

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA149/2011
[2011] NZCA 548**

BETWEEN 21ST CENTURY INVESTMENTS
 LIMITED
 Appellant

AND ANZ NATIONAL BANK LIMITED
 Respondent

Hearing: 18 August 2011

Court: Arnold, Winkelmann and Andrews JJ

Counsel: P Moodley for Appellant
 M J Tingey and N F D Moffatt for Respondent

Judgment: 3 November 2011 at 10:30 AM

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant is to pay the respondent's costs as for a standard appeal on a band A basis, with usual disbursements.**
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REASONS OF THE COURT

(Given by Andrews J)

Introduction

[1] The appellant (21st Century) has appealed against the decision of Associate Judge Bell given in the High Court at Auckland on 25 February 2011 (the

judgment),¹ dismissing its application to set aside a statutory demand served on it by the respondent (the bank). The statutory demand was served after the bank had demanded that 21st Century make immediate repayment of a loan, on the grounds of default, and 21st Century failed to make payment.

[2] The appeal, in essence, challenges the Associate Judge's finding that the bank was entitled to demand repayment of the loan, pursuant to a power to accelerate in the loan agreement.

Background

[3] On 24 November 2005, 21st Century and the bank entered into a loan agreement under which 21st Century took a term loan of \$976,000 for 10 years. The loan agreement provided that interest was to be fixed at 8.20 per cent per annum for the first 12 months, then at the bank's floating interest rate. Interest was to be paid each month in arrears.

[4] Clause 10(b) of the loan agreement provided that all payments under the agreement were to be made on demand. Clause 15 provided that all fees, expenses and liabilities at any time incurred or charged by the bank in connection with the loan, or in the course of protecting or enforcing the loan, were to be paid by 21st Century to the bank on demand. Clause 13 of the loan agreement contained an acceleration clause under which the bank had the power to require immediate repayment of the loan, and any other amounts owing, in the event of default. As relevant to this appeal, cl 13 provided:

The Bank may by written notice to the Customer ... ii) require immediate repayment of the Loan, and payment of all interest and other amounts owing under this agreement if:

- (a) default is made in the payment of any amount due under this agreement, or on any of the Customer's accounts with the Bank, or under any liability the Customer has to the Bank; or

...

¹ *21st Century Investments Ltd v ANZ National Bank Ltd* HC Auckland CIV-2010-404-7366, 25 February 2011.

[5] In July 2010, after the bank had made demand for payment of arrears that had accrued as at 28 June 2010, 21st Century made payments of \$48,252.95 (on 1 July 2010) and \$200,000 (on 16 July 2010) to the bank.

[6] The parties subsequently entered into a variation of the loan agreement. The terms of the variation were set out in a letter from the bank to 21st Century dated 22 July 2010 and provided that:

- (a) the principal was reduced to \$799,574.38;
- (b) the term of the loan was 64 months and 7 days from 22 July 2010; and
- (c) interest was payable at the bank's floating interest rate (at the time 5.99 per cent per annum, but subject to change).

The letter also stated that all other terms and conditions of the loan agreement were confirmed. The bank later contended that the loan variation was invalid, as it had been entered into by mistake. However, that dispute is of no moment for the purposes of the appeal.

[7] On 1 October 2010 the bank's solicitors, Bell Gully, made demand on 21st Century for payment of \$19,868.57, made up as follows:

| <i>Debits since 1 July 2010</i> | |
|--|--------------------|
| 1 July 2010 interest payment | \$4,612.60 |
| 1 August 2010 interest payment | \$4,663.49 |
| 1 September 2010 interest payment | \$4,120.44 |
| 1 October 2010 interest payment | \$4,031.22 |
| June 2010 legal fees | \$4,500.00 |
| July 2010 legal fees | \$6,103.76 |
| Valuer's fees | \$4,545.00 |
| Monthly account fees and debit interest on overdrawn account balance | \$325.06 |
| Sub total | \$32,901.57 |

| | |
|----------------------------------|--------------------|
| <i>Credits since 1 July 2010</i> | |
| 30 July 2010 | (\$4,011.00) |
| 30 August 2010 | (\$4,011.00) |
| 9 September 2010 | (\$1,000.00) |
| 30 September 2010 | (\$4,011.00) |
| Total outstanding | \$19,868.57 |

The letter of demand required payment of the outstanding amount by 21st Century by 4pm on 8 October 2010. No payment was made.

