

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

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

**CIV-2019-404-2644  
[2020] NZHC 1358**

UNDER the Companies Act 1993  
IN THE MATTER of the liquidation of Firma Construction Limited  
BETWEEN FV ALUMINIUM 2011 LIMITED Plaintiff  
AND FIRMA CONSTRUCTION LIMITED Defendant

Hearing: 11 June 2020

Appearances: A Alipour and B J Norling for the Plaintiff  
T P Kelly for the Defendant  
A Witten-Hannah for an interested party

Judgment: 17 June 2020

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**JUDGMENT OF GORDON J**

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This judgment was delivered by me  
on 17 June 2020 at 3.30 pm, pursuant to  
r 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

Solicitors: Norling Law Ltd, Auckland  
Grove Darlow & Partners, Auckland  
Copy To: Witten-Hannah Howard, Auckland

## **Introduction**

[1] This is an application by the defendant, Firma Construction Ltd (Firma), for orders staying and restraining publication of liquidation proceedings commenced against Firma by the plaintiff, FV Aluminium 2011 Ltd (FV Aluminium).<sup>1</sup> Firma also seeks leave to file a statement of defence out of time.

[2] Firma's applications are opposed by FV Aluminium.

## **Background**

[3] This summary is drawn from the affidavit of Michael Money, a director of Firma, sworn 17 December 2019, filed in support of the application, and an affidavit of Scott Lewis, a director of FV Aluminium, affirmed 5 May 2020, filed in opposition.

[4] Firma was the head contractor carrying out construction work on a site at 16 Blake Street (the property). The owner of the property is W Blake Ltd (Blake). Blake is the principal under Firma's construction contract with it.

[5] FV Aluminium is a company that specialises in aluminium window and door joinery. On or about 18 June 2019, Firma engaged FV Aluminium, as a sub-contractor, to carry out construction work at the property.

[6] On or about 30 July 2019, FV Aluminium issued a payment claim for work it says it carried out on the property for \$80,778.75 (the total claim).

[7] Firma responded by issuing a payment schedule accepting that \$33,708.23 was validly claimed (undisputed amount) but said that \$39,570.52 was disputed (disputed amount).<sup>2</sup>

[8] On 5 September 2019, Firma issued a payment claim to Blake for construction work it did at the property in July and August 2019 in the sum of \$275,937.45. No

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<sup>1</sup> The application is made under s 289 of the Companies Act 1993; rr 31.3 and 31.11 of the High Court Rules 2016; and the inherent jurisdiction of the Court.

<sup>2</sup> A part payment of the total claim was made on 1 August 2019, leaving the undisputed amount and disputed amount.

payment schedule was issued by Blake to Firma. As a consequence, Firma served a statutory demand for \$275,937.45 (Blake debt) on Blake on 10 October 2019. Blake then filed an application to set aside the statutory demand and a copy was served on Firma.

[9] Mr Money says that Blake's failure to pay the Blake debt, that Firma says is due and owing, has caused cashflow issues for Firma which he says Firma is managing as best as it can. As a consequence of these cashflow difficulties, Mr Money says Firma was not in a position to immediately pay the undisputed amount it owed to FV Aluminium.

[10] This resulted in FV Aluminium issuing a statutory demand for the sum of \$33,708.23. The statutory demand was served on Firma on 18 October 2019.

[11] Mr Money says that as soon as Firma received the statutory demand, it instructed its solicitors, Grove, Darlow and Partners, to offer to secure the debt by granting a charge over the Blake debt. As a consequence, on 29 October 2019, seven working days after being served with FV Aluminium's statutory demand, a solicitor at Grove Darlow emailed FV Aluminium's (then) lawyers, Davenports Harbour Lawyers, outlining Firma's position in relation to the Blake debt and offering a security interest in the Blake debt. The email from Grove Darlow included the following:

[Firma] is willing to grant a specific security interest in the W Blake account receivable to the extent necessary to repay the amount set out in the FV Aluminium statutory demand subject to FV Aluminium withdrawing the statutory demand to enable time for [Firma] to pursue W Blake for the \$275,937.45 it is owed by W Blake. This withdrawal will be without prejudice to FV Aluminium being able to issue another statutory demand should [Firma] not file the application to liquidate W Blake or otherwise take continuous steps to pursue that debt. The security interest would be subject to any GSA granted over [Firma].

