IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-294
[2024] NZHC 2424

UNDER	section 290 of the Companies Act 1993
AND	
IN THE MATTER	of an application to set aside a statutory demand
BETWEEN	SPEEDY SNAIL DEVELOPMENT LIMITED Applicant
AND	ALIEN HOME LIMITED Respondent

Hearing: On the papers

Appearances: F Teh for the Applicant
A Ho for the Respondent

Judgment: 28 August 2024

JUDGMENT OF ASSOCIATE JUDGE SUSSOCK

This judgment was delivered by me on 28 August 2024 at 3 pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Millennium Lawyers, Auckland
Crimson Legal, Auckland

Introduction

[1] The applicant, Speedy Snail Development Limited, applies for costs following its application to set aside a statutory demand served on it by the respondent, Alien Home Limited.

[2] The applicant discontinued the application but submits it is entitled to costs because the respondent failed to agree to a procedure that it says was likely to be easier, speedier and less expensive than this proceeding.

[3] I briefly set out the background below before considering the relevant cost principles and applying those to the circumstances of the case.

Background

[4] The statutory demand is for the amount of $28,957 and is dated 17 January 2024. It was served on the applicant on or around that date. The solicitor for the applicant wrote to the respondent on 25 January 2024 disputing liability for the debt and asserting that the applicant had been induced to enter into the contract from which the debt arises by a misrepresentation by the respondent. The letter sought the withdrawal of the statutory demand by 26 January 2024 or otherwise the applicant would file an application to set aside the demand. The statutory demand was not withdrawn and so an application to set aside was filed on 31 January 2024.

[5] The respondent filed a notice of opposition on 28 February 2024, two days prior to the first call on 1 March 2024. The applicant took issue with the late filing of the respondent's opposition but as it was filed prior to the first call, timetable directions were made working towards a two-day hearing on 17 June 2024.[1]

[6] Both parties indicated they intended to cross-examine the deponents of the opposing party's affidavit, necessitating a longer hearing than is usual for an application to set aside. As a result, the parties were directed to file a joint

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1 *Speedy Snail Development Ltd v Alien Home Ltd* HC Auckland CIV-2024-404-294, 1 March 2024 (Minute of Associate Judge Sussock).

memorandum following the filing of notices to cross examine to confirm that two days were still required.

[7] A memorandum was filed by the respondent on 4 June 2024 recording that counsel had attempted to confer with counsel for the applicant but had received no response so was filing a separate memorandum confirming that only one day was required in the respondent's view.

[8] A notice of discontinuance was filed by the applicant on the same day, 4 June 2024. The notice recorded that "costs remain to be determined".

[9] On 6 June 2024 the applicant filed a memorandum seeking costs on a 2B basis with a 50 per cent uplift. Counsel records that the applicant has discontinued to avoid the two-day hearing and without prejudice to its rights in the Disputes Tribunal.

[10] A memorandum was filed in response on behalf of the respondent on 7 June 2024 confirming that the statutory demand was not withdrawn and that the applicant has paid the amount demanded. Costs are therefore sought by the respondent on a 2B basis plus disbursements.

[11] No memorandum has been filed following the respondent's memorandum disputing that the full amount has been paid.

Relevant costs principles

[12] On a discontinuance, the applicant bears the onus of displacing the presumption in r 15.23 of the High Court Rules 2016 that the applicant must pay the respondent's costs. Rule 15.23 provides:

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[13] "Proceeding" is defined in the High Court Rules as "any application to the Court for the exercise of the civil jurisdiction of the court other than an interlocutory application".[2]

[14] An application to set aside a statutory demand is required to be brought as an originating application under pt 19 of the High Court Rules[3] and so falls within the meaning of "proceeding". The application in this case was originally filed as an interlocutory application but leave was granted to the applicant to file an amended application properly referring to it being an originating application brought under pt 19 of the High Court Rules and the Companies Act 1993 rather than the repealed rules referred to.[4]

[15] The principles applying to the application of r 15.23 are summarised in *McGechan on Procedure*:[5]

> (a) The r 15.23 presumption obviates any requirement for the defendant to demonstrate that the plaintiff acted unreasonably in commencing and then discontinuing the proceeding. The defendant has the advantage of the presumption even where there has not been such unreasonableness.
>
> (b) Although the r 15.23 presumption is designed to give a certain and predictable outcome upon discontinuance, it may be displaced if the court finds there are circumstances which make it just and equitable that it should not apply.
>
> (c) Although the court is not limited in factors it may take into account when considering whether the presumption is displaced, generally:
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> (i) The court will not consider the merits of respective cases unless they are so obvious that they should influence the costs outcome.
>
> (ii) The court will consider the reasonableness of the stance of both parties up to the point of discontinuance: whether it was reasonable for the plaintiff to bring and continue the proceeding; and for the defendant to oppose the proceeding. The plaintiff will not be able to avoid the presumption by showing that at one point it had reasonable grounds for believing it would be successful in the proceeding.