[8] On 7 October 2010, 21st Century's solicitors, Brookfields, sought clarification from Bell Gully as to the interest payments demanded, and the valuer's and legal fees charged. By a letter dated 12 October 2010, Bell Gully set out the basis of the bank's interest demands, and provided copies of relevant invoices for valuer's and legal fees. The letter concluded with the statement that "if payment is not made by 4pm on Thursday 14 October 2010 then our instructions are to take enforcement action against [21st Century] without delay".

[9] No payment was made by 4pm on 14 October, and on 15 October 2010 the bank wrote to 21st Century, recording that 21st Century was in default in having failed to pay \$19,868.57 as demanded, and making demand for immediate repayment of the loan and payment of all interest and other amounts owing under the loan agreement (in total, \$797,729.88), pursuant to the acceleration clause. The bank required payment in full by 4pm on 22 October 2010.

[10] On 18 October 2010 Brookfields wrote to Bell Gully rejecting the bank's claim for payment of \$19,868.57 and denying the bank's entitlement to demand repayment of the loan. In particular, the solicitors challenged the bank's claim for interest, legal fees, monthly account fees and debit interest. It was accepted that the valuer's fees of \$4,545.00 were payable. On 21 October 2010, 21st Century paid the valuer's fees. No other payment was made.

[11] On 27 October 2010 Bell Gully responded to Brookfields, acknowledging the payment of \$4,545.00 and responding to the matters raised. The final paragraph of

Bell Gully's letter recorded that as 21st Century had defaulted under its obligations under the loan agreement, the bank was entitled to cancel it, which it thereby did.

[12] On 29 October 2010, Bell Gully (on behalf of the bank) had a statutory demand (dated 28 October 2010) served on 21st Century, demanding payment of \$794,909.52. This was expressed to be made up of the loan balance of \$788,493.84 and 21st Century's overdrawn current account balance of \$6,415.68. 21st Century filed its application to set aside the statutory demand on 9 November 2010. The stated ground was that there was a substantial dispute as to whether the claimed debt was owed to the bank.

The High Court judgment

[13] The Associate Judge first noted that the task of the Court was not to resolve a claimed dispute, but to determine whether there was a substantial dispute that the debt was due.² He went on to consider the components of the amount demanded.

[14] The Associate Judge noted that, as at the date of the statutory demand, 21st Century's current account had an overdrawn balance of \$6,415.68 and that, apart from current account fees and debit interest, the bank had not made demand under the current account before issuing the statutory demand. The bank's terms for operating the account were not in evidence. He held that the bank could not issue a statutory demand in respect of "a debt owing" by 21st Century until it had first made demand for payment of the overdrawn balance; that is, the statutory demand could not itself create the liability.³

[15] The Associate Judge then turned to the bank's acceleration of the loan. He held that the bank could invoke the acceleration clause and demand immediate repayment of the loan if there was an unsatisfied liability of 21st Century, and the bank had made 21st Century aware of the unsatisfied liability, so as to clearly inform it of its liability.⁴

² At [3].

³ At [15], citing *Keene v Okere Holdings Ltd* (1996) 7 NZCLC 261,034 (HC).

⁴ At [17]–[20].