[12] On 31 October 2019, Davenports responded in an email which included the following:

Our client is open to the proposal set out in your email subject to the following:

1. The amount owing to our client is in fact \$73,278.75. We are not aware of any dispute in relation to the amount owed. A copy of our

letter of 14 October 2019 is attached which provides further detail. Accordingly, the security offered should be to the extent necessary to repay the full \$73,278.75.

2. Your client agreeing to pay a contribution of \$3000 + GST towards our clients legal costs and disbursements in relation to this matter.

As you mentioned on our phone call, repayment would likely be made in instalments. Without binding your client, it would be appreciated if you could provide an indication of timeframes in which payments could be expected.

Please take instructions and advise if the above is acceptable to your client. Appropriate documentation can then be prepared.

- [13] Grove Darlow responded on 7 November 2019 by email saying, in part:

The undisputed amount (scheduled amount) is \$33,708.23 per the attached payment schedule ("Scheduled Amount").

[Firma] is happy to grant a security interest in the account receivable for payment #20 (W Blake Ltd) amounting to \$275,937.45 to secure payment of the Scheduled Amount.

The balance of the claim by FV[Aluminium] will need to be resolved in accordance with the CCA or how ever the parties choose.

- [14] Davenports responded on 11 November 2019 again by email which included the following:

Thank you for confirming the scheduled amount of \$33,708.23 will be secured.

Our client remains concerned that yours has not agreed to secure the remainder of the claim being an additional \$39,570.52.

We acknowledge that your client is attempting to juggle a number of creditor claims at present. Our client is willing to work with yours with regard to appropriate timeframes for payment. However it is important that the full amount owing to our client is secured.

Please take instructions and advise whether your client is willing to grant security to our client for the full amount owing being \$73,278.75.

- [15] Finally Grove Darlow sent an email on 15 November 2019, that included the following:

There appears to be a genuine dispute regarding the balance and that is the purpose of the payment schedule.

[Firma] has offered to secure the undisputed portion by providing a security interest in the account receivable of W Blake Ltd to the extent of the amount shown in the statutory demand.

Is this aspect (The security) agreed by FV[Aluminium]? If so I will put about to secure that sum. Let me know.

[16] FV Aluminium did not respond to this email.

[17] On 24 November 2019, Grove Darlow emailed Davenports in relation to the application by Blake to set aside Firma's statutory demand advising that the application would be heard on the papers and would, if Firma was successful, avoid the need for a substantive hearing regarding the Blake statutory demand. There was no response to this email on behalf of FV Aluminium.

[18] Mr Money says that by this stage the time for applying to set aside the statutory demand had elapsed and he believed that Firma had an agreement with FV Aluminium to secure the undisputed amount while the issues with the Blake debt were worked through and that FV Aluminium's statutory demand would not be acted on further.

[19] In his affidavit in opposition, Mr Lewis says that Mr Money's belief is misplaced. FV Aluminium did not agree to the security offered by Firma and nothing in the correspondence suggests that FV Aluminium did accept Firma's offer. Mr Lewis says all that they were doing was exploring a possible settlement. But no settlement was agreed, nor was any security documentation entered into between FV Aluminium and Firma. Mr Lewis further says, in any event FV Aluminium would not have accepted such an offer as there was a real risk that the security offered by Firma was worthless. In this situation Firma could not have guaranteed FV Aluminium that it would recover any moneys from Blake.

