

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
KIRIKIROA ROHE**

**CIV-2021-419-000128
[2021] NZHC 3054**

UNDER the Companies Act 1993
IN THE MATTER of an application for orders to set aside
statutory demand
BETWEEN DAIRY SOLUTIONZ (NZ) LIMITED
Applicant
AND PACIFIC DAIRY HOLDINGS LIMITED
(IN LIQUIDATION)
Respondent

Hearing: 30 September 2021 (by AVL)
Further submissions filed 7 October 2021 (for the Applicant) and
14 October 2021 (for the Respondent)
Appearances: W D Hofer and C S Frost for Applicant
W M van Roosmalen for Respondent
Judgment: 11 November 2021

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 11 November 2021 at 3.00 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This is an application under s 290(4) of the Companies Act 1993 by Dairy Solutionz (NZ) Ltd (DSL) to set aside a statutory demand served upon it by Pacific Dairy Holdings Ltd (in liq) (Pacific Dairy). By the demand Pacific Dairy requires payment of an advance made by it to DSL under an agreement between the parties relating to the commissioning of a yoghurt manufacturing plant.

[2] DSL accepts its liability to Pacific Dairy for the advance but says it has an arguable counterclaim against Pacific Dairy which exceeds the sum owing under the statutory demand and that the statutory demand should be set aside on “other grounds”.

[3] For reasons that follow, DSL does not have an arguable counterclaim against Pacific Dairy as it has assigned its rights to such a claim to a third party. Further, there are no “other grounds” justifying setting aside the statutory demand.

Background

[4] In around 2017, DSL, Pacific Dairy and Fremantle Gourmet Pty Ltd (Fremantle) agreed to commission a yoghurt manufacturing plant at DSL’s leased premises at Rukuhia. The intention was that from the manufacturing plant DSL would produce yoghurt products and supply them to Pacific Dairy.

[5] On 25 May 2017, the parties entered into what was described as a Heads of Terms Agreement (Heads of Agreement). Broadly, under the Heads of Agreement:

- (a) Fremantle was to provide a turn-key culturing plant with the ability to make and package three tons of cultured product per day;
- (b) DSL and Pacific Dairy would share the initial cost of commissioning the culturing plant on an equal basis;
- (c) DSL was to own and operate the plant;
- (d) Pacific Dairy’s contribution was to be regarded as an unsecured debt repayable by DSL; and
- (e) Pacific Dairy and DSL were to enter into a separate contract manufacturing agreement within 90 days of the commissioning of the

plant pursuant to which Pacific Dairy would contract DSL to manufacture yoghurt products.

[6] Of particular relevance:

- (a) under cl 13, Pacific Dairy's contribution to the cost of commissioning the culturing plant was USD 50,000 repayable by DSL without interest within three years from the date the factory was commissioned; and
- (b) under cl 10, the parties would use their best endeavours to resolve any dispute by consultation failing which any party could serve a dispute notice on the other of its intention to refer the matter for determination by an independent expert. There was provision for the manner of appointment of the expert and the process to be followed and "the determination made by the independent expert will be final and binding on the parties".

[7] The manufacturing plant was commissioned in November 2017 and production commenced. The total initial commissioning costs came to USD 100,000 of which Pacific Dairy contributed USD 50,000. Yoghurt production commenced following the commissioning of the plant and Pacific Dairy began ordering product from DSL.

[8] In December 2017, E. coli contamination was discovered at the plant which resulted in a recall of product. Pacific Dairy did not thereafter order any further product from DSL, nor did it enter into a contract manufacturing agreement with DSL.

[9] In June 2018, Pacific Dairy went into voluntary liquidation and Damien Grant was appointed liquidator (the liquidator).

[10] On 30 September 2018, DSL assigned in writing the Heads of Agreement to Dairy Solutionz (Processing) Ltd (Processing).

[11] On 19 November 2020, Waterstone Insolvency, acting on behalf of the liquidator, wrote to DSL requiring payment of USD 50,000 (or the New Zealand dollar

equivalent) that Pacific Dairy had advanced as a loan towards the commissioning costs of the plant.

[12] On 19 November 2020, Derek Fairweather, a director of DSL, responded to the liquidator's demand disputing the claim. Two grounds were advanced. The first was that it was intended DSL would repay the loan over time through the manufacture and sale of yoghurt products to Pacific Dairy. It was asserted Pacific Dairy had terminated the business leaving DSL "high and dry" with plant that was of no use to it. Second, Mr Fairweather said the Heads of Agreement had been assigned to Processing. He wrote:

We setup a new company Dairy Solutionz (Processing) and assigned the contract to that company some years ago, where it belongs. This company has battled to get on its feet and is in the process of being sold, if not, it will too be liquidated. If it is sold, then the receipts will be spread across the debtors.

