IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001300
[2014] NZHC 1728

IN THE MATTER OF	the Companies Act 1993
AND	
IN THE MATTER OF	an application to set aside a statutory demand
BETWEEN	WILKINSON BUILDING AND CONSTRUCTION LIMITED Applicant
AND	AUCKLAND COUNCIL Respondent

Hearing: 18 July 2014

Appearances: M Black for Applicant
B Martelli for Respondent

Judgment: 23 July 2014

JUDGMENT OF VENNING J

This judgment was delivered by me on 23 July 2014 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Short & Partners, Auckland
Heaney & Partners, Auckland
Copy to: M C Black, Auckland

[1] Wilkinson Building and Construction Limited (the Company) seeks an order setting aside a statutory demand issued by Auckland Council (Council) against it, together with related orders.

Background

[2] In a decision delivered on 21 September 2012 the Weathertight Homes Tribunal at Auckland found the Company, the Council and a number of other parties, including Mr and Mrs Wilkinson, liable to the claimants for the total sum of $433,087.00.

[3] The Tribunal found Mr and Mrs Wilkinson as vendors of the property liable in contract. It also found the Company and Mr Wilkinson, Allied House Inspections Ltd (Allied), Hitex Building Systems Ltd (Hitex) and Mr Holyoake (the principal of Hitex), and the Council liable as joint tortfeasors. The Tribunal assessed the parties' respective liability as follows:

(a) Hitex and Mr Holyoake – 73%;

(b) Mr Wilkinson and the Company jointly – 10%;

(c) Mr and Mrs Wilkinson for breach of contract – 5%;

(d) the Council – 10%;

(e) Allied – 2%.

[4] If the various respondents met their obligations under the determination that would have resulted in the following payments being made:

(a)	The Company and Mr Wilkinson	$43,308.50
(b)	Mr and Mrs Wilkinson	$21,654.00
(c)	the Council	$43,308.50

(d)	Allied	$8,662.00
(e)	Hitex and Mr Holyoake	$316,154.00
		$433,087.00

[5] The Tribunal ruled that the Council was entitled to recover up to $389,778.50 from the other liable respondents for any amount paid in excess of $43,308.50.

[6] Hitex and Mr Holyoake appealed to the High Court. In a judgment delivered on 14 March 2014 Keane J dismissed the Hitex and Holyoake appeal.

[7] The claimants pursued the Council directly. The Council paid its 10% share of liability of $43,308.80, and has subsequently paid the balance of $389,778.50 (in fact the Council has paid more than that to represent interest and costs, but its ability to recover from the others is limited to that figure). The Company and Mr and Mrs Wilkinson have contributed the sums due by them (in total $64,962.50).

[8] Neither Allied nor Hitex and Mr Holyoake have made any effort to pay. Hitex and Mr Holyoake are facing liquidation and bankruptcy proceedings respectively.

[9] The Council has issued a statutory demand against the Company claiming $162,408.00 calculated as follows:

The Company & Mr Wilkinson's % apportionment of liability, i.e.				
100% less Richard & Catherine Wilkinson's, Allied's, Hitex's, and Mr Holyoake's percentage liability for damages (i.e. 100% less 73%, 2% and 5%)	10% 20%	= 50% X	$8,662 (being the amount of Allied's apportionment of damages)	= $4,331
			$316,154 (being the amount of being Hitex's and Mr Holyoake's apportionment of damages)	= $158,077
			Total	**$162,408**

The application to set aside

[10] Although a number of grounds were raised in the amended application to set aside the statutory demand, during the course of submissions Mr Black refined the grounds to the following:

(a) the Company has a fairly arguable case that the sum claimed by the Council is not due and payable by it now. Hitex and Mr Holyoake are primarily liable for the claimant's loss. The amount claimed against the companies by the Council includes the same amount that Hitex and Holyoake were ordered to pay;

(b) it has not yet been established that Hitex and Mr Holyoake are insolvent and unable to pay. The bankruptcy proceedings against Mr Holyoake are to be heard on 14 August. The Company liquidation proceedings against Hitex are to be heard on 29 August. Until those proceedings are determined it will not be known if Hitex and Mr Holyoake are going to pay. At the very least these proceedings should be stayed until determination of the Council's claims against Hitex and Mr Holyoake;

(c) the District Court has not yet issued a certificate of judgment. The Council intends to apply to the District Court for the judgment;

(d) the Court ought to set aside or stay the statutory demand in the exercise of its discretion;

(e) on the basis of an analysis carried out by the Company's accountants, Lock and Partners, there will be an "inequity" if the Company is required to pay the $162,408. The Council will be in a better position than the Company and the Wilkinsons;

(f) the Company and the Wilkinsons have paid the full amount that they have been held liable. The Tribunal found "there is no principled

reason why the Wilkinsons should pay those increased damages ahead of Mr Holyoake and Hitex".

