

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

**I TE KŌTI MATUA O AOTEAROA  
TE ROTORUA-NUI-Ā-KAHU ROHE**

**CIV-2017-409-000137  
[2017] NZHC 2174**

UNDER Section 290 of the Companies Act 1993

BETWEEN LEISURETIME PORTABLE  
BUILDINGS LIMITED  
Applicant

AND LEISURETIME CARAVANS LIMITED  
Respondent

Hearing: 20 June 2017

Appearances: L Foley for the Applicant  
A Swan for the Respondent

Judgment: 8 September 2017

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**JUDGMENT OF ASSOCIATE JUDGE H SARGISSON**

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

*Registrar/Deputy Registrar*

*Date.....*

[1] Leisuretime Portable Buildings Limited applies for an order under s 290 of the Companies Act 1993 to set aside a statutory demand made against it by the respondent, Leisuretime Caravans Limited.<sup>1</sup> In late 2015, Portable Buildings purchased Leisuretime Caravans' business. Disputes have since arisen.

[2] It is common ground that the balance of \$40,000 on the total purchase price remains unpaid. Leisuretime Caravans served the applicant with a statutory demand in February 2017, demanding the outstanding sum plus interest and collection costs.<sup>2</sup> Portable Buildings applies to set it aside under s 290 of the Companies Act 1993.

[3] At issue is whether Portable Buildings can demonstrate there is arguably a genuine and substantial dispute as to the existence of the debt. If it can, then the statutory demand must be set aside.

### **The court's approach**

[5] Applications to set aside statutory demands are governed by s 290 of the Companies Act 1993. Section 290(4) states that a 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;
- (b) the company appears to have a counterclaim, set-off, or cross-demand;  
or
- (c) the demand ought to be set aside on other grounds.

[6] The onus is on Portable Buildings. While it is not required to prove that there is a substantial dispute or a valid cross-demand, nor can it rely on mere assertion. But the threshold remains low: Portable Buildings must only point to material that demonstrates its claim is reasonably arguable.

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<sup>1</sup> The applicant is referred to as Portable Buildings in this judgment and the respondent as Leisuretime Caravans.

<sup>2</sup> The overall sum demanded is \$53,705.09. Given my ultimate conclusion, I consider it unnecessary to address Portable Buildings' submissions as to alleged problems with the calculation of quantum and also alleged defects in the form of the statutory demand.

[7] The evidence available to the court in this application is almost entirely restricted to affidavits filed by key individuals involved in the dispute. As is typical in such applications, the depositions of Jacob and Natasha are incompatible with Daryl's factual narrative. For Portable Buildings, Daryl Shackleton has filed an affidavit. He along with his partner, Angela Harwood, are the two directors and shareholders of that company. In opposition, an affidavit has been filed by Natasha Halvorsen, formerly the sole director and shareholder of Leisuretime Caravans. There is also an affidavit from her partner, Jacob Halvorsen. Jacob was an employee of Leisuretime Caravans; after its sale and purchase, he was temporarily kept on by Angela and Natasha as the sales manager.

[8] Section 290(4) calls for a prompt judgement as to whether or not there is a substantial dispute.<sup>3</sup> I am satisfied there is, and that it is neither possible nor even appropriate to adjudicate between the depositions and reach a firm view on the facts.<sup>4</sup> The disagreements can only be resolved at trial.<sup>5</sup>

[9] I turn to my reasons for these findings.

### **A genuine and substantial dispute**

[10] Leisuretime Caravans carried on business constructing portable buildings. It operated two factory premises, one in Shannon in the North Island and the other in Rangiora in the South Island. Soon after the Halvorsens decided to sell Leisuretime Caravans in late 2015, they began communicating with Angela and Daryl. As with many deals between small businesses, the parties moved forward informally, operating largely on trust.