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2 High Court Rules 2016, r 1.3(1) definition of "proceeding".

3 High Court Rules 2016, r 19.2(c); and Companies Act 1993, s 290.

4 *Speedy Snail Developments Ltd v Alien Home Ltd*, above n 1, at [4].

5 Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.23.01], citing *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973; *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [10]–[12]; and *Opus International Consultants Ltd v Colac Bay Vision Ltd* [2015] NZHC 1782, [2015] NZCCLR 19 at [20]–[24].

(iii) The reason for discontinuing may be relevant, for example a change of circumstances rendering the proceeding unnecessary. However, it must be clear that the plaintiff would have succeeded had the circumstances … not changed …

(d) The court's general discretion in r 14.1 as to costs can also override the general principles relating to discontinuance.

[16] Counsel for the applicant does not refer to r 15.23 in its submissions relying instead on r 14.7. This rule provides that the Court may refuse to make an order for costs or may reduce the costs otherwise payable in certain circumstances, including where the party claiming costs has contributed unnecessarily to the time or expense of the proceeding by failing without reasonable justification to accept an offer for settlement (whether in the form of an offer under r 14.10 or some other offer to settle or dispose of the proceeding).[6]

Application of costs principles in this case

[17] The applicant discontinued these proceedings in circumstances where the statutory demand was not withdrawn. The presumption in r 15.23 therefore applies. The question then is whether there are circumstances which would make it just and equitable for the presumption to be rebutted.[7]

[18] Counsel for the respondent relies on *Powell v Hally Labels Ltd*, where the Court of Appeal recognised that as a matter of practice, the Court does not lightly allow a plaintiff (or applicant in this case) to displace the presumption.[8] The Court explained that the reluctance to do so reflects the objectives of the High Court Rules, including that liability on discontinuance should be predictable and quantum readily calculable.[9]

[19] In this case the respondent is the successful party as it has been paid the amount demanded in the statutory demand. This is the case irrespective of whether the applicant has reserved its position in respect of proceedings in the Disputes Tribunal or otherwise. It was always open to the applicant upon service of the statutory demand

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6 High Court Rules, r 14.7(f)(v).
7 *Tando v Designer's Destination Ltd (in liq)* [2021] NZHC 3102 at [32].
8 *Powell v Hally Labels Ltd* [2014] NZCA 572 at [20]–[23].
9 At [24].

to pay on the basis that the applicant reserved its position in the Disputes Tribunal. The fact that the applicant filed and then discontinued an application to set aside the statutory demand does not change that.

[20] The applicant relies on its letter dated 13 March 2024, a copy of which is attached to its costs memorandum, to submit that the respondent has failed to accept an offer for settlement or contributed unnecessarily to the cost of a proceeding. The offer made by the applicant was on the following terms:

(a) the application to set aside would be discontinued with each party bearing its own costs;

(b) either party could refer the dispute to the Disputes Tribunal or (with prior written agreement) to arbitration; and

(c) the applicant's solicitor would retain the sum of $28,000 paid into its trust account by the applicant to be paid as directed by the Disputes Tribunal or both counsel for the parties or the High Court.

[21] The respondent did not accept the offer nor make a counter-offer. The applicant submits on the basis of the above letter that the applicant is entitled to costs because the respondent did not agree to an interim settlement as to procedure or a complete settlement by way of a contingent arrangement for payment of funds and instead has required the Court to block out two days for hearing a case involving $28,957.

[22] I do not accept this submission. The offer made to the respondent on 13 March 2024 was for the amount demanded to be held in the applicant's solicitor's trust account pending the outcome of the proposed dispute resolution process and for costs to lie where they fall. The outcome for the respondent would not therefore have been better under the offer than the position now because the applicant has paid the amount demanded and because of the presumption in r 15.23. Rule 14.7 does not therefore assist the applicant as the respondent was reasonably justified in declining the 13 March offer.