[13] On 25 November 2020, Waterstone Insolvency gave notice to DSL of the liquidator's intention to refer the dispute for expert determination in accordance with the Heads of Agreement.

[14] Also, on or around 25 November 2020, DSL filed with the liquidator an unsecured creditor's claim for \$9,324.36 being an amount claimed to be owing for the supply of various yoghurt products to Pacific Dairy during November and December 2017. This was the only claim made by DSL in the liquidation.

[15] The parties agreed to refer the dispute to expert determination by Sarah Polly Pope (Ms Pope), a lawyer practising in Auckland. There was correspondence concerning who were to be the correct parties to an Expert Determination Agreement (the EDA). Mr Fairweather considered that the dispute had to be determined between Pacific Dairy and Processing because the Heads of Agreement had been assigned to Processing. The liquidator did not agree.

[16] In the event, Pacific Dairy and DSL entered into an EDA on 25 February 2021 appointing Ms Pope as expert to determine two issues. These were set out in sch 1 of the EDA as follows:

Whether the obligations under the head of terms agreement have been validly assigned from Dairy Solutionz (NZ) Ltd (the contracting party) to Dairy Solutionz (Processing) Limited.

Amount owed by Dairy Solutionz (NZ) Ltd (or other) to Pacific Dairy Holdings Ltd (in Liq) under clause 13, schedule 1 and schedule 2 of the agreement.

[17] Consistent with the terms of the Heads of Agreement, the EDA provided Ms Pope's decision was to be final and binding on the parties and the parties were deemed to have undertaken to carry out the decision without delay and to have waived their rights to any form of appeal or review, insofar as such waiver can validly be made. It also provided that Ms Pope was to act as an expert and not as an arbitrator and the fees and expenses of Ms Pope would be met equally by the parties.

[18] Having received submissions from the parties, on 14 April 2021, Ms Pope issued her determination. In respect to the issues put before her she determined:

- (a) The obligations of DSL under the Heads of Agreement had not been validly assigned to Processing. Ms Pope relied upon the Supreme Court decision in *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*¹ in determining that for a liability, such as the obligation to repay Pacific Dairy, to be transferred the consent of the original counterparty is required and Pacific Dairy did not agree to the liability of DSL being assigned from DSL to Processing.
- (b) The amount owed by DSL to Pacific Dairy under cl 13, schs 1 and 2 of the Heads of Agreement was USD 50,000. Ms Pope rejected arguments advanced by DSL that the failure by Pacific Dairy to enter into a contract manufacturing agreement released DSL from the obligation to repay the loan or that DSL had suffered any losses claimed by it for breach by Pacific Dairy of the Heads of Agreement.

[19] On 31 May 2021, Pacific Dairy issued a statutory demand to DSL for the sum of \$84,251.75 which was comprised of:

¹ *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121; [2015] 1 NZLR 281 at [85].

- (a) \$69,704.25, being the equivalent of USD 50,000 for repayment of the advance to DSL; and
- (b) \$14,547.50 being DSL's 50 per cent share of the fee charged by Ms Pope and paid by Pacific Dairy upon release of the determination.

[20] DSL has now paid Pacific Dairy the \$14,547.50 (representing its share of Ms Pope's fee) but the repayment of the advance remains in issue.

Section 290

[21] Section 290 of the Companies Act relevantly provides:

290 Court may set aside statutory demand

- (1) The Court may, on the application of the company, set aside a statutory demand.

...

- (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—

- (a) There is a substantial dispute whether or not the debt is owing or is due; or
- (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
- (c) The demand ought to be set aside on other grounds.

...

Principles

[22] DSL accepts it has a liability to Pacific Dairy for the advance. DSL may nonetheless obtain an order under s 290(4)(b) setting aside Pacific Dairy's statutory demand if it can point to the appearance of a right of set-off, counterclaim or cross-demand which results in the amount specified in the statutory demand less the amount of the counterclaim, set-off or cross-demand being less than \$1,000.²

² Companies Act 1993 Liquidation Regulations 1994, reg 5.