[16] The Associate Judge then considered whether 21st Century had an “incontestable” liability to the bank for the various sums claimed in the bank’s demand of 1 October 2010, and whether the bank had adequately notified it of those liabilities. He noted that 21st Century had accepted that it was liable for the valuer’s fees, but that acknowledgement was made after the bank had invoked the acceleration clause on 15 October 2010.⁵

[17] The Associate Judge then considered the bank’s claims for interest payments for 1 July, 1 August, 1 September, and 1 October 2010. He held that there was an arguable dispute as to whether the interest payment claimed for 1 July 2010 (\$4,612.60) had been covered in a payment of \$48,252.95 made by 21st Century following an earlier demand made by the bank on 1 July 2010. He held that this sum could not be used to establish an incontestable liability for the purpose of invoking the acceleration clause.⁶ However, he held that the interest charges for 1 August, 1 September, and 1 October 2010 (totalling \$12,815.15) were incontestable, and there had been no failure to notify 21st Century.⁷

[18] The Associate Judge accepted that there was a dispute as to the legal fees claimed. These amounts could not therefore be used to invoke the acceleration clause.⁸ Finally, the Associate Judge rejected 21st Century’s submission that there was a dispute as to the monthly account fees and debit interest (\$325.06) claimed by the bank. He held that these were incontestable and had been adequately notified.⁹

[19] The result was that the Associate Judge held that there was an incontestable liability for interest due on 1 August, 1 September, and 1 October 2010, valuer’s fees, and current account charges when Bell Gully made the second demand on 12 October 2010. The incontestable amounts (totalling \$17,785.15) were not discharged by the credits after 1 July 2010 (totalling \$13,033.00). The time given to comply with the demand was adequate and was not complied with.¹⁰ Accordingly, he held that there was a default by 21st Century in meeting unsatisfied liabilities,

⁵ At [23].

⁶ At [24]–[25].

⁷ At [26]–[30].

⁸ At [31]–[32].

⁹ At [33].

¹⁰ At [34]–[35], citing *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA) at 565.

which entitled the bank on 15 October 2010 to exercise the power to accelerate.¹¹ After counsel had conferred as to the amount to be specified, the statutory demand was upheld to the extent of \$782,513.52, but set aside for any amount above that.¹²

Issues on appeal

[20] Two broad issues arise. The first is whether the Associate Judge was correct to hold that the bank was entitled to accelerate the loan on 15 October 2010. The second was whether he was correct to refuse to set aside the statutory demand.

The bank's right to accelerate the loan

[21] Mr Moodley accepted that cl 13(a) of the loan agreement gave the bank the power to demand immediate repayment of the loan, but submitted that the Associate Judge was wrong to uphold the bank's exercise of acceleration against 21st Century. Mr Tingey submitted that the Associate Judge had correctly held that the elements required to accelerate (namely, demand and default) were satisfied and that the bank was entitled to exercise the power.

Could the bank exercise the power to accelerate when its demand included disputed amounts?

[22] Mr Moodley submitted, first, that the bank could not accelerate the loan when the bank's demand included amounts that were held to be the subject of an arguable dispute. We accept Mr Tingey's submission that 21st Century cannot succeed on this point. Clause 13(a) is clear in its terms: the bank is entitled to accelerate the loan if "default is made in the payment of *any* amount due ... or under *any* liability the Customer has to the Bank" (our emphasis). We accept that there was never any dispute that 21st Century owed the valuer's fees, the current account charges and debit interest.

[23] We do not accept that the power to accelerate was extinguished by virtue of the fact that some of the individual amounts claimed by the bank were held to be

¹¹ At [36].

¹² At [41].

subject to an arguable dispute. Mr Tingey acknowledged that had it been the case that the bank was not entitled to claim any of the sums listed in Bell Gully's letter of 1 October 2010, then it would not have been entitled to accelerate. That is not, however, the case here. At the time the bank exercised the power to accelerate, 21st Century had defaulted in paying undisputed liabilities owed to the bank. Mr Moodley did not cite any authority for the proposition that a dispute as to one amount claimed by the bank would extinguish the power to accelerate after default on payment of other amounts.

Was it unreasonable to exercise the power to accelerate?

[24] Mr Moodley's second argument was that the Associate Judge should have held that it was unreasonable for the bank to accelerate repayment of the loan when more than 76 per cent of the amount demanded by the bank (\$15,216.36 out of \$19,868.57) was disputed. He also submitted that the bank's unreasonableness was even starker once 21st Century paid the valuer's fees on 21 October 2010, leaving only \$80.21 of unpaid and undisputed liability to the bank.