[20] On 5 December 2019, Grove Darlow received an email from a solicitor at Norling Law advising that firm now acted for FV Aluminium in place of Davenports. The solicitor referred to the offer by Firma to grant a specific security in Blake's account receivable to repay the amount set out in FV Aluminium's statutory demand. But he went on to say, as that account receivable was disputed, FV Aluminium was not willing to accept Firma's offer. The solicitor advised that liquidation proceedings had been filed.

[21] In relation to advertising, Mr Money says that publication of the fact of the liquidation application being filed will have a detrimental impact on Firma and its reputation. Mr Money says Firma continues to trade (the position has now changed as to which see below) and it has relationships with clients, suppliers and subcontractors that will be put in jeopardy if the proceeding is advertised.

[22] In relation to Firma's solvency, Mr Money says that Grove Darlow had previously advised FV Aluminium that it had funds available sufficient to pay the undisputed amount (in an email from Grove Darlow on 5 December 2019). But given Firma's belief the undisputed amount had been secured, and the ongoing issues with the disputed amount for which there was a process under the Construction Contracts Act 2002 (CCA) which had not been utilised by FV Aluminium, Mr Money says he considered the statutory demand had been met to FV Aluminium's satisfaction and there was no need to retain the funds given the (alleged) security.

[23] Mr Money expresses the view that it is clear FV Aluminium is utilising the liquidation application to try and extract an unfair advantage, namely payment of and/or security for the disputed amount when FV Aluminium should be following the procedure in the CCA.

[24] Mr Lewis denies there is any abuse of process. He says that Firma's failure to apply to the Court to set aside the statutory demand, together with the likely lack of recoverability of the security offered by Firma, were the two bases upon which FV Aluminium filed the liquidation proceedings. He denies that FV Aluminium filed the liquidation proceedings in an attempt to secure an advantage for the undisputed portion of the debt.

[25] In relation to Firma's solvency, Mr Lewis refers to a letter issued on or about 30 January 2020<sup>3</sup> by Firma to its sub-contractors and suppliers stating that it could not pay them under their normal trade terms and that consequently it had ceased trading. The letter also records that Firma would not respond to future calls, texts or emails from its subcontractors and suppliers.

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<sup>3</sup> The letter is undated. I will refer to it as the 30 January 2020 letter. The precise date is not material.

[26] As far as prejudice to FV Aluminium, Mr Lewis says his company will suffer prejudice if Firma's application is granted. It will cause further delay in payment of the undisputed amount and FV Aluminium will incur further costs in recovering the undisputed amount. That has put pressure on the firm, exacerbated by the interruptions caused by restructuring in response to the COVID-19 pandemic emergency. He says FV Aluminium is a small business and the undisputed amount is therefore a large sum for them. He says shareholders of FV Aluminium have already had to inject their own money into the business to keep it functioning and it is likely they will have to move into smaller premises in the near future. Mr Lewis expresses the view that Firma's application is really just delaying the inevitable.

[27] To complete the factual background, I refer to the reply affidavit of Mr Money sworn 3 June 2020. He acknowledges Firma's letter of 30 January 2020 and says it was decided this was a commercially responsible step to take to manage risk and collect monies owing, including retentions when they fell due, in order to pay the existing subcontractors of active or completed jobs. He says payment of the final retentions of \$129,474.19 excluding GST on another job is expected soon. A message from the project manager indicates end of June 2020.

[28] Mr Money also says that Firma is awaiting a significant GST refund to come through. Mr Kelly, who appeared for Firma, advised that payment had now been received. The amount was not stated.

[29] Mr Money also annexed to his reply affidavit a Minute of Associate Judge Bell dated 20 April 2020, in which the Judge ordered Blake to pay Firma \$275,937.45 by 4 May 2020. The Judge further directed that if Blake did not do so, Firma may file an application for Blake to be put into liquidation. It is also apparent from the Minute that Blake has shown that it has complaints of defective workmanship, delay and abandonment of work it wishes to raise against Firma to reduce or extinguish its liability (that will go to insolvency set-off under s 310 of the Companies Act 1993 (Companies Act) and may be raised in defence of a liquidation application).