[23] The principles that apply under s 290(4) are well settled and were set out by the Court of Appeal in *Confident Trustee Ltd v Garden and Trees Ltd* as:³

- (a) The onus is on the applicant seeking to set aside the statutory demand to show that there is arguably a genuine and substantial dispute as to the existence of the debt. The Court's task is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due.
- (b) The mere assertion that a dispute exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.
- (c) If such material is available, the dispute should normally be resolved first in ordinary civil proceedings before any statutory demand is issued.
- (d) If a *counterclaim*, cross-demand or set-off is suggested an applicant must establish that this is reasonably arguable in all the circumstances.
- (e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise unless such evidence is contrary to the available documents or earlier statements made by the parties.

[24] The Court may also set aside a statutory demand "on other grounds" under s 290(4)(c). In *Commissioner of Inland Revenue v Chester Trustee Services Ltd*, Tipping J found the exercise of the Court's discretion comes down to the Court's judgment as to whether the creditor's prima facie entitlement to liquidate the company is outweighed by some factor making it plainly unjust for liquidation to occur.⁴ He said:

[3] That said, I agree with Baragwanath J that the general policy of the Act that insolvent companies should be put into liquidation, if a creditor seeks such an order, should not be departed from lightly. To justify such departure there must be some other factor, be it policy, principle or simply the justice of the particular case, which outweighs the prima facie entitlement of the creditor to an order putting the insolvent company into liquidation. If the focus is on the justice of the particular case the discretion must always be exercised on a principled basis and not on some ad hoc perception of what individual justice might require. All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement is outweighed by some factor or factors making it plainly unjust for liquidation to ensue. The ground advanced by the insolvent company must be sufficiently compelling to overcome the general policy of the Act with regard to insolvent companies.

³ *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 at [16] (footnote omitted and emphasis added).

⁴ *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA).

Discussion

[25] DSL accepts Ms Pope's determination is final and binding to the extent she found it is obliged under the Heads of Agreement to repay USD 50,000 to Pacific Dairy.

[26] The grounds advanced by DSL in support of its application were pared-down from those contained in its notice of application. It relies upon s 290(4)(b) and (c) of the Act. Mr Hofer summarised its position as follows:

- (a) DSL has an arguable and substantial counterclaim against Pacific Dairy resulting from Pacific Dairy's breach of the Heads of Agreement which exceeds the amount claimed in the statutory demand;
- (b) DSL's counterclaim has not been resolved by the expert determination process because it was outside the scope of the issues put to the expert to determine; and
- (c) the statutory demand should also be set aside on other grounds as it would be inequitable to allow Pacific Dairy to pursue its claim against DSL by way of statutory demand without recognition by way of set-off of losses DSL suffered as a result of breaches by Pacific Dairy of the Heads of Agreement.

Arguable counterclaim

[27] In his affidavit, Mr Fairweather asserts that DSL and/or Processing have a claim for damages against Pacific Dairy principally as a result of Pacific Dairy's failure to enter into the contract manufacturing agreement as required by the Heads of Agreement and its failure to order product from DSL after December 2017.

[28] DSL estimates its loss of profits for the term of three years contemplated by the Heads of Agreement is in the order of \$1,115,868 –\$2,496,650 based on the production and sale of two tons of yoghurt products per week and a margin of 10 per cent over cost.

[29] Mr Fairweather disagrees with the evidence of the liquidator that Pacific Dairy's decision to go into liquidation was due to the E. coli contamination in December 2017. He says Pacific Dairy had under-budgeted the costs of production (which would diminish its sales margin) and its brand and customer relationships were strained prior to the plant being commissioned. He also says the E. coli contamination was Pacific Dairy's responsibility.

[30] A large part of counsels' submissions focused on whether Pacific Dairy was in breach of the Heads of Agreement by failing to enter into a contract manufacturing agreement with DSL and the extent to which that issue had been (or could be) determined by the expert determination. These are not issues requiring resolution on this application. Put simply, DSL cannot impeach the statutory demand by asserting a counterclaim which it has assigned to Processing.

[31] Section 50 of the Property Law Act 2007 applies to assignments of choses in action made after 1 January 2008. Relevantly it provides:

50 How thing in action assigned

- (1) The absolute assignment in writing of a legal or equitable thing in action, signed by the assignor, passes to the assignee—
 - (a) all the rights of the assignor in relation to the thing in action; and
 - (b) all the remedies of the assignor in relation to the thing in action; and
 - (c) the power to give a good discharge to the debtor.
- (2) Subsection (1) applies whether or not the assignment is given for valuable consideration.

...