[25] 21st Century cannot succeed on this argument. First, it cannot support its submission of unreasonableness by reference to its payment of the valuer's fees; they were paid five days after the bank had exercised the right to accelerate. At the time the bank did so, the valuer's fees were clearly both unpaid and undisputed.

[26] Secondly, the loan agreement does not provide any limit on the amount that might trigger the power to accelerate repayment of the loan. The power is triggered if *any* amount is unpaid. In the absence of the parties themselves having provided any threshold of unpaid liability required for the exercise of the power to accelerate, it would not have been appropriate for the Associate Judge to imply one. We have been given no grounds on which either the Associate Judge, or this Court on appeal, could or should do so.

Time given to pay

[27] Mr Moodley also submitted that the acceleration should not have been upheld because 21st Century had been given only two days to pay. Bell Gully's letter of 1 October 2010 was not an effective demand, as Brookfields had responded to it seeking clarification and explanation of the bank's claims, which was not provided until Bell Gully's letter of 12 October. The two days allowed were insufficient for 21st Century to verify and accept or reject the amounts claimed. This was particularly so, he submitted, in the light of the relationship between the parties, and the substantial payments made to the bank in July 2010.

[28] Mr Tingey submitted, first, that the bank's demand for payment was made on 1 October 2010, not 12 October. In the demand of 1 October, 21st Century was given seven days to pay. In the letter of 12 October, payment was required by 14 October. In all, 21st Century was given 13 days, from 1 October to 14 October, to make payment. This was ample time. Mr Tingey also submitted that even if the Court were to accept that demand was not made until 12 October, the two days allowed were adequate. The sums demanded were not substantial and were amounts that a commercial entity could be expected to pay.

[29] Both counsel referred to this Court's judgment in *ANZ Banking Group (NZ) Ltd v Gibson*,¹³ which was relied on by the Associate Judge in reaching his conclusion that 21st Century had been given adequate time to pay. In *ANZ v Gibson*, the issue was whether two companies had been given reasonable time to pay a debt to the bank before receivers were appointed under powers contained in debentures given to the bank. The debentures contained a covenant that the companies "will on demand duly pay to the Bank the moneys hereby secured". In that case the companies were given two hours to pay \$128,000. That time was held to be reasonable in the circumstances.

[30] In his judgment for the Court, Richardson J first observed that:¹⁴

¹³ *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA).

¹⁴ At 560, lines 22-32.

It is well settled and was common ground between counsel that in providing for notice requiring payment on demand as a condition precedent to the appointment of a receiver the debenture itself required that the company be given a reasonable time to comply with the demand for payment. That construction is reinforced where, as here, the requirement is that the company will on demand *duly* pay. The addition of the adverb “duly” signifies that the payment must be made according to the provisions of the law governing legal tender and at the due time. ... But the authorities are not clear as to what circumstances are relevant in determining whether the time allowed for payment was reasonable in the contractual sense.

(Emphasis as in original)

[31] Richardson J referred to English, Canadian, and Australian authorities. In his review of the English authorities, he referred to the judgment of Goff J in *Cripps (Pharmaceuticals) Ltd v Wickenden*.¹⁵ Goff J concluded, after reviewing earlier authorities, that in relation to a debenture providing for repayment on demand (demand having been made one hour before receivers were appointed), “the cases show that all the creditor has to do is to give the debtor time to get it from some convenient place, not to negotiate a deal which he hopes will produce the money”.¹⁶

[32] Richardson J then said in *ANZ v Gibson*:¹⁷

The parties could have stipulated for time to pay following service of the notice. They chose not to do so and as in many areas of commercial activity the parties were content to agree on an obligation to pay on demand without any qualification as to time and so without any delay. The language of ‘demand’ envisages a pre-emptory notice unaffected by any questions as to matters personal to the debtor or creditor ...

His Honour concluded:¹⁸

In my view the only proper justification for allowing any time for payment after the actual demand is made is the practical commercial consideration that the borrower is not expected to have large cash sums immediately at hand. However he is expected to pay from resources which are presently accessible to him but have to be converted into immediate cash or utilised within the same time to obtain financial cover. It is the time reasonably required to achieve that, always bearing in mind that it is a demand liability which must be met. ... The test is objective and produces the certainty which commercial parties require in order to be clear from the outset as to their rights and obligations.

