UNDER The Companies Act 1993

BETWEEN FREEMONT DESIGN & CONSTRUCTION LIMITED Applicant AND NATURES VIEW JOINERY LIMITED T/A NEBULITE WAIKATO Respondent AND BETWEEN FREEMONT DESIGN & CONSTRUCTIONS LIMITED Applicant AND INSTALL FOR A VIEW LIMITED Respondent

JUDGMENT OF ASSOCIATE JUDGE FAIRE [on application to set aside statutory demands] High Court of New Zealand. Hamilton Registry. 26th July 2006.

The applications

[1] The applicant applies to set aside two statutory demands which were both served on it on 22 February 2006.

[2] The first statutory demand required the applicant: *To pay to Install for A View Limited the sum of $45,055.22 due and owing under an adjudication pursuant to the Construction Contracts Act 2002 dated 27 January 2006.*

[3] The second statutory demand required the applicant: *To pay to Natures View Joinery Limited trading as Nebulite Waikato the sum of $80,814 (including party costs of $10,000 and the adjudicator's expenses of $6,898.50) due and owing under an adjudication pursuant to the Construction Contracts Act 2002 dated 27 January 2006.*

[4] The hearing proceeded on the basis of amended applications to which no objection was taken.

[5] The applications are made in reliance on s 290(4) of the Companies Act 1993. Section 290(4) provides:

290 Court may set aside statutory demand

(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 counterclaim, set-off, or cross-demand is less than the prescribed amount; or

(c) The demand ought to be set aside on other grounds.

[6] The amended applications plead as grounds that:

a) *There is a substantial dispute whether or not the debt is owing or due; and*
b) *The applicant appears to have a counterclaim, set-off or crossdemand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; and*
c) *The demand ought to be set aside on other grounds, pursuant to s 290(4)(c) of the Companies Act 1993, namely that the statutory demand and/or liquidation processes are not appropriate where the underlying and substantive matter giving rise to the demand is clearly in dispute; and*
d) *Other methods of execution are available to the respondent.*

The opposition

[7] The respondents oppose the orders sought and plead that: *An adjudication pursuant to the Construction Contracts Act 2002 was made in the respondents' favour on 27 January. There is no substantial dispute that the debt owed by the applicant to the respondent is owing or due.*

Although not expressly pleaded, Mr Talbot made it plain, and no objection was taken to the point, that so far as the ground of the counterclaim or set-off was concerned, no new matters were raised by the applicant beyond those which were put in issue in the adjudication which was held pursuant to the Construction Contracts Act 2002. Accordingly, it was submitted for the respondent, that there was no outstanding counterclaim, set-off or cross-demand.

Background

[8] The applicant, as head contractor, entered into a construction contract with a developer, Samco Limited, in respect of an apartment building at 12 Beaumont Street, Freemans Bay, Auckland.

[9] Natures View Joinery Limited, trading as Nebulite Waikato, were engaged by the applicant as subcontractors to supply the aluminium windows and doors for the apartment building. Install for A View Limited were engaged by the applicant as subcontractors to install the aluminium windows and doors. Both respondent companies have a sole director, Mr JS Hodgson.

[10] The developer gave notice cancelling the contract on 30 May 2005. The documents produced indicate that the applicant disputes the notice of cancellation.

[11] The applicant and respondents served notices pursuant to s 28 of the Construction Contracts Act 2002 in November 2005. The papers indicate that the parties agreed to consolidate the four adjudication claims and agreed to their determination by Mr Rex Moyle as adjudicator. Mr Moyle issued his determination on 27 January 2006.

