

**JUDGMENT : ASSOCIATE JUDGE D.I. GENDALL** : High Court. New Zealand. Wellington Registry. 13<sup>th</sup> February 2006.

**Introduction**

- [1] The plaintiff applies to set aside a statutory demand dated 16 June 2005 issued by the defendant. The statutory demand claims \$32,649.34, described as being for "electrical services and product supplied between March 2002 and May 2005".
- [2] The application is opposed by the defendant.

**Background Facts**

- [3] Between March 2002 and May 2005 the defendant, an electrical contractor, provided electrical services and products for the plaintiff on several of its construction contracts. These included contracts at Scots College, Evans Bay Intermediate School, St. Thomas More Church, Normandale School, and Sacred Heart College.

- [4] Although the amount originally claimed in the statutory demand was \$32,649.34, the defendant acknowledged (in an affidavit of Robyn Janice Ramsay dated 13 July 2005 (paragraph 14) that the final amount due from the plaintiff was actually much less than this \$32,649.34. It appears from that 13 July 2005 affidavit that in fact the defendant from that time was claiming the following reduced amounts

Scots College Contract	\$8,411.29
Evans Bay Intermediate School Contract	\$4,801.11
St. Thomas More Church Contract	\$2,813.42
Normandale School Contract	\$989.51
Sacred Heart College Contract	<u>\$1,438.37</u>
	<u>\$18,453.70</u>

- [5] Following the issue of the statutory demand, it appears from counsel's current submissions that a number of the reduced contractual claims noted in paragraph [4] above have now been resolved.
- [6] First, the Sacred Heart claim noted at \$1,438.37 has apparently been settled with a lesser sum (\$1,001.41) paid on or about 26 July 2005.
- [7] Secondly, the Normandale School claim totalling \$989.51 was also settled when a slightly lesser payment of \$962.68 was apparently made to the defendant, again, on or about 26 July 2005.
- [8] Thirdly, as to the \$2,813.42 St. Thomas More Church claim, this too was resolved when that amount was paid to the defendant apparently once issues concerning a warranty were resolved.
- [9] Fourthly as to the \$4,801.11 Evans Bay Intermediate School claim, this has also been virtually resolved. As recently as 25 January 2006, a form of settlement agreement was entered into between the parties. Under this settlement agreement the claim was to be settled, it seems, with \$269.28 to be paid immediately, and \$1,473.85 to be held as retention monies "*withheld as per the conditions of contract and ... released accordingly*". Counsel confirm, however, that this \$269.28 has still not as yet been paid. And I note that, before me, no evidence was provided as to the terms upon which the agreed retentions amount of \$1,473.85 was to be ultimately released.
- [10] As to the final amount claimed by the defendant of \$8,411.29 relating to the Scots College Contract, the evidence before the Court is, at the very least, confused and complex both as to the precise calculation of this amount, and also as to whether the amount is payable to the defendant now and overdue.
- [11] What is clear with respect to the Scots College Contract (entered into in 2002) is that it pre-dates the coming into force of the Construction Contracts Act 2002 on 1 April 2003.
- [12] Accordingly, the "pay when paid clause" included in clause 5(E) of this Contract on its face applies, and may mean that the plaintiff is not required to pay to the defendant the retention monies under this Contract until the plaintiff has received these amounts from Scots College as the principal.
- [13] The evidence before the Court seems to indicate that Scots College is retaining monies under its head contract with the plaintiff with regard to this job, although it is not clear for what reason this is occurring.
- [14] What is also clear with respect to the Scots College Contract is that the defendant's work on this project was completed some considerable time ago, and if indeed monies are outstanding under this Contract to the defendant, then the delay in making payment has been considerable.

**Counsel's Arguments and My Decision**

- [15] The present application is made under s290 Companies Act 1993. Under s290(4) the Court is given a discretion to set aside a statutory demand if it is satisfied that:
- (a) *There is a substantial dispute whether or nor 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.*
- [16] To invoke this discretion, an applicant plaintiff must go further than merely assert the existence of a dispute or some counterclaim or set-off. It must be shown that there is a genuine and substantial dispute as to the existence of the debt and, further, that it would be unfair to allow this dispute to be resolved through the liquidation provisions of the Companies Act 1993 rather than by actions in the usual way - see *Taxi Trucks Limited v Nicholson*

[1989] 2 NZLR 297, 291, and *Pink Pages Publications Limited v Team Communications Limited* (1986) 3 NZCLC 99, 764.