[30] Mr Money says that Firma has taken further steps to recover money owed to it by Blake but says he is precluded from saying anything further in relation to those steps.

### **Submissions**

[31] The case for Firma rests on its position that FV Aluminium had accepted the security offered over the Blake debt. To use the words of the statutory demand, Firma had “give[n] a charge over [Firma’s] property to secure payment of the debt, to the reasonable satisfaction of FV Aluminium 2011 Ltd”. Mr Kelly submits that evidence of the alleged acceptance by FV Aluminium of that proposal is to be found in the email correspondence I have set out above.

[32] Firma does not submit, as is often the case in such applications, that the debt is disputed. It accepts that the amount of \$33,708.23 in the statutory demand is owed but it says it is not owed on the statutory demand immediately, but rather, as a consequence of the alleged agreement, it is owed upon the realisation of the security in the Blake debt.

[33] Mr Kelly submits that FV Aluminium is using the liquidation application in *terrorem* to secure both the disputed and undisputed amounts, despite the agreement to give a charge over the Blake debt. Acting in this way, and using the process as a debt collection mechanism, is an abuse of process.

[34] As to the 30 January 2020 letter from Firma to its subcontractors and creditors, Mr Kelly submits that its intent and purpose has been misconstrued by FV Aluminium. He refers to Mr Money’s evidence as to the true intent and purpose and submits that the letter was by no means an expression of Firma’s solvency.

[35] Mr Kelly refers to Firma’s receipt of a GST payment refund and the anticipated receipt of retentions from another job, which I have referred to above. He submits that either of those sums enables Firma to pay the undisputed amount to FV Aluminium. The reason payment has not been made, Mr Kelly says, is because of Firma’s belief that the undisputed sum had been secured by a charge over the Blake debt and Firma is trying to use some of the money received to distribute to other creditors.



[36] Finally on prejudice and in relation to advertising, Mr Kelly submits that while the 30 January 2020 letter had been sent to existing subcontractors and creditors, others were not aware of the position and so Firma would suffer prejudice in relation to potential future subcontractors and suppliers. He submits that FV Aluminium will not suffer any prejudice if the order restraining publication is granted but it will do undue harm to Firma if this occurs.

[37] Ms Alipour, for FV Aluminium, submits there is no genuine dispute as to the debt of \$33,708.23 being owed and due. There are also no clear and persuasive grounds for a stay.

[38] She submits that Firma has not established a strong prima facie case for the existence of a genuine dispute on substantial grounds against the undisputed amount. Ms Alipour submits on this basis alone the Court should dismiss Firma's application.

[39] In relation to Firma's contention that FV Aluminium accepted the offer of security over the Blake debt, she submits that FV Aluminium did not accept Firma's offer. Nor was any security ultimately granted. She submits it would be unreasonable for Firma to require FV Aluminium to wait until an unspecified date for Firma to be paid by Blake in order to recover the undisputed amount. FV Aluminium had, and has, no obligation to accept Firma's offer.

[40] As to solvency, Ms Alipour submits that, despite its onus, Firma has not produced any supporting evidence to show it is solvent. The strong inference, which she invites the Court to draw, is that Firma is insolvent.

[41] Ms Alipour submits that FV Aluminium is not utilising this proceeding to try and extract an unfair advantage from Firma (payment of, or security over, the disputed amount). She makes it clear that FV Aluminium is not attempting to recover the full amount in this proceeding. It simply wants to be paid the undisputed amount. She submits there is no abuse of process and Firma feeling pressure because of these proceedings does not make it so.<sup>4</sup>

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<sup>4</sup> Citing *Stone-Weir Fine Lodges Ltd v Stone* (1999) 13 PRNZ 214 (HC) at 220.

[42] In relation to advertising, Ms Alipour submits that the advertising of Firma's liquidation is unlikely to have any detrimental impact on Firma and its reputation with its clients, suppliers and subcontractors because Firma has already advertised its precarious financial situation with these entities in its 30 January 2020 letter.