[11] The parties recorded their intentions for the sale and purchase in an undated note described as a "brief" by them and signed only by the Harvorsens on 12 November. It appears to be an oversight that Angela and Daryl did not sign. In late November 2015, Portable Buildings provided Leisuretime Caravans with an Agreement for Sale and Purchase. The Agreement was executed by Natasha on behalf

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<sup>3</sup> *Industrial Group Ltd v Bakker* [2011] NZCA 142 at [24], [25].

<sup>4</sup> *Takanini Central Residential Ltd v Terra Group NZ Limited* [2016] NZHC 478 at [34].

<sup>5</sup> *Kim v Wasan International Co Ltd* 9/2/06 HC Auckland CIV-2005-404-6077.

of Leisuretime Caravans. Angela and Daryl never signed, although the reasons for this are disputed.

[12] The Agreement sets out the breakdown of the purchase price, and stipulates that payment was to be made in three instalments. What is critical here, however, is simply that Portable Buildings paid only \$180,000 towards the total purchase price of \$220,000, leaving a balance of \$40,000 outstanding.

[13] Portable Buildings advances its application on a range of grounds – these are couched in various forms in both tort and contract. I focus on two submissions that are, in my view, sufficient to justify setting the statutory demand aside. I take each in turn.

#### *The stock take*

[14] Much of the parties' dispute relates to the sale and purchase of the stock in trade. The Agreement valued the stock in trade at \$40,000. But this was in effect subject to "any adjustments required pursuant to the final stock take" of the two factory premises in Shannon and Rangiora. It is apparent that a stock take was undertaken for both factories in early December.

[15] Portable Buildings now contends that it did not receive \$40,000 worth of stock; in fact, it values the stock at less than \$10,000. It says there was little of substance in either factory and much of it was "unusable scrap". Leisuretime Caravans maintains that the stock was valued accurately, and if anything, that \$40,000 was actually a low valuation for what was provided.

[16] There are other disagreements between the parties bound up in the dispute over the stock value. One disagreement is whether the folk lift and scaffolding were included within the stock valuation or as tangible assets (a separate category in the Agreement's breakdown of the purchase price).

[17] Another is whether Leisuretime Caravans misrepresented which tools were included within the purchase price. Portable Buildings says that after the stock take,

Leisuretime Caravan employees began to take for themselves tools which were represented to have been included within the sale and purchase. It says that on being confronted about this, Jacob said that the employees were entitled to take their own personal property. In his own affidavit, however, Jacob pleads ignorance of these events.

[18] There are significant evidential limitations in assessing the parties' positions:

- (a) The original stock take list was not produced in evidence. It appears that a tool list was taken at the time. But that list was never provided to Daryl and Angela (as Portable Building contends) or else was provided but then lost by them (as Leisuretime Caravans contends).
- (b) Jacob's affidavit provides a list and accompanying photographs. However Portable Building contends the photographs might have been taken some 3-5 weeks after it took possession, and in any case, a close analysis still demonstrates that the items in the photographs are "largely worthless".
- (c) Most significant is that so Leisuretime Caravans cannot verify its assertion that the stock provided was in fact valued at \$40,000, as no receipts were adduced in evidence.

[19] It is not possible on the evidence to determine the factual dispute either way, but there is in my view a degree of plausibility in the applicant's account. I consider there is an arguable case that Leisuretime Caravans has not supplied stock to the agreed value and/or misrepresented the nature and value of what was included in the purchase price for stock.

*Jacob's actions and the restraint of trade*

[20] A second area of contention is Jacob's involvement with the business after its purchase by Portable Buildings. The Agreement provided that Jacob would be kept on

for a period in the capacity of a sales manager – essentially to impart his knowledge and keep the business going.

[21] Jacob did indeed stay on, though it is apparent the relationship between him and the two directors of Portable Buildings soon began to sour. The applicant's complaints are wide-ranging and not always expressed as legal causes of action. For instance, Daryl deposes that after he and Angela arrived back from holiday, after leaving Jacob in charge of the business for over a month, they were shocked to discover that not a single sale had been made in that period. They began to harbour suspicions about Jacob's intentions.