[32] Section 48 of the Act contains the following relevant definitions that apply to s 50 as follows:

absolute, in relation to an assignment, means—

- (a) not conditional; or
- (b) not by way of charge only

assignment means an instrument effecting or relating to an assignment

debt includes an obligation to—

- (a) pay money:
- (b) deliver or transfer property:
- (c) do or not do any other thing

debt owing includes an obligation that is due to be performed

debtor means a person (including a trustee) who is under an obligation to pay a debt

payment of a debt includes the performance of an obligation that is not an obligation to pay money

thing in action—

- (a) means a right to receive payment of a debt; and
- (b) includes part of a thing in action

[33] Section 50 applies to the assignment of both legal and equitable things in action. It requires that an assignment must be in writing, signed by the assignor and be absolute, in the sense of not been conditional or by way of charge only. There is no requirement that the assignee must give valuable consideration for the assignment. Written notice is not an essential ingredient of a statutory assignment under s 50 but is important to impose obligations on the debtor to pay to the assignee (or perform obligations) and to establish priorities.⁵

[34] The authors of *Garrow & Fenton's Law of Personal Property in New Zealand* describe the effect of an assignment complying with s 50(1) as follows:⁶

The effect of a statutory assignment of a chose in action is to transfer all rights of ownership to the assignee. If a legal chose in action is assigned, then the assignee becomes the legal owner; assignees are able to sue for it in a court of law in their own name and their receipt will be a complete discharge to the debtor. All remedies available to the original creditor become available to the assignee. The property or the debt passes to the assignee, and the assignee becomes the legal owner of it just as transferees of a chattel become the legal owner of the chattel after it is transferred to them. The assignee can issue proceedings or take any other legal steps that the assignor might have taken. Proceedings should be issued in the name of the assignee and not the assignor.

⁵ Roger Fenton *Garrow & Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) at [9.35].

⁶ At [9.37] (footnotes omitted) and see also *Read v Brown* (1888) 22 QBD 128 (CA) at 131-132.

[35] Here, the assignment of the Heads of Agreement is in writing and reads as follows:

Assignment

Dairy Solutionz (NZ) Limited assigns the HOA between it and Pacific Dairy Holdings Limited

And

Fremantle Gourmet Pty Ltd

To Dairy Solutionz (Processing) Limited, whose purpose is to process milk and yogurt and owns the processing assets.

Signed by Its Director

Derek Fairweather

30 September 2018

[36] In his affidavit, Mr Fairweather says at the time the assignment was made he was a director of both DSL and Processing and the assignment was intended by both DSL and Processing to transfer “all assets, approvals, leases and liabilities under the Heads of Terms Agreement from DSL to Processing.”

[37] It is entirely consistent with this that DSL did not file a creditor’s claim in the liquidation of Pacific Dairy until 25 November 2020 and then only in respect of the amount of unpaid invoices for product supplied by it to Pacific Dairy prior to the date of the assignment.

[38] Further, in correspondence between Mr Fairweather and the liquidator’s in-house counsel prior to the expert determination, Mr Fairweather repeatedly asserted that the Heads of Agreement had been validly assigned to Processing. In an email of 13 January 2021 to the liquidator’s counsel, Mr Fairweather stated:

We can not undo what already has been done, you seem to be struggling with that reality, the HOA is not legally attached to Dairy Solutionz (NZ) Limited, you are barking up the wrong tree.

...

I presume you are qualified enough to determine that the HOA was legally able to be assigned, and that it has been assigned, and that it is perfectly logical

that the HOA and liability should be sitting right next to the assets and processing capability, where it belongs.

[39] This position was maintained in the expert determination. In her determination Ms Pope records, at para 3.16, DSL's submission that it had declared its intent to assign the Heads of Agreement on 23 May 2017 (two days before it was signed) and, at para 3.18, that by the assignment all assets, approvals, leases and liabilities under the Heads of Agreement were transferred to Processing.

[40] At the hearing, I raised with counsel that the assignment appeared to be a complete answer to DSL's application to set aside the statutory demand on the ground that it had an arguable counterclaim against Pacific Dairy. As the matter had not been directly addressed in counsel's written submissions, I allowed them to file further submissions which were subsequently received.

[41] For DSL, no submissions have been made that the assignment does not comply with s 50(1) of the Property Law Act. The requirements of the section are satisfied. The assignment of the Heads of Agreement is in writing and is signed on behalf of DSL by its director Mr Fairweather. There is no suggestion that Mr Fairweather was not authorised to sign the assignment on behalf of DSL. The assignment is not conditional or by way of charge only. There is no statement as to the consideration for the assignment, but none is necessary. Similarly, there was no requirement for notice of the assignment to be given to Pacific Dairy, but written notice was in fact given prior to the expert determination.