¹⁵ *Cripps (Pharmaceuticals) Ltd v Wickenden* [1973] 1 WLR 944 (Ch).

¹⁶ At 955.

¹⁷ *ANZ v Gibson* at 564.

¹⁸ At 565.

[33] We do not have to decide whether the bank made demand on 1 or 12 October 2010. The Associate Judge proceeded on the basis that the letter of 12 October was the bank's "final notice to the company".¹⁹ For the purposes of this appeal we take the same approach. The Associate Judge was required to decide whether demanding payment by 14 October was reasonable, in the circumstances of the case.

[34] In this case, cl 10(b) of the agreement required that all payments under the agreement were to be made "on demand". The agreement provided no qualification as to time. The amounts claimed by the bank, and as to which there was no dispute, were not substantial and were amounts which 21st Century could reasonably be expected to pay from resources presently available to it. We conclude that the Associate Judge was right to hold that 21st Century was given reasonable time to make payment.

[35] Accordingly, we conclude that the Associate Judge was not in error in holding that the bank was entitled to exercise the power of acceleration when 21st Century failed to pay the amounts demanded. Once 21st Century had defaulted in payment of any of the amounts demanded, cl 13 provided that the bank could "require immediate repayment" of the loan.

The statutory demand

[36] The Associate Judge recorded that counsel had conferred and agreed on the sum that represented the amount of the demand less the overdrawn current account balance and the bank's claims for the 1 July 2010 interest payment and legal fees. He upheld the statutory demand to the extent of \$782,513.52 and set it aside as to any amount above that.²⁰ Mr Moodley submitted that the Associate Judge should have set aside the demand in its entirety.

[37] The jurisdiction to set aside a statutory demand is provided in s 290 of the Companies Act 1993 (the Act). Subsections (4), (5), and (6) are relevant:

¹⁹ At [35].

²⁰ At [36], [40], and [41].

- (4) The 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; or
 - (b) the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
 - (c) the demand ought to be set aside on other grounds.
- (5) A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.
- (6) In subsection (5), **defect** includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.

[38] Mr Moodley gave two grounds for contending that the Associate Judge was wrong not to set aside the statutory demand in its entirety. First, there was a material misdescription of the debt owed by 21st Century, in that the statutory demand contained a significant miscalculation of the sums owed. This meant there was a substantial dispute as to whether the debt was owing. Secondly, a substantial injustice was caused when the statutory demand was not set aside.

Was there a material misdescription of the debt?

[39] In relation to the first ground, Mr Moodley acknowledged that the Court is entitled to allow statutory demands to stand in reduced amounts representing items not open to dispute.²¹ However, he submitted that the demand made on 12 October 2010 contained a significant miscalculation of the sum owed by 21st Century, which went beyond mere misdescription, and represented a genuine and substantial dispute regarding the bank's right to accelerate and to issue the statutory demand.

[40] That submission must fail, for the following reasons. First, it rests on the alleged invalidity of the bank's exercise of the power to accelerate repayment of the loan. We have found that the Associate Judge was right to hold that the bank was entitled to exercise that power. The statutory demand cannot be set aside on the basis of any dispute as to the bank's exercise of the power to accelerate. Accordingly, insofar as the statutory demand was in respect of the amount due to

²¹ See *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447 (CA) at [46].

repay the loan, it was not a misdescription of the debt owed by 21st Century to the bank.

[41] Secondly, and as Mr Moodley acknowledged, a statutory demand can be allowed to stand in respect of items which are not open to dispute. *United Homes (1988) Ltd v Workman* is a good example. In that case, statutory demands had been issued by shareholders in respect of amounts claimed to be owed to them by three companies, for \$6,093.33, \$9,821.43, and \$154,957.25, respectively. The companies applied to set aside the demands. The Court of Appeal said:²²

[44] It is at least fairly arguable on the material presented that the accounts (and behind that the dividends) on which the Workmans base the greater proportion of their various statutory demands did not come into effect. With that being so, it is at least fairly arguable that the Workmans are not owed the greater part of the current account indebtedness shown in the accounts.