[22] Those suspicions are now full-blown. Portable Buildings contends that Jacob abused his position to divert business opportunities away from Portable Buildings and towards him and his partner personally, undercutting prices and hiding purchases. Daryl even accuses Jacob of stealing company materials for his own benefit.

[23] The most grounded allegation is that Jacob acted in breach of a restraint of trade agreed to by the Halvorsens. Portable Buildings point to a number of specific incidents where Jacob is said to have made sales in breach of the restraint of trade; each is contested by Leisuretime Caravans. It says variously that the sales took place before the restraint of trade came into effect, or that the sales were not of Leisuretime property, or that it is patently false that the sale took place. On the evidence before me I am not able to determine the issue either way.

[24] There are also various complications with Portable Buildings relying on the restraint of trade. First, while the brief does not specify any geographic limitation on the restraint of trade, the Agreement appears to specify the Canterbury Region. Only one of the incidents relied on by Portable Buildings relates to a purchaser based in the Canterbury region. A second issue is that the Agreement required Portable Buildings to procure a Deed of Covenant from [the Halverosens] acknowledging that they are bound by the terms of the Restraint of Trade in this Agreement. This never happened.

[25] Though these issues would need to be worked through before Portable Buildings would be entitled to any relief at law, they do not discredit the argument

entirely. I remain satisfied that Portable Buildings' claim is at least arguably genuine and substantial.

*Early promises, late complaints*

[26] Leisuretime Caravans' strongest argument is that Portable Buildings made early promises to pay, and made its complaints too late. The contention is that Portable Buildings failed to take any steps to bring its concerns to the attention of Leisuretime Caravans – there is certainly nothing in writing about the restraint of trade and stock valuation issues for many months after the sale and purchase.

[27] This submission appears especially compelling with respect to the stock take, for which the Agreement stipulates a process for disagreements as to valuation. Portable Buildings accepts it did not give any notice of an adjustment, as contemplated by the Agreement, before making the relevant payment instalment on 29 February 2016. Nor did it require that the value be determined by an independent valuer as the Agreement also allows for in circumstances of disagreement.

[28] Portable Buildings responds in a couple of ways. It insists, for one, that the issues were raised orally from the beginning and on multiple occasions. It also stresses that parties operated informally, and that absence of written correspondence is unsurprising in that context. As an example of such informality, the applicant points out that Leisuretime Caravans similarly failed to comply with procedures laid out in the Agreement in the event of instalment payments not being made.

[29] These two points are equally important in explaining why Daryl and Angela made a number of promises in writing to pay the outstanding balance, rather than disputing that the money was owed. Portable Buildings submits, in essence, that these putative 'promises' are not legal undertakings but simply the attempts of lay people to constructively work through a dispute involving a party with whom they were still working.

[30] I do not consider that the early promises or belated complaints inevitably negative the arguments raised by Portable Buildings. There remains an arguable case that there is no debt owing.

### **Result**

[31] Portable Buildings' case relies almost entirely on the deposition of Daryl. While a court is not required to accept uncritically any or every disposition, it will not reject off hand even dubious affidavit evidence as long as it casts sufficient doubt on the existence of the debt.<sup>6</sup> The grounds relied upon by Portable Buildings are not proven, nor even necessarily more believable than the rebuttals from Liesuretime Caravans. But in my view they raise sufficient doubt to justify setting aside the statutory demand.

[32] So for these reasons, the application is granted and the statutory demand set aside.

[33] As costs follow the event under the statutory costs regime the respondent is ordered to pay costs to the applicant on a 2B basis plus disbursements as fixed by the Registrar.

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Associate Judge Sargisson

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<sup>6</sup> *Freemont Design and Construction Ltd v W Stephenson & Sons Ltd* HC Auckland CIV-2005-404-4807, 20 April 2006 at [8]/