

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

**CIV-2009-404-1767**

BETWEEN                      SENSATION YACHTS LIMITED  
   Applicant

AND                              DET NORSKE VERITAS PTE LIMITED  
   Respondent

Hearing:            1 May 2009

Counsel:            L Ponniah for Applicant  
                                 D J O'Connor for Respondent

Judgment:        29 May 2009 at 2.30 pm

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**RESERVED JUDGEMENT OF ASSOCIATE H SARGISSON  
(To set aside a Statutory Demand)**

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*This judgment was delivered by Associate Judge Sargisson on 29 May 2009 at 2.30 pm pursuant to  
Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

*Date .....*

*Solicitors:  
Corban Revell, PO Box 21 180, Waitakere City  
Elvidge & Partners, PO Box 609, Napier*

[1] The applicant, Sensation Yachts Ltd, seeks an order setting aside a statutory demand. The respondent, Det Norske Veritas PTE Ltd, served the demand on Sensation Yachts on 16 March 2009 seeking payment of two invoices for work Det Norske says it carried out at the request of Sensation Yachts. The invoices are:

- a) Invoice No MONSG314358727 for the sum of US\$95,821.08 for services described in the invoice as project “risk assessment, strategic partner in quality – Phase 0”;
- b) Invoice No. MONSG314358776 for the sum of SG\$194,600.21 for what is described as “pre-contractual project management and naval architectural support super yacht development”.

[2] The demand also seeks interest of US\$2,887.76 and SG\$5,864.66 in respect of the two invoices.

[3] In support of the order it seeks, Sensation Yachts raises the following grounds:

- a) Its contract for the projects was with Det Norske’s parent company, Det Norske Veritas AS. Therefore it has no liability to Det Norske;
- b) Alternatively, even if the contract was with Det Norske and not the parent company, there is a substantial dispute about the remaining debt and whether it is owing or due. Further, under the contract any dispute or disputed issue (including whether there is a substantial dispute about the debt) is governed by the laws of Singapore and must be determined by the Courts in Singapore and not New Zealand.

[4] Det Norske opposes the application for an order to set aside the demand. The grounds it raises are:

- a) The application was not served in accordance with the mandatory requirements for service of legal proceedings on overseas companies in s 389(1) of the Companies Act 1993, and therefore it is a nullity;

- b) The grounds Sensation Yachts relies on to establish a genuine and substantial dispute in respect of the two invoices are spurious;
- c) There is no basis to dispute the jurisdiction of the New Zealand Court in the statutory demand process.

### **Issues**

[5] The issues I am required to determine for the purpose of the application are:

- a) Was the application to set aside the statutory demand properly served? If it was not properly served, is it therefore a nullity?
- b) If it was properly served, is there a genuine and substantial dispute the applicant does not owe the debts referred to in the demand either because:
  - i) Sensation Yachts contracted with the parent company and not Det Norske; or
  - ii) Because of the various other grounds raised by Sensation Yachts?
- c) Does the Court lack jurisdiction in any event to determine whether or not there is a substantial dispute?

[6] For reasons I will come to I am satisfied that the application was not properly served and that it is therefore a nullity. It is unnecessary therefore to consider the other issues further.

### **Mandatory service requirements of documents in a legal proceeding under the Companies Act 1993**

[7] The respondent is an overseas company.

[8] Section 389(1) of the Companies Act provides the methods for service for documents on an overseas company in legal proceedings. It states:

**s 389 Service of documents on overseas companies in legal proceedings:**

- (1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on an overseas company in New Zealand as follows:
  - (a) By delivery to a person named in the overseas register as a director of the overseas company and who is resident in New Zealand; or
  - (b) By delivery to a person named in the overseas register as being authorised to accept service in New Zealand of documents on behalf of the overseas company; or
  - (c) By delivery to an employee of the overseas company at the overseas company's place of business in New Zealand or, if the overseas company has more than 1 place of business in New Zealand, at the overseas company's principal place of business in New Zealand; or
  - (d) By serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or
  - (e) **In accordance with an agreement made with the overseas company.**

[Emphasis added]

[9] Section 389(2) specifically limits the methods of service on overseas companies in New Zealand to those specified in s 389(1): *Environmental Solutions v Jesco Dosiertechnik GMBH & CO KG* (1999) 8 NZCLC 261,854. It states:

- (2) The methods of service specified in subsection (1) of this section are the only methods by which a document in legal proceedings may be served on an overseas company in New Zealand.

