at. The applicant is the lessee of light industrial premises at 1/94 Henderson Valley Road under a deed of lease dated 9 November 2006. The lease is in the Auckland District Law Society deed of lease, 4th edition, 2002. The First Schedule to the lease describes the premises as "Commercial unit at 1/94 Henderson Valley Road, Henderson". The term of the lease is four years from 1 September 2006. There are also two rights of renewal of two years each. Rent was payable

monthly in advance and in the 2009/2010 period, monthly rental was $4,060.91, inclusive of GST.

[9] The applicant made deductions of $404.66 per month beginning in March 2009 and it paid no rent in January, February and March 2010. The applicant has also calculated interest charged, giving a total debt of $16,868.56. The applicant has not taken issue with these calculations. The respondents also say that the applicant began occupying the premises as a lessee from the end of July 2002, although the written lease was not signed until November 2006.

[10] The applicant's first affidavit in support of its application to set aside the statutory demand is surprisingly light on evidence. A director of the applicant denies that there are any arrears in rental and says that the applicant properly cancelled its lease with the respondents effective from 31 December 2009. The affidavit has attached to it two letters said to set out its position. Those are letters sent by its solicitors dated 27 October 2009 and 15 February 2010. The letters were sent to the respondents' counsel. The letter of 27 October 2009 gives notice of cancellation of the lease with effect from 31 December 2009 and advises that the applicant will vacate the premises by that date. It says that the applicant will pay the rent up until 31 December 2009 but will not pay any rent after that date. The letter contains assertions of misrepresentation about having vehicle access over neighbouring properties. The letter refers to Court proceedings but does not attach copies of any relevant judgments. In those Court proceedings, it is alleged that the respondents' right to use neighbouring land was ruled against. The letter of 27 October 2009 says that these decisions were given in 2004. It says that, because of this loss of use of the right of way, the applicant's business is affected and it is cancelling.

[11] The first point is that I do not regard the allegations of misrepresentation as having been satisfactorily proved. In a case such as this, a party in the position of the applicant has to set out enough evidence so that the Court can find that the applicant has a reasonable basis for saying that a debt is disputed or for saying that it has validly cancelled a lease. In this case, simply attaching letters sent by lawyers and saying those letters set out a position, is not proper proof of the matters said to give rise to the right of cancellation. The applicant's case really falls at first base

simply because the matters that the applicant says it wants to set out have not actually been properly proved. Nevertheless, I go on to consider the matters raised as if they had been properly proved.

[12] On my reading of the affidavits, the respondents have effectively answered the points raised by the applicant. The respondents point out that there were arrears of rent from 1 March 2009 to 1 January 2010 of about $404.00 a month, plus interest. This means that, even if the applicant did validly cancel the lease at the end of December 2009, it still owed the respondents rent of more than $4000 and that amount is sufficient for the statutory demand to be valid.

[13] Mr Herzog says that these funds were held back because of a set off.

[14] There are two points about the set off claim. The first is that it is not apparent from the materials before the Court that there is any basis for any kind of set off. Certainly there has been no evidence to suggest that there was any proper claim against the respondents that could be raised against their entitlement to be paid rent.

[15] The second point raised by Mr Swan is that the covenants in the lease require payment of rent without deduction or set off. Mr Swan relied on the authority of *Grant v NZMC* [1989] 1 NZLR 1 at 8 for the proposition that parties may contract out of the right to raise a set off and he says that the wording of the covenant in this case "without deduction or set off" is adequate to deny the applicant any claim to set off in this case. I accept that submission.

[16] The respondents have pointed out in their evidence that the issues about the right of way are longstanding. The applicant had taken possession of the premises in 2002. Apparently, there were rulings by courts about the right of way in 2004. Despite knowing that position, the applicant signed the lease in 2006. Quite properly, the respondents point out that the applicant has known about the position of the right of way for a long period of time and it has continued to occupy the premises as tenant and has paid rent as tenant knowing this situation. In particular, Mr Swan points to a letter sent by the respondents to the applicant in 2008 which

specifically referred to the question of the absence of right to use the right of way. The respondents say that the applicant continued to occupy the premises as tenant knowing of this position and continued to pay rent. These are acts of affirmation of the lease. Affirmation is dealt with expressly in the lease in clause 41.1:

> A party to this lease shall not be entitled to cancel this lease if, with full knowledge of any repudiation or misrepresentation or breach of covenant, that party affirmed this lease.

[17] I uphold the respondents submission that there has been affirmation of the lease.

[18] The respondents have also shown that they gave the applicant proper notice under s 245 of the Property Law Act requiring the applicant to pay arrears of rent. They have also shown that they validly re-entered on 31 March 2010. The statutory demand is confined to arrears of rent and leaves out claims for damages for loss of future rental and claims for legal costs.

[19] The applicant attacked this evidence by saying that the respondents re-entered early and in particular changed the locks and were observed to be on the premises during February 2010. I accept the respondents' evidence on this point that they went on to the premises before re-entering to change the locks to secure the premises. That is not a re-entry by itself alone. I also accept their evidence that they returned to remove an overflowing oil drum left by the applicant. These acts do not amount to re-entry and the respondents are entitled to recover arrears of rent up until the date of re-entry on 31 March 2010.

[20] Accordingly, I dismiss the application to set aside the statutory demand. Under s 291(1)(a) of the Companies Act, I am satisfied that the debt in the statutory demand is not the subject of a substantial dispute and is not the subject of a counterclaim, set off or cross-demand**.**

[21] Under s 291(1)(a), **I order** Brave Design Ltd to pay the respondents the sum of $16,229.33 by **Monday, 23 August 2010**. If payment is not made, the respondents may apply to this Court for an order putting Brave Design Ltd into liquidation.

[22] I award the respondents costs of $4,300.00.

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R M Bell
Associate Judge