[43] Finally, relying on the affidavit of Mr Lewis, Ms Alipour submits that FV Aluminium will suffer real prejudice if Firma's application is granted. The amount is significant for a small business of the size of FV Aluminium.

[44] For completeness I record that Mr Witten-Hannah appeared on behalf of Fabrication Solutions Ltd (Fabrication), which has filed an appearance in support of FV Aluminium's application to put Firma into liquidation. The notice records that Fabrication is a creditor in the sum of \$217,885.74. Mr Witten-Hannah says that this debt is a relatively long-standing one. He submits it is untenable for Firma to argue that it is solvent.

#### **Legal principles – Court's jurisdiction to stay liquidation proceedings**

[45] In *Nemesis Holdings Ltd v North Harbour Industrial Holdings Ltd*,<sup>5</sup> Wallace J set out what has been described as the classic summary of the principles concerning the Court's jurisdiction to stay liquidation proceedings as follows:

- (a) The Court has an inherent jurisdiction to stay winding-up proceedings where the debt upon which such proceedings are founded is the subject of genuine dispute. In those circumstances the plaintiff cannot show that it has the status of a creditor or that there has been neglect by the company to pay;
- (b) The jurisdiction to stay is an inherent one to prevent an abuse of process. There is no inflexible rule;
- (c) The governing consideration is whether the proceedings savour of unfairness or undue pressure;

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<sup>5</sup> *Nemesis Holdings Ltd v North Harbour Industrial Holdings Ltd* (1989) 1 PRNZ 379 (HC) at 385.

- (d) It is a serious matter to stay winding-up proceedings so that the decision to do so is never made lightly; and
- (e) The onus is on the applicant and it is normally necessary to demonstrate “something more” than the balance of convenience considerations which it is usually appropriate to consider on an application for an interim injunction.

[46] In *Taxi-Trucks Ltd v Nicholson*, the Court of Appeal stated:<sup>6</sup>

It has long been settled that the Court may under its inherent jurisdiction restrain or stay winding-up proceedings that are an abuse of the Court’s process.

## **Discussion**

### *Alleged agreement*

[47] I start with an analysis of the email correspondence. Mr Kelly places particular reliance on Davenports’ email of 11 November 2019, and the words “Thank you for confirming the scheduled amount of \$33,708.23 will be secured”. In my view, those words, by themselves, do not convey an acceptance. They simply acknowledge Firma’s confirmation. The email does not go on to say that FV Aluminium accepts Firma’s offer or any such words of similar effect. Further, when the sentence relied on is read in the context of the rest of the email, it is apparent that at that time FV Aluminium was asking for security for the disputed amount as well as the undisputed amount. Discussions were continuing.

[48] That the parties were still in negotiation over the matter of the proposed security for the undisputed amount is apparent from Grove Darlow’s reply in its email of 15 November 2019. It said:

[Firma] has offered to secure the undisputed portion by providing a security interest in the account receivable of W Blake Ltd to the extent of the amount shown in the statutory demand.

Is this aspect (The security) agreed by FV [Aluminium]? If so, I will put about to secure that sum. Let me know.

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<sup>6</sup> *Taxi-Trucks Ltd v Nicholson* [1989] 2 NZLR 297 (CA) at 299.

[49] In my view, that communication indicates that Firma's own solicitors did not consider there was yet an agreement. They specifically asked whether FV Aluminium agreed with the proposal. If agreement had been reached it would not have been necessary to ask that question.

[50] Davenports did not respond to the 15 November 2019 email. There was no follow up by Grove Darlow. As at 15 November 2019, there was no agreement even in the broadest of terms. Further, there were no terms and conditions discussed and agreed including, importantly, any timeframes. The 31 October 2019 email from Davenports specifically asked about timeframes for repayments and noted that Grove Darlow had mentioned likely repayment in instalments. None of this was ever further discussed and agreed. Also Grove Darlow's earlier email of 29 October 2019 said that the security interest would be subject to any General Security Agreement granted over Firma. There was no General Security Agreement.