[10] An application to set aside a statutory demand is a document in a legal proceeding.

[11] Any defect in the service of an application to set aside a statutory demand cannot be corrected under the High Court Rules. The issue is not one of compliance with the High Court Rules but one that relates specifically to compliance with the requirements of the Companies Act: *Livi Investments Ltd v Butler Gilpat Ltd* (1998)

11 PRNZ 680; *Timberworld Limited v Tanner Sawmills Limited* (Auckland Registry, M 685-IM02, 29 August 2002, Master Lang).

[12] The High Court Rules expressly recognise the Act's requirement for service in accordance with s 389 of the Companies Act: see r 6.13.

[13] An application to set aside a statutory demand that is not served within the required 10 working day period from the date of service of the demand is therefore a nullity. The Court has no jurisdiction to extend time for an application to set aside the demand if it is served out of time: *Ingleburn Developments Limited v BRC Limited* (Wellington Registry, Associate Judge Gendall, CIV2007-485-454, 30 July 2007).

[14] In *Ingleburn* the applicant attempted to serve an application to set aside a statutory demand by facsimile on the company's solicitors. In the statutory demand the solicitors provided an address for service. But service by facsimile was not a means by which they stated they would accept service. The Court held that the strict service requirements in the Act must be complied with and in the absence of a prior agreement to accept service by way of facsimile, personal service was required at the address for service. As the application to set aside a statutory demand was not served by personal service at the address for service within the time, it was a nullity. It could not be corrected under the High Court Rules.

[15] If a creditor includes an address for service in a statutory demand this constitutes an agreement to accept service at that address for service in accordance with s 389(1)(e): *Exactics Process Innovations Ltd v Hollands Worldwide Ltd* (17/11/99, Master Faire, Auckland Registry, M1677-IM99).

### **Service on Det Norske**

[16] Det Norske's statutory demand contained the following memorandum that referred expressly to its address for service:

Clayton Russell Walker is the solicitor the Creditor of the firm Elvidge & Partners. The address for service of the Creditor is at the office of Elvidge & Partners, corner Raffles and Bower Streets, Napier.

[17] The memorandum went on to expressly refer to two other methods of service. It stated:

Documents for service may be left at that address or may be:

- (a) Posted to the solicitor at PO Box 609, Napier; or
- (b) Left for the solicitor at the Document Exchange for direction to DX MP70017, Napier.

[18] Applying the principle in the *Exactics Process Innovation* decision, I conclude that the memorandum therefore includes an agreement to accept service by three methods: personal service at the solicitor's office; by post to the solicitor's PO Box; or by leaving documents at the solicitor's DX address.

[19] The statutory demand was not served by any of the three methods of service.

[20] Both counsel recognised that the statutory demand does not expressly agree to any other method of service.

[21] However, the statutory demand had a cover sheet that contained another memorandum at its foot. It included the same box number and DX number as in the first memorandum, plus the name, and the fax and email addresses for the solicitor dealing with the proceeding, Mr O'Connor. The memorandum stated:

Elvidge & Partners  
Solicitors  
D J O'Connor  
Phone: (06) 835 0436  
Fx: (06) 835 0557  
PO Box 609  
DX MP70017  
Napier 4140  
e-mail: doconnor@elvidges.co.nz

[22] Unlike the first memorandum, the second did not contain any express authorisation stating that the documents for service may be sent to the fax or email addresses of Mr O'Connor. Nevertheless, on 27 March 2009, the solicitors for Sensation Yachts sent the application seeking an order setting aside the statutory demand by email and facsimile to Mr O'Connor at Elvidge & Partners. Counsel submitted this was service in terms of s 389(1) because the second memorandum

amounted to an implied agreement authorising service by these additional methods.