[42] In the further submissions filed on behalf of DSL, Mr Hofer advanced two arguments in support of the position that notwithstanding the assignment, the statutory demand should be set aside under s 290(4)(b).

[43] First, he argues Ms Pope's finding that the obligations of DSL were not validly assigned to Processing leaves the status of "the balance of the assignment" uncertain. Mr Hofer submits the assignment of the benefits of the Heads of Agreement may be invalid and, in that event, the right to bring a claim against Pacific Dairy still lies with DSL. However, Ms Pope's finding that DSL's contractual obligations under the Heads of Agreement had not been assigned was entirely orthodox. It casts no doubt on the

validity of the assignment of the benefits enjoyed by DSL under the Heads of Agreement to Processing. While contending there is a plausible argument that the “whole assignment” was invalid, DSL has provided nothing to support that submission.

[44] The second submission advanced is DSL did not intend to assign the benefits but not the obligations of the Heads of Agreement. DSL contends its position can be remedied by DSL cancelling or reversing the assignment. Mr Hofer further submits it is no impediment that the assignment was not reversed or cancelled prior to DSL making this application to set aside the statutory demand. This is because, he argues, DSL’s counterclaim is to be regarded as contingent upon it taking steps to cancel or reverse the assignment and a contingent counterclaim can be relied upon to set aside a statutory demand.

[45] DSL relies upon *Beckett Books Ltd v Moving Out 2012 Ltd*.⁷ That case involved an application to set aside a statutory demand arising from the sale and purchase of a business concerned with the importation and distribution of books and educational products. The amount said to be owing related to the value of stock assessed by a jointly appointed expert. Beckett Books claimed to have an arguable counterclaim for breach of warranty and misrepresentation as to the turnover of the business. It was argued the asserted counterclaim was unquantified and contingent and could not therefore be relied upon to impeach the statutory demand.

[46] Associate Judge Sargisson held an unquantified claim could justify the setting aside of a statutory demand⁸ and the claim asserted by Beckett Books was not contingent in the sense of being dependent on the occurrence of some external event. The Associate Judge also rejected an argument advanced by the respondent that the terms of the sale and purchase agreement precluded Beckett Books from raising a claim by way of set-off.

[47] Mr Hofer submits *Beckett Books* is authority that if the contingency is with the control of the counterclaimant, a contingent counterclaim can be relied upon to set

⁷ *Beckett Books Ltd v Moving Out 2012 Ltd* [2015] NZHC 669.

⁸ Relying on *Covington Railways Ltd v Uni-Accommodation Ltd* [2001] 1 NZLR 272 (CA) at [11].

aside a statutory demand. I do not agree. Associate Judge Sargisson clearly did not decide the case on that basis. She referred to *Datasouth Holdings Ltd v Melco Sales (NZ) Ltd*⁹ and *Alfex Doors and Windows Ltd v Alutech Windows and Doors Ltd (Alfex)* which are authority contingent counterclaims or set-offs do not provide a basis to set aside a statutory demand. She quoted from the Court of Appeal’s decision in *Alfex* where it was said:¹⁰

[15] For our part, however, we prefer to deal with the matter without reaching the residual discretion. Employing the generally accepted threshold of a “fairly arguable basis”: *United Homes (1998) Ltd v Workman* CA68,69,70/01, judgment 25 May 2001, we are not satisfied that Alfex presently has any counterclaim set-off or cross-demand within the statute. The unquantified claim of “liquidated damages” plainly is contingent on the outcome of the unresolved dispute between Alfex and Ebert. Mr Michalik accepted that it is not possible to set-off or claim in respect of contingent indebtedness, as recognised in *Body Corp s66289 v Rua Developments Ltd* High Court M328/96, Hamilton Registry, Master Faire, to which we were referred.

[16] There is before the Court no sufficient basis for Alfex to continue to retain part of the purchase price against unquantified contingent claims of the kind in question. We are not therefore satisfied that there has been shown a substantial dispute whether or not that part of the debt is due.

[48] In my view, the relevant time for determining whether an applicant has shown the appearance of an arguable counterclaim for the purposes of s 290(4)(b) must be when the application to set aside the statutory demand is made.¹¹ Here, prior to filing its application, DSL had assigned all its rights and remedies under the Heads of Agreement to Processing. When it filed the application to set aside the statutory demand it had divested itself of any right to seek damages from Pacific Dairy for breach of the Heads of Agreement.

