IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY
I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-404-1139
[2017] NZHC 2432

IN THE MATTER	of Section 290 of the Companies Act 1993
BETWEEN	KIWI BOBCATS AND LANDSCAPING LIMITED Plaintiff
AND	COUNTIES READY MIX LIMITED Defendant

Hearing:	26 September 2017 (on papers)
Appearances:	T S Burtenshaw for Applicant A M Swan for Respondent
Judgment:	5 October 2017

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***05.10.17 at 3.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] It would appear that the respondent served the statutory demand in this case after the core debt which was claimed had actually been paid.

[2] The statutory demand, as well as claiming for the core debt, also claimed for collection costs of approximately $8,500. This was for the expenses related solely to the debt collection agencies costs and did not apparently include legal costs.

[3] Because the collection costs were not paid, the respondent declined to withdraw the statutory demand. An originating application was filed on 8 December 2016 for an order setting aside the statutory demand. There followed negotiations but they do not seem to have resolved the question of how much ought to be paid, if anything, to the respondent on account of debt collection agency costs.

[4] Eventually the parties agreed that the statutory demand would be withdrawn, the originating application would not proceed to a defended hearing on the basis that the Court would decide the question of costs.

[5] The question of costs gives rise to the following questions:

a) who should pay costs;

b) on what basis?

[6] While the Court did not hear substantive argument concerning the nature of the dispute between the parties, it appears to be common ground that the facts that I have set out in paragraphs 1-4 of this judgment are correct. That is to say that the only basis upon which the respondent could have justified continuing with the statutory demand in the sense that it would not withdraw the statutory demand, was because it wished to recover its debt collection costs of $8,500 approximately.

[7] A dispute arose concerning the reasonableness of the debt collection costs. This was a legitimate issue to raise by way of dispute. It was flagged right at the outset

of the interaction between the parties. Because no agreement proved possible it became necessary for the applicant to file and serve an originating application together with evidence in support thereof. In my view, from the point where the applicant raised that issue, the respondent was without justification for not withdrawing the statutory demand. That is not to say that the respondent ought to have agreed with the applicant that the costs of the debt collection were not a legitimate debt. What was not justifiable was the attempt to enforce that debt by a statutory demand when the applicant had made its position clear that those costs were in dispute.

[8] While this case did not therefore proceed to a defended hearing this is one of the relatively exceptional types of case where the Court is able to come to a clear conclusion on the merits of the costs application. Having regard to the merits, in my view the respondent should be required to pay costs of the entire proceeding, subject to an argument about preparation of the bundle and a synopsis of argument.

[9] The next issue concerns whether costs should be according to scale or calculated on some other basis.

[10] In my view the respondent in all the circumstances must be viewed as having proceeded "frivolously, improperly or unnecessarily in … continuing, or defending a proceeding or a step in a proceeding".[1] By doing so, the respondent exposed itself to an order for indemnity costs.

[11] I therefore conclude that this was an appropriate case for indemnity costs to be ordered, rather than scale costs.

[12] The next issue concerns what if any deductions ought to be made from the costs that were actually incurred by the solicitors for the applicant in these proceedings.

[13] To understand the contentions of the respondent in regard to this part of the dispute it is relevant to take into account the order in which relevant events occurred:

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1 HCR 14.6(4)(a).

a) The proceeding was first called on 3 April 2017. At that point I made an order extending the time within which the respondent would be required to file and serve the notice of opposition and affidavit in support. Costs on the appearance were ordered in favour of the respondent because of the failure of the applicant to comply with the time limits within which the notice of opposition and affidavit in support ought to have been filed:

b) The proceeding was placed on the list for 6 April 2017 to review compliance with the order extending time for the filing of the notice of opposition;

c) On 6 April, the notice of opposition et cetera having been filed and served in accordance with the orders made on 3 April, I made an order timetabling the date by which the applicant was to file and serve any affidavit in reply and directed that the Registrar was to allocate a fixture of one half day's duration and I also directed the filing of submissions and a bundle 10 working days prior to the fixture.

d) On 15 May the applicant filed submissions and bundle.

e) On 24 May 2017 the Registrar advised that a fixture would be proceeding on 27 September 2017.

f) On 28 August 2017, having reviewed a joint memorandum of counsel dated 28 August 2017, Brewer J ordered that the fixture be vacated with costs to be determined.

[14] The submission which is made by Mr Swan, counsel for the respondent, is that it was unnecessary for the submissions and bundle to be filed when they were because that, in the event, turned out to be work that was not required because the parties eventually settled the dispute between them.

[15] Literal compliance with the timetable by the applicant would have required the submissions to be filed and served by 3 September 2007. It is implicit in the submission of counsel for the respondent that:

a) It was not reasonable for the applicant to comply with a timetable direction prior to the date when the step in question is directed to be taken;

b) The costs relating to the step that was taken before the date it was required to be taken ought not to be the subject of a costs order in favour of the party taking it.

[16] In my view it comes down to a question of reasonableness. On one view of the matter, filing submissions and bundle et cetera brings with it advantages in that it exposes the opposite party to the substance of the arguments which the party providing the memoranda et cetera are going to make at the trial. The earlier that that occurs, it could be reasoned, the greater are the chances that the parties will settle their dispute. In general, the longer a dispute is left unresolved, the greater the costs that the parties will incur. Further, the more costs that parties "sink" in a dispute, the less chance there will be that the parties will be able to come to a settlement. Viewed in this way, there was nothing about the conduct of the applicant in the circumstances of this case which means that its claim for costs for the step in question is un-meritorious.

[17] The further point is that timetable orders are generally regarded as designed to provide a minimum period of time to the opposite party during which they will be in possession of the arguments of their opponent and in which period they are expected to prepare their arguments in response. Parties frequently complain about the prejudice caused to them by late provision of submissions. It is unusual for a party to complain that providing submissions too early somehow amounted to disentitling conduct.

[18] Further, at the point where the applicant filed its synopsis of submissions et cetera, the dispute over the collection fees was already apparent to the respondent. By then it knew that there was a substantial dispute over whether it was entitled to claim the collection costs. Having regard to the potentially oppressive nature of statutory demands, it behoves those who serve such documents to act promptly when they become aware that there is a substantial dispute about the claim to withdraw the statutory demand and make it clear that it will not be proceeded with. The applicant in this case no doubt proceeded on the basis that, when there was no notice from the opposite party that the statutory demand was going to be withdrawn, that it would be necessary for the proceeding to progress to a defended hearing.

[19] Considering matters overall I consider that the applicant cannot be reproached for filing the bundle and synopsis earlier than the timetable strictly required it to be produced.

[20] My ultimate conclusion is that this is one of the exceptional cases where the Court ought to make an order for indemnity costs. The proceedings ought never to have been permitted to get to the point where they did with the parties incurring substantial legal costs. In my view the blame for this position coming about rests with the respondent and it is appropriate that it should shoulder the costs consequences of the decisions that it made in the proceeding.

[21] I do not consider that any deduction ought to be made from the costs which are set out at Schedule 2 to the memorandum which Mr Burtenshaw filed dated 1 September 2017. There will be orders accordingly.

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J.P. Doogue
Associate Judge