He also relied on rules 5.16, 5.44(1)(b) and (c) and 6.1(1)(d). These rules state:

**5.16 Information at foot of cover page**

- (1) The following information must appear at the foot of the cover page of every document for filing:
  - (a) the name of the solicitor or firm of solicitors (if any) presenting it for filing and the name of any agent by whom the document is filed; and
  - (b) when the document is presented for filing by or on behalf of a solicitor or firm of solicitors,—
    - (i) the name and telephone number of the principal or employee dealing with the proceeding; and
    - (ii) the address of any post office box or document exchange used by the solicitor or firm; and
    - (iii) any fax number and any email address used by the solicitor or firm.
- (2) The fact that the name of a solicitor or firm of solicitors is subscribed on a document is prima facie evidence that the document was filed by that solicitor or firm of solicitors.

**5.44 Memorandum at end of first document filed by party**

- (1) At the end of the first document filed by a party there must be a memorandum stating—
  - (a) that the document is filed by a party in person, or by the party's solicitor, as the case may be; and
  - (b) if it is filed by a solicitor,—
    - (i) the name of the solicitor; and
    - (ii) if the solicitor is a member of a firm or practises under a firm's name, the name of the firm; and
  - (c) if it is filed by a solicitor who has another solicitor acting as the solicitor's agent in the proceeding,—
    - (i) the name of the agent or of the agent's firm (if any); and
    - (ii) the postal address of the party's solicitor; and
  - (d) an address for service; and

- (e) if it is filed by a solicitor, any post office box address, document exchange box number, fax number, or email address by which the solicitor will accept service of documents in the course of the proceeding.
- (2) The memorandum may be in 1 of the paragraphs of form G 10.

### **6.1 Methods of service**

- (1) Any of the following methods may be used for serving a document that is required by these rules to be served:
  - (a) personal service:
  - (b) service at an address for service given in accordance with these rules:
  - (c) service at an address directed by the court as the address for service for the party or person:
  - (d) if the solicitor for the party or person has, under [rule 5.44(1)(e)], specified a post office box address, document exchange box number, fax number, or email address,—
    - (i) by posting the document to that post office box address; or
    - (ii) by leaving the document at a document exchange for direction to that document exchange box number; or
    - (iii) by transmitting the document electronically to that fax number or email address.
- (2) In any case not provided for by these rules, service must be effected by the method and at the place the court directs.
- (3) This rule does not apply if an Act or a rule requires a special and exclusive method of service.

[23] I am unable to agree with counsel's submission for the following brief reasons:

- a) The express inclusion of an address for service in a statutory demand and the express authorisation to use a specific fax or email address constitutes an agreement under the Act to accept service by those methods;
- b) If the intention had been to also agree to service by fax or email then it can only be assumed the statutory demand would have allowed

these methods by express authorisation in the same way. The obvious inference to be taken from the absence of an express authorisation is the absence of such intention;

- c) There is no room in these circumstances to infer that the agreement claimed and the second memorandum can be treated as anything more than advice that Mr O'Connor is the contact person with knowledge of the proceeding and authority to file the application;
- d) The High Court Rules do not govern the methods of service of a legal proceeding on an overseas company and cannot be relied upon to infer an agreement as to service by a particular method, where in fact there was no agreement to that method.

[24] I therefore accept the submission that the application was not served in accordance with s 389(1). There was no personal service or service by the methods agreed to under s 389(1)(e). Accordingly, the application is a nullity and cannot be corrected under the High Court Rules: *Ingleburn Developments*.

## **Result**

[25] The application to set aside the statutory demand is struck out as a nullity.

[26] There is an extant order that the time for compliance with the statutory demand is to continue pending further order. That order will be extended until **19 June 2009**, at which time Det Norske may file a liquidation proceeding based on the statutory demand if the demand has not been satisfied.

## **Other Matters**

[27] As I have not dealt with the application on its merits, neither side should take this judgment as indicating a view on the question whether there is any substance to the grounds that have been raised by Sensation Yachts in support of its application. Whether or not the grounds have substance will be a matter for a liquidation proceeding assuming one is filed.

[28] Costs must follow the event. I make an order that the application pay costs to the respondent on a 2B basis plus disbursements to be fixed by the Registrar.

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Associate Judge Sargisson