[45] There can be and is no dispute, on the other hand, that the Workmans were and are owed small residual balances ...

[42] The Court of Appeal upheld the statutory demands in respect of the residual balances: \$5,144.40, \$2,780.00, and \$7,206.50 respectively. The amount upheld in respect of the third company (\$7,206.50 as against \$154,957.25) is clearly a “significant miscalculation” (to use Mr Moodley’s term), but the statutory demand was nonetheless upheld in respect of the lower amount. In the present case, the statutory demand was for \$797,729.88. It was upheld in the sum of \$782,513.52 (98 per cent). The difference of 2 per cent does not constitute a material misdescription of the debt (in terms of s 290(5) and (6) of the Act), or a “significant miscalculation” (as submitted by Mr Moodley).

[43] As a consequence of the bank’s exercise of the power to accelerate, there was a debt owed to the bank when 21st Century did not repay the outstanding balance of the loan, together with the sums claimed by the bank (as to which the Associate Judge held there was no arguable dispute). The Associate Judge held that the statutory demand was not properly made in respect of sums which were subject to an arguable dispute but held it was properly made in respect of sums which he found were disputed. We are not persuaded that he was wrong to do so.

²² *United Homes (1988) Ltd v Workman* at [44]-[45].

Was there a substantial injustice?

[44] Mr Moodley's second submission was that the statutory demand should be set aside as a substantial injustice would be caused if it were not set aside. He submitted that the statutory demand should have been set aside because "all but \$80.12 of the amount properly due to the bank" had been paid by 21st Century. He also submitted that the consequence of the bank's actions in demanding payment was that 21st Century was required to repay a loan which would not otherwise have been due for repayment until 28 October 2015. We understood this to be a submission that the demand should have been set aside "on other grounds" under s 290(4)(c).

[45] We are not persuaded that the statutory demand should have been set aside under s 290(4)(c). First, Mr Moodley's submission ignores the fact that at the time that he submits 21st Century had paid "all but \$80.12" of the amount owed to the bank (that is, when it paid the valuer's fees on 21 October 2010), the date for payment (14 October) had passed and the bank had exercised the power to accelerate (on 15 October). The entire outstanding balance of the loan was payable as from that date. Accordingly, it cannot be said that, as at 21 October 2010, 21st Century had paid all but \$80.12 of the amount it owed to the bank.

[46] Secondly, as Mr Tingey submitted, the same loan agreement that provided for a final repayment date of 28 November 2015 also gave the bank the power to accelerate if 21st Century committed an event of default by failing to pay any amount when due. Thus, the bank was simply exercising its contractual power, following 21st Century's default. 21st Century cannot take the benefit of one clause in the agreement without accepting the burden of another clause.

[47] In *CIR v Chester Trustee Services Ltd*,²³ Tipping J said that all cases involving s 290(4)(c) come down to the Court's judgment as to whether the creditor's prima facie entitlement to liquidate the company is outweighed by some factor (or factors) making it plainly unjust for liquidation to ensue. His Honour went on to say that "[t]he ground advanced by the insolvent company must be sufficiently

²³ *CIR v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA).

compelling to overcome the general policy of the Act with regard to insolvent companies”.²⁴

[48] In the same case, Baragwanath J said that caution is required when considering how the discretion under s 290(4)(c) may properly be used.²⁵ He went on to say that the discretion must be exercised in conformity with the purposes of the measure by which it was conferred. Thus, it should only be used in cases “which clearly justify departure from the fundamental principle that insolvency should bring the end of the company’s existence.”²⁶

[49] We are not satisfied that the statutory demand should have been set aside under s 290(4)(c) on the grounds of “substantial injustice”.

Result

[50] The appeal is dismissed.

[51] The appellant is to pay the respondent’s costs as for a standard appeal on a band A basis, with usual disbursements.

Solicitors:
Brookfields, Auckland for Appellant
Bell Gully, Auckland for Respondent

²⁴ At [3].

²⁵ At [47].

²⁶ At [48].