Preliminary matter

[11] As a preliminary matter Mr Black noted that Hitex had sought a stay and recall of Keane J's judgment. The Judge had directed an exchange of memoranda on the points. The Judge is to deal with the applications on the papers. Mr Black submitted this proceeding should await the outcome of that application.

[12] There is no purpose in awaiting the further decision of Keane J. The obvious starting point is that s 95 of the Weathertight Homes Resolution Services Act 2006 provides that the Court's decision on an appeal is a final determination of the claim (subject only to s 95(3) which does not apply in the present case). While it will be for Keane J to determine, it seems clear the only issue could possibly be whether his judgment should be recalled in part. But the recall application is a red herring for present purposes. At best it might lead to a reduction in Hitex's liability which would only increase the portion due by the Company, the Council, and others. Further, the Council (and the Company and Wilkinsons) have paid on the basis of the decision as confirmed by Keane J. I proceed on the basis of Keane J's judgment as it stands at present.

[13] A further preliminary point is Mr Black's submission directed at ss 90 and 98 of the Weathertight Homes Resolution Services Act 2006. Mr Black noted that the Council intended to apply to the District Court to obtain certificates of judgment. The Council has prepared a memorandum explaining the quantum claimed against the various judgment debtors. Mr Black submitted that, in the circumstances, s 90(2) of the Weathertight Homes Resolution Services Act 2006 was engaged and the Company would have the opportunity to make submissions concerning the amount of money payable by it. Until that process was completed he argued the sum due by the Company was not certain.

[14] However, s 90(2) has no relevance to the present situation. Section 90(2) only applies in the event that the Tribunal requires a person to take any action *other than the payment of money*. That is confirmed by s 98(2). In this case the orders of

the Tribunal were directed solely at quantifying the monetary damages. The Tribunal fixed the quantum of the claimants' claim at $433,087 and, as noted, fixed the apportionment of the various parties' liability for that sum. Nothing further is required. The determination of the Tribunal is treated as an order of the District Court and may be enforced accordingly: s 98(1). Further, as noted, the Tribunal's decision has been confirmed on appeal.

[15] The only reason the Council seeks a certificate of judgment from the District Court is to support bankruptcy proceedings. The Council's application to the District Court for a certificate of judgment is not an opportunity for the parties to renegotiate their respective contributions and liability which have been determined against them. The Council does not need to obtain a formal sealed judgment or certificate from the District Court to support the issue of the statutory demand. It is settled law that a statutory demand may be issued when a debt is claimed as due and owing. That can be prior to judgment. The issue is whether there is a genuine and substantial dispute as to the existence or quantum of the debt.

[16] Next, Mr Black relied on the observations of the Weathertight Homes Tribunal that there was no principled reason why the Wilkinsons should pay the increased damages ahead of Mr Holyoake and Hitex to support his submission for a stay. However, the quote is taken out of context. The Tribunal's comment was made in the context that, in reliance on *Marlborough District Council v Altimarloch Joint Venture Ltd*,[1] the Council sought an order that as Mr and Mrs Wilkinson had been found liable in contract, the claimants should exhaust their contractual remedies against Mr and Mrs Wilkinson before pursuing the tortfeasors. The Tribunal rejected that submission on the facts of the case before it. It is in that context that the Tribunal made the statement there was no principled reason why the Wilkinsons should pay those increased damages ahead of Mr Holyoake and Hitex. In fact the Tribunal went on to determine that contribution between all the respondents was permissible and equitable. The Tribunal proceeded to consider the relative contributions and fix them in the proportions noted above.

---

1 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

[17] The Company's submission on this point reflects a misapprehension that coloured the rest of its submissions, namely it conflates the position of the Wilkinsons personally with that of the Company. They are however two separate entities and have separately identifiable liability in respect of the total damages.