- [17] As to the issue of a disputed debt, the onus rests upon the plaintiff to satisfy the Court that the debt is disputed - see *Re Scott Plumbers Limited* (1994) 2 NZCLC 99,184.
- [18] It has also been said that the standard required is proof sufficient to establish an arguable case - *Queen City Residential Limited v Patterson Co-Partners Architects (No. 2)* (1995) 7 NZCLC 260,936.
- [19] Before me, the principal ground advanced by the plaintiff to set aside the statutory demand was that there is a substantial dispute whether or not the debt claimed in the demand is owing or is due. No evidence was advanced or submissions made as to the solvency of the plaintiff company.
- [20] The starting point here is that the defendant clearly acknowledges that its claim to \$32,649.34 in the statutory demand is overstated.
- [21] As to this, Brookers Company and Securities Law at para CA290.06 in part states. *A defect or irregularity in a statutory demand is not by itself sufficient reason for the demand to be set aside unless substantial injustice would result. This is stated clearly in ss5.*
- This comment goes on to state: *A defect includes a material misstatement of the amount due and a material misdescription of the debt referred to in the demand: ss6. In Bateman Television Limited v Coleridge Finance Co Limited [1969] NZLR 795 (CA) it was held that though there may be a bona fide dispute concerning the precise indebtedness of the debtor, if it is clear that there is sufficient owing to found a petition, and the company is insolvent, an order will be made.*
- [22] Here, since the statutory demand was originally issued on 16 June 2005, the plaintiff has made or agreed to make payments to the defendant in respect of the Sacred Heart Contract, the Normandale School Contract, the St. Thomas More Church Contract, and the Evans Bay Intermediate Contract.
- [23] The remaining outstanding dispute the plaintiff claims exists does relate solely to the Scots College Contract.
- [24] But returning for a moment to the Evans Bay Intermediate School Contract, from the settlement agreement reached between the parties on 25 June 2005, it is clear that \$269.28 was due for payment from that date. Counsel acknowledge, however, that it remains unpaid at this point. Further, the retentions amount of \$1,473.85 is to be paid at some future time in terms of the conditions of this Contract. At the very least, therefore, the plaintiff is clearly indebted to the defendant at this point in the outstanding sum of \$268.28.
- [25] Turning now to the Scots College Contract, as I have noted above, the actual legal position with respect to the \$8,411.29 amount claimed by the defendant is murky to say the very least. The statements and contract values presented in evidence before the Court are complex and include a range of variations and additional claims, some of which seem to be accepted and some disputed.
- [26] To determine the precise amount owing by the plaintiff under the Scots College Contract at this point is difficult.
- [27] What is clear is that today the sum of \$1,674.46 has been tendered to pay off monies owing to the defendant under this Contract, and according to the plaintiff the sum \$6,736.83 remains due as a retention when the final retention monies are received by the plaintiff from the principal Scots College.
- [28] The plaintiff relies upon the "pay when paid clause" (clause 5(E) of the Contract) to justify the retention of this \$6,736.83 at this point. This is strongly disputed by the defendant.
- [29] I turn now to s290(4) Companies Act 1993, and the requirement that the plaintiff bears the onus to satisfy the Court that the debt in the statutory demand is disputed. From the material before the Court I reach the conclusion that the plaintiff here has done sufficient to meet this test. Clearly, with the exception of the \$269.28 presently outstanding under the settlement agreement for the Evans Bay Intermediate School Contract, the plaintiff has put before the Court sufficient material generally undisputed by the defendant to show that the only amounts still claimed to be potentially outstanding under the statutory demand are the \$1,473.85 retention under the Evans Bay Intermediate School Contract and the \$6,736.83 retention under the Scots College Contract, both of which, it is arguable, on their face may not be contractually due for payment to the defendant at this point.
- [30] Mr Buchanan for the defendant argued before me that in this case, the plaintiff has shown a history of delay and non-payment under its Contract, and further that there has been no complaint from Scots College itself as to the quality of the defendant's electrical work under the Scots College Contract. The only conclusion, he maintains, must be that the plaintiff is yet again looking to manufacture reasons for continuing to delay or dispute payments properly due to the defendant.
- [31] It may be that there is something in this contention, but on the material before the Court, I am unable to say that the remaining monies claimed by the defendant must be seen as clearly undisputed.
- [32] On balance, therefore, I am of the view that the plaintiff has put before the Court sufficient material to justify its claim that there is a substantial dispute whether or not remaining monies under the statutory demand are due. Clearly, the sum of \$269.28 which I have noted at paragraph [24] above is due for payment and outstanding, but this amount is under the prescribed amount of \$1,000.00 provided for in s289 Companies Act 1993.

- [33] For these reasons, the present application to set aside the statutory demand succeeds. An order is now made that the statutory demand issued by the defendant against the plaintiff dated 16 June 2005 is set aside.
- [34] As to costs, these are reserved. If costs are in issue between the parties, then counsel are to file appropriate memoranda within 28 days of the date of this judgment, and unless they give notice that they wish to be heard on this issue, I will decide the question of costs upon the basis of the material filed.

Solicitors: Guy & Toby Manktelow, Barristers & Solicitors, Lower Hutt for Plaintiff Terrace Legal, Wellington for Defendant  
Appearances: G.W.D. Manktelow for Plaintiff R.J. Buchanan for Defendant