

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2019-404-1946  
[2020] NZHC 281**

UNDER the Companies Act 1993  
IN THE MATTER OF an application to set aside a statutory  
demand  
BETWEEN DIGITAL SIGNS LIMITED  
Applicant  
AND INSIGHT CA LIMITED  
Respondent

Hearing: 20 February 2020

Appearances: N Perera for the Applicant  
A Ho and X Zhang for the Respondent

Judgment: 20 February 2020

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**ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL**

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***Solicitors:***

Legal Associates (N Perera), Papatoetoe, Auckland, for the Applicant  
Norling Law (A Ho/X Zhang), Auckland, for the Respondent

[1] Insight CA Ltd, an accounting practice, has served a statutory demand on Digital Signs Ltd requiring it to pay \$17,250 for unpaid accounting fees. Digital Signs Ltd says that Insight CA Ltd quoted it \$3,500 plus GST for the work. Within the period for complying with the statutory demand it paid Insight CA Ltd the \$3,500 plus GST. It disputes the balance of the amount claimed: \$13,225. It has applied under s 290 of the Companies Act 1993 to set aside the statutory demand claiming there is a substantial dispute whether the debt is owing or due.<sup>1</sup>

[2] There is no dispute as to the test the court applies in these cases. The onus is on the applicant to show that there is a genuine and substantial dispute as to the existence of the debt. The task for the court is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due. Merely asserting that a dispute exists is not enough. Material, which may be short of proof, is required to support the claim that the debt is disputed. If such material is not available, the dispute should normally be resolved other than by means of proceedings in the companies court. It is usually not possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise, unless the evidence is contrary to the available documents or earlier statements made by the parties. What I have just set out has been recited by the courts in many cases. A recent example is the Court of Appeal's decision in *Confident Trustee Ltd v Garden and Trees Ltd*.<sup>2</sup>

[3] As its name suggests, Digital Signs Ltd carries on business providing signs. Its director is Mr David Jaques. The director of the accounting practice is Mr Murray Phillips.

[4] In January 2019, Digital Signs Ltd instructed Insight CA Ltd to carry out accounting work for it. Digital Signs Ltd required financial statements to be prepared to support an application for finance. It had used other accountants in earlier years to prepare draft financial statements. On 22 January 2019 Insight CA Ltd provided a letter setting out the terms of engagement. Mr Jaques signed that letter. The letter describes three main tasks:

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<sup>1</sup> Companies Act 1993, s 290(4)(a).

<sup>2</sup> *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 at [16].

- (a) The first one was management reporting. That involved bringing Xero files up to date for the period April 2018 to December 2018 to prepare for the funding application. That service would be capped at five hours. The amount stated was \$1,500 plus GST.
- (b) The second task was preparing annual accounts and returns for 2018. Again, the amount stated was \$1,500. That would entail validating draft financial statements prepared by third parties, updating financial statements including notes and minutes. For that part the letter has this caveat:

The estimated fees are based on our discussion dated 22.01.19 whereby it is Insight CA Ltd's understanding that in essence this is merely a peer review of data already prepared and the major focus is to validate the balance sheet.

There is another qualification, that the work would not involve filing any tax returns, and the work was being done for a finance application only. In other words, Insight CA Ltd was not to act as the tax agent for Digital Signs Ltd.

- (c) The third task was the annual accounts and returns for 2017. The amount stated there was \$500. Again, that work was subject to a caveat similar to that stated for the 2018 annual accounts and returns. For the 2017 work Mr Phillips recorded his understanding that there was only one month's trading in the year ending March 2017.

The letter sets out a clearly defined scope of work.

[5] Insight CA Ltd began work. When it started work, it sent out invoice 1381. That was for \$3,500 plus GST (\$4,025). That is the total of the amounts stated in the letter of engagement. At the time of the invoice, no work had been carried out.

[6] On 19 February 2019 it sent out a further invoice, 1397. That invoice charges \$11,500 plus GST (\$13,225). In this invoice, Mr Phillips has recorded the work he has carried out under the three tasks that he had set out in his letter of engagement.

He was shown charges for each of those tasks. For the 2017-2018 annual financial statements he was charged for 7.25 hours at \$300 per hour: \$2,075. For the 2018 annual accounts he has charged 27.75 hours again at an hourly rate of \$300 per hour: \$8,325. For the management reporting he was charged a lump sum of \$9,795. If I apply his charge-out rate of \$300 per hour, then he appears to have carried out some 32.5 hours of work on management reporting. When those amounts are all added up, the charges come to over \$20,000, but he has allowed \$3,500 for the invoice that he sent in January, and he has also applied a discount of \$5,295. There is no explanation for the discount.

[7] When he got the second invoice, Mr Jaques emailed Mr Phillips:

I don't want to be a complainer, but when we next meet I'd be interested to know how I went from a \$4k to a \$17k bill. You strike me as usually pretty good at quoting. There is no issue you spent the time on it, my question is around forward planning etcetera.