[18] The misapprehension is also contained in the Lock Report relied on by the Company. The Company's accountants Lock and Partners have prepared the schedule which is attached to this judgment.

[19] Mr Black submitted that the schedule showed that if the Company and the Wilkinsons paid the amounts demanded to the Council then the Company and the Wilkinsons would have paid more of the Hitex, Mr Holyoake (and Allied's) liability than the Council. Mr Black submitted that that was reinforced by the Council's own acknowledgement in its proposed memorandum for the District Court that the sealed judgments would be for a greater amount than the maximum contribution of $389,778.50 that it may claim from the judgment debtors.

[20] However, the Lock Partners Report is based on the fallacy that both the amount of $162,408 demanded from the Company and the amount claimed from Mr and Mrs Wilkinson personally will be paid in full in the sums claimed. The figure presently claimed from the Company is on the basis that there will be nothing further from the Wilkinsons personally (or from any other contributor). In the event that the amount of $162,408 was paid by the Company then the amount the Council could claim against Mr and Mrs Wilkinson personally would be recalculated.

[21] The approach of the Council in calculating the shares of the other contributors' liability in this way is orthodox and in accordance with the decisions of *Fisher v CHT Ltd* and *Dubai Aluminium Co Ltd v Salaam & Ors*.[2]

[22] In the case of *Fisher* Lord Denning MR noted that in a case of joint liability where one joint tortfeasor had no money or did not pay the remaining joint

---

[2] *Fisher v CHT Ltd (No 2)* [1966] 2 QB 475 (CA); and *Dubai Aluminium Co Ltd v Salaam & Ors* [2003] 2 AC 366 (HL).

tortfeasors had to bear the whole damages between them. In typically succinct fashion Lord Denning noted:[3]

> Tolainis were rightly held 60 per cent. liable. But they have got no money. So they pass out of the picture. The other two, Crockfords and the plasterers, have got to bear the whole damages between them. The question is how should they bear them as between themselves. If the judge's decision was right, it meant that they would have to bear them half-and-half. …

That observation was in the context where the Judge had assessed Crockfords and the plasterers' liability at 20 per cent each and Tolainis at 60 per cent. As Crockfords and the plasterers' liability was the same (as the Council and the Company in this case) they were to share equally in the balance 60 per cent.

[23] In the *Dubai Aluminium* case, in the course of rejecting a submission that it was not open to take into account receipts, Lord Nicholls said this:[4]

> I cannot accept this submission. It is based on a misconception of the essential nature of contribution proceedings. The object of contribution proceedings under the Contribution Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of where that cost has fallen in the first instance. The burden of liability is being redistributed. But, of necessity, the extent to which it is just and equitable to redistribute this financial burden cannot be decided without seeing where the burden already lies. The court needs to have regard to the known or likely financial consequences of orders already made and to the likely financial consequences of any contribution order the court may make. For example, if one of three defendants equally responsible is insolvent, the court will have regard to this fact when directing contribution between the two solvent defendants. The court will do so, even though insolvency has nothing to do with responsibility. An instance of this everyday situation can be found in *Fisher v C H T Ltd (No 2)* [1966] 2 QB 475, 481, per Lord Denning MR.

[24] It is not necessary for the Council to pursue Hitex and Mr Holyoake to liquidation and bankruptcy respectively. It is not a requirement, before pursuing contribution from other parties for the amount the Council has paid, that the Council pursue other parties to insolvency. Having paid the full amount of the judgment the Council is entitled to seek contribution from other parties to the full extent permitted, which is to the extent of $389,778.50.

---

3 *Fisher v CHT Ltd*, at 481.

4 *Dubai Aluminium Co Ltd v Salaam & Ors*, at [52].

[25] If the claimants had pursued the Company for the full amount, then the Company would have been able to seek contribution from the Council and others. In those circumstances, despite Mr Black's suggestion to the contrary, the Council would not have been able to resist the claim for its contribution until the Company had pursued Hitex and Mr Holyoake to liquidation and bankruptcy.

