JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE : High Court, New Zealand. Auckland Registry. 19th May 2006.

[1] The applicant has filed an application to set aside statutory demand pursuant to s 290 of the Companies Act 1993.

[2] The application was originally made on the grounds set out in s 290(4)(b) of the Act. Mr McCartney told me however that the company now accepts that it is unable to succeed on that basis. The company, in other words, accepts that the position is as the judgment creditor has stated it to be. The judgment creditor says that it made a number of payment claims within the meaning of s 20 of the Construction Contracts Act 2002. In each case, the judgment debtor issued a payment schedule showing an amount that the judgment debtor proposed to pay to the judgment creditor. Those sums were the full amounts claimed in the payment claims. The consequence is that in terms of s 24 of the Act the judgement credit is able to recover the debt due in any Court within the meaning of s 24(2)(a).

[3] Further, s 79 of the CCA prevents the judgment debtor from raising any counter-claim in any proceedings for the recovery of the debt except where judgment has been entered for the counter-claim or where there is no dispute between the parties in relation to the claim.

[4] Section 79 would appear to apply to the present proceedings and accordingly, the judgement debtor is unable to raise against the claim of the judgment creditor any entitlement to a cross-demand counter-claim or anything of that nature arising out of the allegedly defective work done by the judgment creditor.

[5] Accordingly the judgment creditor concedes, and properly in my view, that it has to comply with the statutory demand in one way or another and that the statutory demand cannot be set aside.

[6] Mr McCartney for the judgement debtor submitted that the appropriate course was to allow the judgment debtor time pursuant to s 291 of the Act. Mr McCartney said that if such an order was made then the judgment debtor would either pay the money claimed in or give security for it.

[7] Mr Noble for the judgement creditor said that his client had already waited too long for payment. He submitted that the appropriate order I should make was under s 291(1)(b) dismissing the application forthwith making an order putting the company into liquidation.

[8] I am not prepared to make an order putting the company into liquidation. While I agree that there has been unnecessary delay, it would appear that the judgment debtor did not initially apprehend what the affect of the provisions of the CCA were in that they constituted a bar to the judgment debtor moving to set aside the statutory demand on the basis that it has a cross-demand or counter-claim. I accept that the judgement debtor was acting bona fide (if mistakenly) in bringing the proceedings in the first place. As well, there is some evidence before the Court which would indicate that the company will be able to pay the debt. Finally, an order under s 291(1)(b) will necessarily be made in the absence of any knowledge of possible prejudice to third parties: ***Gameline of New Zealand v TV3 Network Services Limited*** HC CHCH M188-96 12 July 1996. Because of this last factor, and because I am not persuaded that there is great urgency in placing the company in liquidation, I would prefer to proceed by way of s 291(1)(a).

[9] Therefore I direct that the applicant is to pay the debt within 14 days from today and that in default of payment, the company may make an application to put the company into liquidation.

[10] The respondent has been successful on its application and it shall have costs on a 2B basis together with disbursements to be fixed by the registrar.

W A McCartney, P O Box 4420, Shortland Street, Auckland for Applicant J instructed by Carson & Co, P O Box 37403, Parnell, Auckland
Noble for Respondent instructed by Boyle Mathieson, P O Box 21-640, Waitakere City