[23] The applicant says further that the respondent ought to have accepted its offer to go to the Disputes Tribunal as it would not only have resolved costs but would have led to a more timely resolution of the dispute.

[24] The respondent says in reply that it is entitled to choose the forum in which it wishes to litigate the dispute and has done so by issuing a statutory demand. The respondent considers that there is no genuine and substantial dispute for the reasons set out in its affidavit filed in opposition and the fact that the applicant wished to avoid a hearing for its own reasons is not relevant to the question of costs. The respondent submits that if the applicant wished to avoid the costs associated with the application, it ought to have paid the amount demanded prior to making its application to set aside the statutory demand. It would not then have incurred any costs and could have maintained the right to pursue the dispute in the Disputes Tribunal. Counsel for the respondent submits therefore that the applicant's argument that it is now entitled to costs for steps it has taken in the proceeding is fundamentally flawed. I agree.

[25] Nor do I consider that the slightly late filing of the opposition by the respondent ought to change the position on costs as the applicant submits. The applicant therefore ought to pay costs to the respondent.

Quantum

[26] The respondent seeks costs on a 2B basis plus disbursements as set out in the table below:

Steps taken		**Allocated day or parts (2B basis)**	**Appropriate daily recovery rate**	**Total**
38	Opposition to application for possession and cancellation	2	$2,390	$4,780
11	Filing memorandum for mentions (29 February 2024)	0.4	$2,390	$956
12	Appearance at mentions hearing	0.2	$2,390	$478
11	Filing memorandum for mentions (4 June 2024)	0.4	$2,390	$956
11	Filing memorandum on costs	0.4	$2,390	$956
29	Sealing order	0.2	$2,390	$478
Total		**3.6**	**$2,390**	**$8,604**

Disbursements	**Total**
Filing fee – Opposition	$110
Translator's fee	$495
Filing fee – Sealing order	$184
Total	**$789**

[27] The respondent seeks costs for filing a memorandum on costs plus costs for sealing the costs order which has not yet been done. I consider both are appropriately claimed. There was not a proper basis for the applicant to claim costs where it had discontinued after paying the amount demanded in the statutory demand. The respondent's costs for preparing a costs memorandum ought not therefore to have been necessary. It is also efficient for the costs of sealing the costs order to be claimed prospectively.

[28] The disbursements include a fee for a translator of $495 as well as filing fees for the notice of opposition and what is labelled "Filing fee – sealing order" for $184. This latter amount appears to relate to the fee invoiced by Secure Collections & Investigations Ltd for service on the applicant, with the invoice for $184 attached to the respondent's memorandum. This is appropriately claimed and so I include this in the orders below.

[29] A filing fee will be payable for the sealing of the costs order of $65 and so I add this to the disbursements awarded as it is again appropriate to award this prospectively from an efficiency perspective.

[30] In terms of the translator's fees, a copy of the invoice from the translator is attached to the respondent's memorandum. The fees of a private interpreter connected with the preparation and translation of evidence are recoverable but they must be reasonable, reflect translation work only and be comparable to fees charged by other interpreters.[10]

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[10] *Zeng v Cai* [2018] NZHC 2277 at [33]–[37].

[31] The invoice records that the date that the job was undertaken was on 21 February 2024 and that it relates to the translation of WeChat screenshots. The invoice therefore appears to reflect translation work only and to be reasonable. The applicant has not filed any memorandum in response challenging the amount claimed for the interpreter. In these circumstances I include this fee in the orders below.

GST

[32] An adjustment does have to be made to the disbursement amount claimed as the invoices issued by the respondent confirm that it is registered for GST and the disbursements claimed by the respondent are GST inclusive — the filing fees prescribed by the High Court Fees Regulations 2013 are inclusive of GST[11] and the invoices issued by the respondent's interpreter and Secure Collections & Investigations Ltd include GST.

[33] A party claiming disbursements that is registered for and able to recover GST is not entitled to disbursements inclusive of GST.[12] The award for disbursements must therefore be reduced from $854 ($789 plus $65 filing fee for sealing the costs order) to $743 to exclude GST.

Orders

[34] I order the applicant to pay costs to the respondent on a 2B basis in the amount of $8,604, plus disbursements of $743 excluding GST.

Associate Judge Sussock

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11 High Court Fees Regulations 2013, reg 24.

12 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260 at [17].