[26] In practical terms, the calculation supporting the Council's claim against the Company (jointly with Mr Wilkinson) is as follows:

Judgment paid by Council (actually more with interest and costs)	$433,087.00
Council obligation for its liabilities	$43,308.00
Amount Council entitled to recover	$389,779.00
Company and Mr Wilkinson's joint liability	$43,308.00
Wilkinson's personal liability	$21,654.00
	$324,817.00
Council and Company equally liable:	$162,408.50

If the Company were to pay the $162,408.50 to the Council then each would have paid out $162,408.50 more than their liability.

[27] If the calculation was done on the basis that both the Company and the Wilkinsons would pay the amounts due, then the figures would be as follows:

Council	40%	$129,926.40
Company	40%	$129,926.40
Wilkinsons	20%	$64,963.20
		$324,816.00

[28] However, the Council is entitled to pursue the Company for its full share of contributions. This is no different to the position of a judgment creditor obtaining judgment against judgment debtors jointly and severally, and enforcing against one.

[29] For those reasons there is no arguable basis for the suggestion that the amount claimed is not presently due and owing to the Council.

[30] Mr Black also pursued a stay and argued that these proceedings should be consolidated with the liquidation proceeding against Hitex and the bankruptcy proceedings against Mr Holyoake.

[31] Largely for the same reasons neither of those applications can succeed. The stay is pursued on the basis that the Council is obliged to pursue Hitex and Mr Holyoake. Whether anything comes of the pursuit of Hitex and Holyoake is entirely speculative. In the meantime it cannot be said to be a substantial miscarriage of justice for the Company, which has had the benefit of the Council settling the claimants' claim against all joint tortfeasors (including the Company), to be required to contribute its share to the overpayment the Council has been required to make: *Marac Finance v Twilight Trustee Ltd.*[5]

[32] As to consolidation I accept the force of Mr Martelli's submission that there is no point in consolidating this application with the Council's proceedings against Hitex and Mr Holyoake. While they both arise out of the Weathertight Homes Tribunal decision the circumstances of the Company and of Hitex and Mr Holyoake are quite different and distinct. The Council is entitled to pursue both separately. The Council's claim against the Company should not be delayed or determined by the outcome of the Council's claim against Hitex and Mr Holyoake.

[33] That then leads to the issue of the general discretion. In *CIR v Chester Trustee Services Ltd*)[6] Tipping J noted that all cases involving s 290(4)(c) come down to a 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

---

5 *Marac Finance v Twilight Trustee Ltd* HC Auckland CIV-2008-404-7291, 25 February 2009.
6 *CIR v Chester Trustee Services Ltd* [2003] 1 NZLR 395; (2002) 9 NZCLC 236,016 (CA).

liquidation to ensue. The ground advanced by the company must be sufficiently compelling to overcome the general policy of the Companies Act 1993 with regard to insolvent companies.

[34] In this context it is relevant that the Company says that it will be unable to pay the demand without the contribution from Hitex. The Council must be entitled to seek contributions from the other tortfeasors and on an equitable basis is entitled to pursue the Company for the sum claimed.

Result

[35] The application is dismissed. The Company is to pay the amount demanded in the statutory demand by 4.00 pm, 1 August 2014. In the event it does not, the Council may apply to place it in liquidation.

Costs

[36] Costs to the respondent Council on a 2B basis plus disbursements as fixed by the Registrar.

_____

Venning J

	% of Liability	Share of Initial claim	Paid (excl interest)	Reimbursement	Total Paid	Funds under/ (over) paid	Claim from Council of non-paying debt	Total Council Claim	Claim Paid	Total if paid as demanded	If Paid, Total % of initial claim	Increase Over Initial claim
Auckland Council	10%	$43,309	$433,087	$64,963	$368,124	$324,815				$97,444	22%	$54,136
The Company	10%	$43,309		$43,309	$43,309	$0	$162,408	$162,408	$162,408	$205,716	48%	$162,408
Allied	2%	$8,662			$0	$8,662	$50,585	$59,246		$0	0%	($8,662)
Wilkinsons	5%	$21,654		$21,654	$21,654	$0	$108,272	$108,272	$108,272	$129,926	30%	$108,272
Hitex	73%	$316,154			$0	$316,154	$7,536	$323,689		$0	0%	($316,154)
Total	100%	$433,087	$433,087	$0	$433,087	$0	$328,800	$653,615	$270,680	$433,087	100%	$0