The general approach taken by the Court to applications under s 290(4) of the Companies Act 1993

[12] The approach that the Court adopts to an application which relies on s 290(4)(a) of the Companies Act 1993 can be shortly stated. The Court is required to determine whether there is a substantial dispute whether or not the debt is owing or is due. The applicant must show a fairly arguable basis upon which it is not liable for the amount claimed. ***Forge Holdings Ltd v Kearney Finance (NZ) Limited*** HC CHCH M 149-95 20 June 1995 at 2 and ***Queen City Residential Limited v Patterson Co-Partners Architects (No 2)*** [1995] 3 NZLR 307, (7 NZCLC) 260,936. That formulation was approved by the Court of Appeal in ***United Homes (1988) Ltd v Workman*** [2001] 3 NZLR 447 at

451-2. Once that position is reached the statutory demand should be set aside and the dispute is then disposed of, if necessary, by other proceedings in the ordinary way.

[13] When a matter is to be determined pursuant to s 290(4)(b) of the Companies Act 1993, the Court's approach is as set out by the Court of Appeal in ***Covington Railways Ltd v Uni-Accommodation Ltd*** [2001] 1 NZLR 272 at 274 where the Court said: *"Where a company which is the subject of a liquidation application is indisputably in debt to the applicant creditor, it may nonetheless be able to show that it has a claim against the applicant creditor, it may nonetheless be able to show that it has a claim against the applicant which reduces the net balance owing to the creditor or even off-sets it altogether. Where there are liquidated sums due each way, that is simply an arithmetical exercise. It is more difficult if, on the applicant's side, there is an indisputable liquidated sum, but the other party's claim is for an unliquidated sum with liability and/or quantum in dispute. Then, in order to impeach the statutory demand and overcome the presumption in s287(a) that the company is unable to pay its debts when it has failed to comply with the demand, it must be able to do more than merely assert that there is an available set-off. It must be able to point to evidence before the Court showing that it has a real basis for the claimed set-off and that accordingly, the applicant's claim to be a creditor is, to the extent of the set-off, seriously in doubt. In the words of Buckley LJ in **Bryanston Finance Ltd v De Vries (No.2)** [1976] Ch 63, 78, it must show that there are "clear and persuasive grounds" for the set-off claim. Where this can be done, the party who has issued the statutory demand against the company will be shown to be using the statutory demand and liquidation procedures improperly because there is a "genuine and substantial dispute" about the net amount of the company's indebtedness (**Taxi Trucks Ltd v Nicholson** [1989] 2 NZLR 297, 299). The dispute should then be resolved in the ordinary - way - except as to any undisputed balance - rather than upon the hearing of a liquidation application."*

[14] When the matter is to be determined pursuant to s 290(4)(c) helpful guidance is found in ***Commissioner of Inland Revenue v Chester Trustee Services Ltd*** [2003] 1 NZLR 395 (CA). Tipping J at 398 said: *"All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement is outweighed by some factor or factors making it plainly unjust for liquidation to ensue. The ground advanced by the insolvent company must be sufficiently compelling to overcome the general policy of the Act with regard to insolvent companies."*

The affidavit evidence

[15] The narrative parts of the affidavits filed by the applicant and respondents are not extensive. The applicant has, however, exhibited a substantial volume of material. Mr McKay confirmed that the matters relied upon as raising a dispute or, alternatively, appearing to form the basis of a counterclaim, set-off or cross-demand were all part of the material analysed and ruled upon by the adjudicator, Mr Moyle.

[16] The affidavits do not reveal the existence of:

a) Any application for Judicial Review of Mr Moyle's determination; and
b) Any other proceeding relating to a dispute between the parties.

[17] Mr McKay advised, from the Bar, that a notice had been sent to the respondents to arbitrate certain matters in dispute. Mr Talbot had just received it. He had not considered it and had not taken instructions on it. Precisely what was intended to be the subject of the proposed arbitration was not revealed to me.

[18] The respondents' affidavit was filed before the applicant's affidavit was received. That situation came about because the application to set aside the statutory demands was filed without a supporting affidavit. Mr Hodgson, the deponent for the respondents, in his affidavit, referred to Mr Moyle's determination, the fact of nonpayment by the applicant, the fact of service of the demand, and that there had been no appeal from the adjudicator's decision. The respondents' position, which I will shortly discuss, is that there can be no further examination of the matters the subject of the adjudication having regard to ss 59, 60 and 79 of the Construction Contracts Act 2002.