[8] Mr Phillips gave a response in an email of 28 March 2019. He pointed out that there were inaccurate account balances, and Mr Jaques had asked him to reconcile those balances as far back as 2016. That work was beyond that stated in the engagement letter. He also said that he worked over Auckland Anniversary weekend and well into the following week. He was sending Mr Jaques requests for information so the accounts could be fully ready to submit to lenders. He recorded Mr Jaques' acknowledgement that there was obviously more work required than was first anticipated by the number of email queries that were sent and responded to. He also recorded that they had met at Mr Phillips' home on 1 February.

[9] Digital Signs did not pay and did not take any steps to deal with the outstanding bills until Insight instructed lawyers. They sent a letter of demand on 11 September 2019.

[10] Mr Jaques sent an email to the lawyers in which he included:

1. Thank you for your letter.
2. I advised Murray I was unhappy that he had quoted \$4k and invoiced \$16k.

3. I told him that despite being unhappy about his ability to quote (even after having done extensive work on our accounts and ought to have been able to know) we would have paid 100% of his account.
4. Our position has not changed despite the letter and Murray not speaking with me first.
5. I told him we were experiencing extremely difficult cash flow and that at the moment we had a first plan of paying at least 50 per cent by Christmas and the balance next year. We have had some improvement in our situation and managed to avoid other potentially fatal debts, but we have not quite got to the point of paying this invoice (though it has now basically come to the top of the pile).

...

I can advise debt exceeds assets at this point in time.

[11] In response the lawyers indicated that a statutory demand would be issued, and that was done. Mr Jaques protested that the debt was disputed and was unsuitable for a statutory demand. Service of the statutory demand did at least have the effect of prompting the payment of \$4,025, the amount of the January 2019 invoice.

[12] Mr Phillips has put in evidence financial statements he prepared for the year ending March 2018. They show that the company traded at a loss and has negative equity.

[13] For Digital Signs Ltd, Mr Perera takes the point that the letter of engagement indicated that if the work to be carried out was to go beyond the scope stated in the letter of engagement, Mr Phillips was to advise Mr Jaques to that effect, and to obtain the go-ahead to carry on outside the initial scope. That submission seems to envisage a formal notification process and a negotiated extension. The evidence shows that the parties did not do that. It is apparent from the evidence, which is not disputed by Mr Jaques, that Mr Phillips appreciated that he would have to do far more extensive work, and he notified Mr Jaques to that effect. Mr Jaques at the very least acquiesced in him carrying on working when it involved going back into earlier accounting years. That is apparent from the preparation of the management accounts.

[14] Mr Jaques appreciated that the time being spent was much more extensive than had been outlined in the initial scope. I note that the time envisaged for the

management accounts was capped at 5 hours. Quite clearly both men knew that much more than 5 hours was being spent on management accounts.

[15] Mr Phillips has not put in evidence his timesheets or other time records, but I can accept that he did the work that he says he did, because Mr Jaques acknowledged that Mr Phillips spent the time on the job that he charged for.

[16] In short, I see nothing in the objection that consent to do extra work was not obtained. Mr Jaques knowingly acquiesced in more work being carried out and was actively involved in the work by meeting with Mr Phillips and providing more information as it was requested.

[17] Mr Perera objected that there was a double charging claim because of the credit of \$3,500. However, the credit of \$3,500 acknowledged that some of the work had been charged for already. There was no double charging and no substance in the complaint.

[18] Finally, Mr Perera argued that Mr Phillips could have arranged for some of the work to be carried out by somebody else. Some of the work was coding work, and coding work would not necessarily be charged out at \$300 per hour because that work can be carried out by a less skilled and less experienced employee. Mr Jaques refers to Mr Phillips having communicated with his daughter and spoken to her about the accounts of Digital Signs Ltd.

[19] I see nothing in that. It is a quibble. Mr Phillips is a sole practitioner. When a sole practitioner is engaged, the client ought to appreciate that the sole practitioner will carry out the work. They should not expect that work to be delegated to somebody else. I see nothing objectionable in Mr Phillips having charged his work out at \$300 per hour, even if in some respects the work might be delegated and charged out at a lower rate. There tend to be swings and roundabouts with using a sole practitioner, in that they charge consistently at an hourly rate regardless of the work they carry out. That is just part and parcel of engaging a sole practitioner to do the work. In short, I see nothing in the coding quibble.

[20] Any doubts that there might be as to the bill are set aside when one considers the discount of \$5,295. Mr Jaques does not seem to have sought or expected it. It has been given. If there were conceivably any element of overcharging, it has been adequately addressed by that discount.

[21] Overall, I am not satisfied that there is any substantial dispute as to the debt. The clear background is the underlying insolvency of Digital Signs Ltd. The complaints about the amount of the bill are hollow and smack of delaying tactics to put off paying the bill.

[22] I am satisfied there is not a genuine and substantial dispute as to the amount of the accounts, and I dismiss the application to set aside the statutory demand. I make an order under s 291(1)(a) of the Companies Act that Digital Signs Ltd is to pay Insight CA \$13,225 by **12 March 2020**. If it does not pay, Insight CA may begin a liquidation proceeding based on the failure to pay.

[23] Digital Signs Ltd is also to pay Insight CA costs on the application on a 2B basis. I expect counsel to confer and agree costs, but if they cannot agree costs, memoranda may be filed and I will decide costs on the papers.

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**Associate Judge R M Bell**