

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

**CIV-2015-404-2628  
[2016] NZHC 472**

BETWEEN EBERT CONSTRUCTION LIMITED  
Plaintiff

AND CRAIG ALEXANDER SANSON AND  
DAVID JOHN BRIDGMAN  
Defendants

Hearing: On the papers

Appearances: R J Gordon for plaintiff  
M J Tingey for defendants

Judgment: 18 March 2016

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**JUDGMENT OF LANG J  
[on costs]**

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*This judgment was delivered by me on 18 March 2016 at 2.30 pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date.....*

[1] On 20 November 2015, Associate Judge Sargisson made an order by consent setting aside a statutory demand issued by the defendants on 23 October 2015 and served on the plaintiff on 28 October 2015.

[2] I am now required to determine the issue of costs. The plaintiff seeks an order of increased costs in its favour because it contends the defendants acted improperly in issuing the statutory demand. The defendants resist that claim, and seek an order for costs in their favour on a category 2B basis.

### **Background**

[3] The defendants (the liquidators) are the liquidators of Takapuna Procurement Limited (In Liquidation). In October 2014, they issued proceedings in this Court against the plaintiff, Ebert Construction Limited (Ebert), seeking to set aside three voidable transactions. In a reserved judgment delivered on 6 October 2015, Associate Judge Doogue upheld the liquidators' claim and set the transactions aside.<sup>1</sup>

[4] Ebert had until 4 November 2015 to file an appeal to the Court of Appeal against the judgment. On 23 October 2015, Ebert's solicitors advised the liquidators that they intended to appeal against the Associate Judge's decision. They asked the liquidators to "hold off any thoughts of hasty enforcement action, at least until Ebert's notice of appeal is to hand".

[5] The liquidators declined this request. In a letter sent on the same day, their solicitors advised Ebert that, in the absence of an order staying execution of the judgment, Ebert was liable to pay the judgment sum. They suggested that the judgment sum be held in the liquidators' solicitor's trust account pending determination of the appeal. They also advised Ebert that, if payment was not received by 3 pm on 27 October 2015, the liquidators would take enforcement action without further notice.

[6] On 27 October 2015, the liquidator's solicitors advised Ebert's solicitors that the liquidators were pressing for payment because they held concerns about Ebert's

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<sup>1</sup> *Sanson & Anor v Ebert Construction Ltd* [2015] NZHC 2402.

ability to pay the judgment sum. When Ebert did not provide a substantive response to the suggestion that the judgment sum be held in the liquidators' solicitors trust account, the liquidators issued a statutory demand. This was served on Ebert on 28 October 2015 at 3.27 pm. Just over one hour later, at 4.38 pm, Ebert's solicitors advised the liquidators' solicitors that Ebert had paid the judgment sum into a separate bank account.

[7] The liquidators then carried out a search of the personal property securities register. This revealed that a number of creditors held registered security interests over Ebert's property. One of these was a registered General Security Agreement (GSA) in favour of the Bank of New Zealand (BNZ) that provided the bank with security over all of Ebert's present and after acquired property. The liquidators' solicitors immediately advised Ebert's solicitors that the funds deposited into the separate bank account did not provide the liquidators with any comfort because the funds remained subject to the GSA in favour of the BNZ. The liquidators suggested that the funds should instead be held in Ebert's solicitors' trust account. Ebert's solicitors would hold the funds as stakeholder, and were to confirm that the funds were free from any security interests. Ebert did not respond to that proposal.

[8] The liquidators' solicitors wrote to Ebert's solicitors again on 4 November 2015 requesting an explanation of why Ebert was not willing to accept their clients' proposal. Ebert did not respond to that letter. Instead, on the same day, it applied for stay of execution of the judgment and filed the present proceeding seeking an order setting aside the statutory demand.

[9] After the liquidators received the application to set aside the statutory demand, their solicitors sent an email to Ebert's solicitors on 5 November 2015 asking whether Ebert intended to respond to their email of the previous day. They had not received a response by 11 November 2015, and filed documents in opposition to the application on that date.

[10] On 16 November 2015, four days prior to the first call of the proceeding, Ebert's solicitors advised the liquidators that Ebert had paid the judgment sum into their trust account. Ebert's solicitors agreed to hold the funds as stakeholder pending

determination of Ebert's appeal. After the liquidators received that advice, they consented to an order being made setting aside the statutory demand.

### **The arguments**

[11] Ebert contends that the liquidators acted improperly and with undue haste in serving the statutory demand. They say that the liquidators were clearly using the statutory demand as a debt collection procedure rather than as a means of having an insolvent company placed in liquidation. Ebert also contends that it was the successful party in the proceeding, because it obtained the orders that it sought. That being the case, it argues that it is entitled to an award of costs in its favour. It also contends that, given the improper use by the liquidators of the statutory demand procedure, the Court should make an award of increased costs.

[12] The liquidators point out that they had suggested from an early stage that the funds be held in a solicitor's trust account pending determination of the appeal. They say that they had genuine concerns regarding Ebert's ability to pay the liquidation sum, and that they were therefore entitled to use the statutory demand procedure. They also contend that the matter was ultimately resolved on the basis that they had earlier suggested. The liquidators therefore argue that they were the successful party in the proceeding, and that they are entitled to an award of costs in their favour as a result.

### **Decision**

[13] I do not accept that the liquidators used the statutory demand procedure improperly. Although they sought payment of the judgment sum at an early stage following delivery of the judgment, they were entitled to do so in the absence of an application for stay of execution. There is also no evidence to refute the liquidators' evidence that they were concerned about Ebert's ability to pay the judgment sum.

[14] Furthermore, Ebert was the author of its own misfortune to the extent that it failed to respond to the liquidators' concern regarding the fact that Ebert initially paid the funds into a separate bank account. The concern was legitimate, because whilst the funds remained in that account they were subject to the GSA in favour of

the BNZ. In addition, Ebert has not provided any explanation for the fact that it did not pay the funds into their solicitors' trust account until 16 November 2015.

[15] The ultimate outcome was a variation of the suggestion made by the liquidators at a very early stage, and it mirrored the suggestion they made on 4 November 2015. Had Ebert agreed to the liquidators' proposal on 4 November 2015, it would not have been required to commence this proceeding and the liquidators would not have been required to respond to it.

[16] I consider that the liquidators were the successful party in this proceeding because they obtained the outcome that they sought and suggested well before Ebert commenced the proceeding. For that reason they are entitled to an award of costs.

### **Result**

[17] I make an order awarding the liquidators costs on a category 2B basis together with disbursements as fixed by the Registrar.

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Lang J

Solicitors:  
Minter Ellison Rudd Watts, Wellington  
Bell Gully, Auckland