Discussion

[19] The respondents' position, to adopt Mr Talbot's submission, is that:

The position of the respondents is on all fours with that of the respondent in the decision ***Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd*** (2005) 11 TCLR 256.

[20] Mr McKay submitted that I should not follow that judgment. He submitted that the Judges' determination that a statutory demand was a proceeding for the purposes of s 79 of the Construction Contracts Act 2002 was in error.

[21] I will return to analyse the submissions of counsel on this matter shortly. I prefer to approach this application by analysing each of the grounds advanced by the applicant pursuant to s 290(4) of the Companies Act 1993.

Is there a substantial dispute?

[22] The first inquiry is pursuant to s 290(4)(a) of the Companies Act 1993. The applicant, having regard to the authorities I have mentioned, must establish that there is a substantial dispute whether or not the debt is owing or is due.

[23] Although s 290(4)(a) is mentioned in the judgment in ***Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd***, the application of s 290(4)(a) to the facts of that case was not analysed by the Judge.

[24] In considering this question, I pose the further question. What would the position be if the respondents issued proceedings in respect of Mr Moyle's adjudication? I raise that question because when s 290(4)(a) refers to a

substantial dispute the clear legislative intention is a reference to a dispute in respect of which there is a proper foundation to be placed before a Court or other properly constituted tribunal to determine it.

[25] The Construction Contracts Act 2002 provides the answer. The respondents may, by virtue of s 59(2)(c) apply for the adjudicator's determination to be enforced by entry as a judgment in accordance subpart (2) of part (4) of the Act.

[26] Section 73 of the Construction Contracts Act 2002 provides:

73 Enforcement of adjudicator's determination

(1) This section applies if an adjudicator determines that a party to the adjudication is liable, or will be liable if certain conditions are met, to pay another party either or both of the following:

(a) an amount of money under the construction contract:

(b) any costs and expenses incurred in the adjudication (including any amount of contribution to the adjudicator's fees and expenses that the adjudicator has determined is payable by one party but that has been paid by another party).

(2) If this section applies, a plaintiff may apply for the adjudicator's determination in respect of the matters referred to in subsection (1) to be enforced by entry as a judgment in accordance with this subpart.

(3) The application

(a) may be made to a District Court; and

(b) must be made in the manner provided by the rules of that court (if any).

(4) Either before or immediately after making the application, the plaintiff must serve on the defendant

(a) a copy of the application; and

(b) a statement setting out the consequences for the defendant if

the defendant takes no steps in relation to the application.

(5) Despite subsection (2), a plaintiff (to whom an amount of money will be payable under an adjudicator's determination if certain conditions are met) may only apply for that determination to be enforced by entry as a judgment after those conditions have been met.

[27] No submission was made to me that would indicate that the conditions enabling the respondents in this case to apply to have Mr Moyle's adjudication to be enforced by entry as a judgment could not be met.

[28] Accordingly, it is necessary to look at the next step, which is the application of s 74 of the Construction Contracts Act 2002. That sets out the statutory basis available to a party to oppose the entry of judgment. In particular, s 74(2) provides:

74 Defendant may oppose entry as judgment

(2) The application for an order referred to in subsection (1) may be made only on the following grounds:

(a) that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant:

(b) that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies:

(c) that a condition imposed by the adjudicator in his or her determination has not been met.

[29] Again, no submission was made to me which would support the proposition that any of the grounds available to oppose the entry of judgment were available to this applicant.

[30] The above analysis, therefore, leads to one conclusion only. There is no basis, on the material placed before me, which would prevent the respondents in this case proceeding to the District Court to have Mr Moyle's determination enforced as a judgment of the Court. That result leads to the inevitable conclusion that there can, in this case, be no substantial dispute whether or not the debts claimed in the statutory demands are owing or are due for the purposes of s 290(4)(a) of the Companies Act 1993.

Is there a counterclaim, set-off or cross-demand?