[51] To complete the picture, on 5 December 2019, Norling Law, by then acting for FV Aluminium, made the position plain saying that the offer was not accepted, as Blake's account receivable was disputed by Blake. Grove Darlow responded on the same day saying their recollection was that FV Aluminium had accepted the proposed security.

[52] In my view, the above analysis shows the email communications on which Firma relies fall well short of establishing any agreement as asserted by Firma.

#### *Abuse of process*

[53] Having made the finding that there was no agreement between the parties that the undisputed amount would be secured, I turn to consider whether, in those circumstances, the liquidation proceeding is an abuse of process.

[54] First, there is no dispute between the parties that the amount for which the statutory demand issued, \$33,708.23, is payable by Firma to FV Aluminium.

[55] Second, there was no obligation on the part of FV Aluminium to accept the security proposed by Firma. The Blake debt is subject to legal proceedings. Mr Lewis

said in his affidavit that FV Aluminium would not have accepted the offer. He says there was (and still is) a real risk that the security offered is worthless.

[56] FV Aluminium has followed the appropriate procedure in s 24 of the CCA to recover the undisputed amount. It served a payment claim on Firma. Firma then served a payment schedule on FV Aluminium accepting the undisputed amount. Firma did not pay FV Aluminium the undisputed amount. Accordingly, under s 24 of the CCA, FV Aluminium was entitled to apply to the Court to recover the undisputed amount.

[57] FV Aluminium served a statutory demand under s 289 of the Companies Act for the undisputed amount. The legitimate purpose of a statutory demand is to obtain payment of a debt due. It is only where the demand is made for some other or ulterior purpose that it is improper, and an abuse of the Court's process.<sup>7</sup> FV Aluminium has a legitimate purpose in using the statutory demand procedure to seek payment of the undisputed amount. I do not consider the steps taken by FV Aluminium indicate that it is attempting to obtain payment of the disputed portion of FV Aluminium's payment claim.

[58] In *Stone-Weir Fine Lodges Ltd v Stone*, which involved an application for an order to set aside a statutory demand, (then) Master Venning said:<sup>8</sup>

... whilst undoubtedly the demand will place pressure on the company that is not sufficient to satisfy me the statutory demand should be set aside on other grounds.

[59] The same could be said here in the context of an application to stay the liquidation proceedings.

[60] There is no abuse of process. There being no dispute over the amount in the statutory demand, the debt ought to be paid.<sup>9</sup>

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<sup>7</sup> *Apple Fields Ltd v Trustees Executors and Agency Company of New Zealand Ltd* (1999) 13 PRNZ 387 (HC) at 391.

<sup>8</sup> *Stone-Weir Fine Lodges Ltd v Stone*, above n 4, at 220.

<sup>9</sup> *Jellie v Tannenberg Ltd* [2016] NZHC 2187 at [41].

### *Solvency*

[61] Firma has not produced any supporting evidence to show that it is solvent. Firma's 30 January 2020 letter to subcontractors and creditors includes the following:

As a result of those non-payments [from principal in construction contracts], Firma Construction is unable to pay you under your normal trade terms and as a consequence of those non-payments, Firma Construction has ceased trading.

...

The non-payment by the above principals has created cashflow difficulties for Firma Construction. That is not denied. ... Whilst Firma Construction cannot stop any subcontractor or supplier from seeking to recover monies owed by Firma Construction to you, the above proposal may result in a better outcome than any outcome achieved through the wind up of Firma Construction.

If Firma Construction is wound up we will provide the liquidator with as much information as possible to continue with the recovery process of monies owed to Firma Construction by the above principals. As you know liquidator costs will eat into the amount available to creditors. ...