[49] DSL’s argument must fail for another reason. It proceeds on the basis, which I do not accept, that it is within DSL’s control to cancel or reverse the assignment. Mr Hofer submitted the assignment was within a “group structure” and not an arms-length assignment between separate commercial entities; that Mr Fairweather was director of both DSL and Processing; and the claim against Pacific Dairy is worth more to DSL

⁹ *Datasouth Holdings Ltd v Melco Sales (NZ) Ltd* HC Christchurch M41/96, 17 May 1996.

¹⁰ *Beckett Books Ltd v Moving Out 2012 Ltd*, above n 7, at [14], quoting *Alfex Doors and Windows Ltd v Alutech Windows and Doors Ltd* CA38/01, 30 May 2001.

¹¹ See for instance *Primary Health Remuera Ltd v Avoca Residential Construction Ltd* (2004) 17 PRNZ 295 (CA) at [49]-[51]. In a summary judgment context see for instance *Birchfield v Birchfield Holdings Ltd* [2021] NZCA 428 at [51].

than to Processing, accordingly it is commercially sensible for the assignment to be reversed.

[50] It is incongruent, in the face of the expert's determination and the issue of the statutory demand by Pacific Dairy, that if DSL has the requisite control to reverse the assignment it has never done so. There is no evidence DSL has it within its power to cancel the assignment or require Processing to re-assign the Heads of Agreement to it.

[51] While Mr Fairweather is a director of both DSL and Processing, he is not a sole director of either. In the email correspondence between him and the liquidator's counsel of 13 January 2021 he stated that he could make no commitments on behalf of DSL. Mr Hofer refers to Mr Fairweather having instigated the cancellation of the Heads of Agreement by DSL or Processing on 7 July 2021. It is notable the letter is signed by Mr Fairweather and another director of Processing, indicating Mr Fairweather does not have authority to act alone on behalf of Processing.

[52] There is no evidence that DSL and Processing are presently within a group of companies. The evidence before me is that DSL's shares are owned by a company called Tropical Dairy Group Ltd, but what relationship that company has to Processing is unclear. In the absence of such evidence, it cannot be inferred it would be commercially sensible for Processing to re-assign the Heads of Agreement to DSL as Mr Hofer submits.

[53] DSL has failed to satisfy me that it has an arguable counterclaim against Pacific Dairy for the purposes of s 290(4).

Other grounds

[54] Mr Hofer submits if DSL's primary submission, that it has an arguable counterclaim under section 290(4), is not accepted an inequity will arise. He argues it would be unjust for Pacific Dairy to pursue repayment of the advance from DSL without also taking into account the losses Pacific Dairy is said to have caused DSL by its failure to enter into the contract manufacturing agreement. I can see no merit in this submission for several reasons.

[55] First, the kernel of this argument is DSL has a counterclaim against Pacific Dairy that should be brought into account. It is the argument advanced under s 290(4)(b), in a different guise, which I have rejected.

[56] Second, the situation said to be unjust has arisen as a result of the assignment of the Heads of Agreement to Processing. That was a decision taken by DSL after Pacific Dairy had gone into liquidation. DSL must accept the consequences of the transactions it freely entered into to advance its own commercial interests.

[57] Third, by the terms of the EDA, DSL agreed that the decision of the expert would be final and binding and it undertook to carry out the decision “without delay”. It is plainly inconsistent with the terms of the EDA that now DSL refuses to give effect to the determination and pay what Ms Pope found is owed to Pacific Dairy. Increasingly alternative dispute resolution (ADR) is being adopted to ensure the prompt and economical resolution of commercial disputes. The Courts have recognised that where parties have agreed to ADR as a means of resolving their disputes they should be held to their commitments. This is particularly important in the case of expert determination which does not have any legislative imprimatur.¹²

Result

[58] The application to set aside the statutory demand is dismissed.

[59] Under s 291(1)(a) of the Companies Act, I order that within seven days from the date of this judgment DSL is to make payment to Pacific Dairy of the amount of \$69,704.25 failing which Pacific Dairy may apply for an order liquidating DSL.

¹² Shane Campbell “Expert Determination as Dispute Resolution in New Zealand” (2020) 30 ADRJ 142 at 145.

[60] Pacific Dairy is entitled to costs to be calculated on a scale 2B basis plus reasonable disbursements as fixed by the Registrar.

O G Paulsen
Associate Judge

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