[31] I consider the next ground advanced in the application. That raises the question of whether this applicant has established, in accordance with the authorities that I have referred to, that it appears to have a counterclaim, set-off or cross-demand and amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount.

[32] A summary, but preliminary observation, must be made. If the counterclaim matters are all encompassed in the adjudicator's award and if there is no basis available to the applicant to stop that award being enforced as a judgment, it is difficult to see how there could be any counterclaim, set-off or cross-demand which could be independently determined for the purposes of s 290(4) of the Companies Act 1993. Certainly, once a judgment is obtained, the principle of estoppel per rem judicatum applies. The judgment is a final decision. It has been pronounced by a New Zealand Judicial Tribunal of competent jurisdiction. It is pronounced over the parties to the subject-matter of the litigation. Those parties are therefore estopped from disputing or questioning that decision on the merits in any subsequent litigation: ***Shiels v Blakeley*** [1986] 2 NZLR 262. The above position is reached without any need to analyse the effect of s 79 of the Construction Contracts Act 2002, which was, of course, the focus of the principal inquiry by Randerson J in ***Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd.*** Unlike the Volcanic case the conclusion arises from the position that all issues which make up the potential counterclaim, set-off or cross-demand were the subject of the adjudication. By contrast, in the Volcanic case the set-off was for losses said to have been incurred as a consequence of delay in carrying out the work. Volcanic

had apparently issued proceedings in the District Court against Dempsey & Wood alleging loss caused by the delays.. Claims relating to delay in Volcanic were never, apparently, the subject of a notice pursuant to s 28 of the Construction Contracts Act 2002 and therefore could not be the subject of the adjudicator's award.

[33] I go on to consider the position on another basis.

[34] The submissions were advanced to me on the basis that the adjudicator determined matters that fell within the ambit of s 48(1)(a) of the Construction Contracts Act 2002. That necessarily means that the issues that were determined in the adjudication were whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions to met, to make a payment under the contract.

[35] As a consequence of that position, s 60 of the Construction Contracts Act 2002 applies. Section 60 provides:

60 Effect of review or other proceeding on adjudicator's determination under section 48(1)(a)

An adjudicator's determination under section 48(l)(a) is binding on the parties to the adjudication and continues to be of full effect even though

(a) a party has applied for judicial review of the determination; or

(b) any other proceeding relating to the dispute between the parties has been commenced.

[36] One is driven again to the conclusion that if the adjudicator has ruled on the matters that make up the counterclaim, set-off or cross-demand, and that determination is binding on the parties by virtue of s 60, there can be nothing further to determine, in respect of those issues, before a Court. The applicant therefore cannot, on the authorities that I have earlier referred to, establish the necessary basis for an order under s 290(4)(b) of the Companies Act 1993. This, then, is an independent basis which leads to the conclusion I have reached in relation to this aspect of the application in [32] of this judgment. Once again, it is reached without reference to s 79.

[37] An area that was not covered specifically in counsel's submissions is whether the true nature of the counterclaim or set-off or cross-demand of the applicant relate to matters ruled upon by Mr Moyle that are covered by ss 48(1)(b) and (2) of the Construction Contracts Act 2002. In short, are these matters based on the adjudicator's determination of questions in dispute about the rights and obligations of the parties under the contract rather than a determination of who is liable to make a payment?

[38] If the concern I have expressed has any foundation to it, it is necessary to consider ss 60 and 61 of the Construction Contracts Act 2002. I have already referred to the binding nature of an adjudicator's determination which is given under s 48(l)(a) by the operation of s 60 of the Construction Contracts Act 2002. The consequence, however, of not complying with an adjudicator's determination which relates to questions about the rights and obligations of the parties, ie, pursuant to s 48(1)(b) or s 48(2), is set out in s 61 of the Construction Contracts Act 2002. Section 61 provides:

61 Consequence of not complying with adjudicator's determination under section 48(1)(b) or (2)

(1) If a party to an adjudication fails to comply fully with the adjudicator's determination under section 48(1)(b) or (2) about the parties' rights and obligations under the relevant construction contract, any other party to the adjudication may bring proceedings in any court to enforce that other party's rights under that contract.