... If Firma Construction does not receive the support of its subcontractors and suppliers then ultimately one or another creditor will seek to have a liquidator appointed to Firma Construction. ...

[62] In my view the strong inference that can be drawn from that letter is that it is an admission of insolvency. Despite what is said in Firma's written submissions, referred to in [34] above, in oral submissions Mr Kelly accepted that it was fair to interpret the letter as evidence of insolvency.

### *Prejudice to FV Aluminium*

[63] The undisputed amount of \$33,708.23 could be said to be modest but FV Aluminium is a small company and I accept Mr Lewis' evidence that it is a substantial sum for FV Aluminium.

[64] I consider that, on the basis of Mr Lewis' evidence, FV Aluminium will suffer prejudice if Firma's application was granted. There will be further delays and associated costs. At present FV Aluminium is surviving on injections of funds from shareholders.

### *Restraint on advertising*

[65] I accept Ms Alipour's submission that advertising Firma's liquidation is unlikely to have any detrimental impact on Firma and its reputation with its clients, suppliers and subcontractors because it has already set out its precarious financial situation in its 30 January 2020 letter.

[66] As to Mr Kelly's submission that there will be a prejudicial effect in relation to potential subcontractors and creditors, it is unlikely there will be any future subcontractors and suppliers because Firma says it has ceased trading.

[67] In all those circumstances I do not exercise my discretion to restrain FV Aluminium from advertising Firma's liquidation.

### **Application for leave to file statement of defence**

[68] Firma seeks an order regardless of whether its application for a stay is granted, that it be provided further time to file a statement of defence in the liquidation proceedings.

[69] The statement of claim was served on Firma on 12 December 2019. Firma did not file a statement of defence within the 10 working days as required by r 31.17 of the High Court Rules 2016. Instead it filed the present application on 17 December 2019.

[70] I adopt the test for granting of leave from *Freshcut Flower Wholesalers Ltd v Living and Giving Gift Company Ltd*, where Paterson J said:<sup>10</sup>

First, leave should not be granted unless the applicant can show on the papers an arguable basis upon which it is not liable for the amount claimed. Further, in my view, even if there is an arguable defence, leave should not be granted if the applicant is insolvent.

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<sup>10</sup> *Freshcut Flower Wholesalers Ltd v Living and Giving Gift Company Ltd* (2001) 16 PRNZ 173 at [9].

[71] In neither the written submissions nor in Mr Kelly's oral submissions was the Court provided with any real basis for granting the application for leave to file a statement of defence out of time. Mr Kelly's position was simply that Firma had elected to follow the path of pursuing the present application. He submits that Firma will be prejudiced if it is not able to file a statement of defence. However, he acknowledges that Firma could have filed a statement of defence at the same time as it filed the present application. There was nothing to prevent Firma from doing so.

[72] Firma has not put forward an arguable basis upon which it is not liable for the amount claimed. As is clear from this judgment, Firma accepts the amount in question is not in dispute. There is no arguable defence and Mr Kelly accepts that a fair interpretation of the 30 January 2020 letter is that it is an indication of insolvency.

[73] In all those circumstances the application for leave to file a statement of defence out of time is refused.

## **Result**

[74] Firma has not established that the liquidation proceedings savour of unfairness, undue pressure, or are otherwise an abuse of process. There are no clear or persuasive grounds for staying the liquidation proceedings or restraining their advertising.

[75] The application by Firma for orders staying and restraining publication of the liquidation proceedings filed by FV Aluminium is refused.

[76] The application by Firma for leave to file a statement of defence out of time is refused.

## **Costs**

[77] I did not hear from counsel on costs. I therefore reserve costs. If the parties are able to agree costs, then a joint memorandum should be filed within 20 working days of the date of this judgment. If costs cannot be agreed, FV Aluminium is to file and serve its memorandum within five working days of the date for the joint memorandum. Firma is to file and serve its response within a further five working



days. Memoranda should not exceed four pages (excluding any attachments). I will determine costs on the papers.

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Gordon J