(2) In any proceedings under subsection (1), the court must have regard to, but is not bound by, the adjudicator's determination.

[39] There is, however, an immediate problem with the applicant's case. There was simply no analysis in terms of s 48 as to precisely what the nature of the counterclaim or set-off or cross-demand was. Mr Logie, in his affidavit, does criticise the adjudicator's determination in a number of respects and, certainly, that might form some basis for the proposition in terms of s 61(2) of the Construction Contracts Act 2002 that a Court might not follow the adjudicator's determination. However, I repeat, it seems to me, that there has been no specific foundation for getting to that second part of the inquiry which would arise under s 61 because it has not been established that what the adjudicator was determining was simply the rights and obligations of the parties rather than who was to pay what. I will comment separately on the matters that were referred to in the affidavit and which apparently arise in a separate arbitration between the developer and Mr Logie's company shortly.

[40] Apart from the counterclaim with the developer, it is appropriate that I record what Mr Logie, the director of the applicant, said in his affidavit in support. He claimed that if his company were forced to pay the demand in order to prevent it being liquidated, a great injustice will have occurred. That injustice, however, was not founded on any inability to pay but simply was founded on the following grounds, namely:

a) That the adjudicator made a determination of matters not under his jurisdiction because they were not referred to in the notice of adjudication or in the adjudication claim; and
b) The adjudicator's determination was wrong because of an incorrect interpretation of the Act; and
c) The applicant had a valid counterclaim that was dismissed out of hand.

None of this material establishes, in terms of the authorities that I have referred to, a proper basis for a counterclaim, set-off or cross-demand which would justify setting the demand aside.

[41] I referred to the claim with the developer. That, clearly, is in a difficult category. Clause 2.1 of the subcontract General Conditions provides that the applicant's obligations to the developer are also owed by the respondent to the applicant. The result, in theory, is that if a claim is made against a company in the applicant's position, there may well be a foundation for a claim against the subcontractor. Here, again, the applicant company, has chosen to reveal very little by way of particularisation of what that counterclaim is and how it directly affects the

respondent. He refers to the fact that the claim between the developer and his company is for an amount in excess of $1.8 million. He says that much of it is for alleged late and defective work. He says much relates to the installation of the joinery for which the respondent's were responsible. No attempt was made to establish for me a counterclaim for a sum which, in terms of s 290(4)(b), evidences the existence of a counterclaim, set-off or cross-demand which has the potential to form the basis to set aside the statutory demand.

[42] Further, I cannot find anything in these papers which provide the basis for the Court exercising the jurisdiction to set aside the statutory demand based on s 290(4)(c). Indeed, in this case, the applicant is attempting to do precisely what the Act was designed to avoid. The Act's stated purpose is to allow decisions of adjudicators to be enforced. Its purpose is to see payments made in a timely fashion. Those purposes are set out clearly in s 3 of the Construction Contracts Act 2002 which provides:

3 Purpose

The purpose of this Act is to reform the law relating to construction contracts and, in particular,

(a) to facilitate regular and timely payments between the parties to a construction contract; and

(b) to provide for the speedy resolution of disputes arising under a construction contract; and

(c) to provide remedies for the recovery of payments under a construction contract.

[43] Whether it would be appropriate for the Court to appoint a liquidator of a company, such as the applicant, where it had failed to pay the subcontractors' claims as determined by an adjudication and where such applicant company is simply financially unable to do so, is not the issue that has been raised before me, and, certainly, is a matter that this judgment makes no final determination upon.

Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd

[44] Randerson J gave his judgment on that matter on 24 May 2005. There are some similarities with the present case. There was, in that case, an adjudication. The adjudication, which was the basis for the sums claimed in the statutory demand, was determined for the purposes of s 48(l)(a) of the Act. As a consequence, Randerson J noted that, pursuant to s 58, the adjudicator's determination was enforceable in accordance with s 59. One of the options available to the successful party to the adjudication given pursuant to s 48(l)(a) is the right in terms of s 59(2) to recover from the other party as a debt due .... the unpaid portion of the amount. His Honour noted that the reference to Court was a reference to High Court or District Court. He further noted that there was a clear statutory intention to limit the scope for challenging an adjudicator's determination under the Act. He further determined, critically for the purposes of the argument advanced by Mr McKay, that there was no limitation on the type of proceeding for recovery of a debt which might be relied upon for the purposes of s 79. Further, he held that there was nothing in the Act to suggest that the statutory demand proceeding was not a proceeding contemplated by s 79 for the recovery of a debt. He reached that conclusion because the procedure for dealing with statutory demands, and the use to which statutory demands are put, are steps in the whole winding-up process under Part 9A of the High Court Rules. He considered it appropriate, therefore, that when the matter was raised in a s 290 application to set aside a statutory demand, that that was a proceeding which fell within the definition of proceeding contemplated by s 79 of the Act.

[45] My reading of His Honour's judgment is that it is not the issue of the statutory demand itself which is the proceeding but rather the application pursuant to s 290, which is the proceeding. In addition, there is the possibility that such an application can invoke the Court's jurisdiction pursuant to s 291 of the Companies Act 1993 and thereby permit the appointment of a liquidator as part of the application itself. When the matter is analysed on that basis there is no inconsistency with those decisions which have ruled that notices which are issued under the Companies Act 1993 are not proceedings, eg ***Bond Cargo Ltd v Chilcott*** (199) 13 PRNZ 629 and ***Stiassny v Gleeson*** (1999) 12 PRNZ 684. Those decisions, however, are confined to a ruling on the notice itself. The proceeding in the instant case is the application I am determining, namely the application to set aside the statutory demand which has, amongst other things, the consequences which are referred to in s 291 of the Companies Act 1993 and which section, for completeness' sake is now set out.

291 Additional powers of Court on application to set aside statutory demand

(1) If, on the hearing of an application under section 290 of this Act, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute, or is not subject to a counterclaim, set-off, or cross-demand, the Court may

(a) Order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or

(b) Dismiss the application and forthwith make an order under section 241(4) of this Act putting the company into liquidation,

on the ground that the company is unable to pay its debts.

(2) For the purposes of the hearing of an application to put the company into liquidation pursuant to an order made under subsection (1)(a) of this section, the company is presumed to be unable to pay its debts if it failed to pay the debt within the specified period.

[46] I therefore agree with and adopt the reasoning of Randerson J in Volcanic Investments Ltd v Dempsey & Wood Civil Contractors. That gives a clear and definitive reason why the grounds advanced in support of the applicant's application cannot succeed in this case. If they were to succeed it would simply violate the clear statutory intention expressed in s 79 of the Construction Contracts Act 2002. This is subject to the reservation I made in [43] of this judgment concerning the exercise of the Court's discretion to appoint a liquidator.

Decision

[47] I am satisfied that the applicant has not made out a case based on any of the grounds set out in s 290(4) to set aside the statutory demand in this case. However, even if I am wrong in that conclusion, the applicant's entitlement to relief is, in fact, barred by the operation of s 79 of the Construction Contracts Act 2002 for the reasons I have set out and, in particular having regard to the decision of Randerson J in ***Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd.***

[48] I have made reference to s 291 of the Companies Act 1993. In my view, the correct approach is to dismiss the application and to indicate that the respondent may make application to the High Court to appoint a liquidator if the amount set out in the statutory demands are not paid within 15 working days of the date of this decision. I order accordingly.

Costs

[49] The respondent has been successful. This is clearly a Category 2 case. There appears to be no reason to depart from Band B for each step taken. Accordingly, I order that the applicant pay the respondent's costs based on Category 2 Band B of the High Court Rules together with disbursements as fixed by the Registrar.

J McKay and S Tau for applicant instructed by Chapman Tripp, PO Box 2206, Auckland
M Talbot for respondents instructed by McCaw Lewis Chapman, PO Box 9348, Hamilton