JUDGMENT : ASSOCIATE JUDGE DOOGUE. High Court, New Zealand, Auckland Registry. 30th May 2007

Background

[1] There are before the Court four applications to set aside six statutory demands that Wedding Earthmovers Limited ("WEL") have served on various companies which are part of the Ocilla Group of companies ("Ocilla"). The statutory demands in detail involve the following sums:

[2] McLaughlin Park Limited
a) statutory demand one for $367,424.92;
b) statutory demand two for $333,482.62; and
c) statutory demand three for $116,726.66.

[3] Favona Developments Limited
a) statutory demand for $102,399.65.

[4] Pacific Bridge Limited
a) statutory demand for $20,684.53.

[5] Silverpoint International Limited
a) statutory demand for $86,072.19.

[6] In addition to referring to the companies by their proper names, I will refer to them in the following manner: Wedding Earthmovers Ltd as "WEL", Favona Developments Ltd as "FDL", McLaughlins Park Ltd as "MPL", Pacific Bridge Ltd as "PBL" and Silverpoint International Ltd as "SIL".

[7] The respondent, WEL, as its name suggests, is an earthmoving contractor. It had a lengthy trading history with various companies which may be broadly described as being part of Ocilla - for some six years or more. The Ocilla companies, which are the applicants, are property developers, except for Silverpoint, which was set up for a separate and distinct purpose of investigating openings for pre-fabricated houses in Pacific Island countries.

[8] The principal parties who have given affidavits in the litigation are first of all a Mr O'Kane who describes himself as the "*general manager of the Ocilla group of companies*". That company, in turn, seems to own the four applicant companies. His business partner is a Mr Barry. Mr Barry is a director of Silverpoint. Mr O'Kane and Mr Barry were described as being shareholders or directors of the other companies within the Ocilla group. The three companies (with the exception of Silverpoint) which are involved in this litigation seem to have been set up to carry out particular developments.

[9] Another person who has given affidavits in the proceedings is a Mr Askew. He was for 25 years up until May 2006 an employee of WEL, ending up as general manager of that company. He was responsible for preparing the invoices that are now the subject of statutory demands which WEL has served on the Ocilla companies. He commenced work on 1 June 2006 for the Ocilla group. He is therefore in the curious position of having been employed by both sides involved in the present litigation.

[10] Mr Askew in his affidavits gave an account of what he said was the relationship between the various companies in the Ocilla group and the WEL group of companies. He painted a picture of a collaborative relationship with the parties each acting for the advantage of the other. For example, Ocilla, he said, in undertaking a project might find a way of reducing the initial costs that they expected to incur and rather than the Ocilla company pocketing all the saving they would be shared with WEL.

[11] He said that after he left WEL's employment he was retained to carry out some work on WEL's behalf to resolve issues relating to the completion of one of Ocilla developments and therefore knows about the dispute which underlies the proceedings that have now been started between the parties.

[12] Another person who has given affidavits in the proceedings, Mr Wedding, says he is the sole director and majority shareholder of WEL. Mr Wedding's general approach is that he would not accept that the parties contracted with each other on any other basis other than that the individual companies in the Ocilla group contracted with WEL. His firm view was that the activities of the Ocilla companies were strictly compartmentalised and that it would be wrong to approach matters on the basis that all debits and credits arising out of the relationship between WEL and the various companies should be lumped together to arrive at some sort of group balance owing after allowance of liabilities properly owing to WEL and any credits arising out of justifiable cross-claims. I will make further mention of these various debit and credit items in the course of my judgment.

[13] The Statutory Demands were as follows:

Date	Recipient	Amount	Job
21.12.06	Favona Developments Ltd	$102,399.65	Harania Park Estate
21.12.06	McLaughlin Park Ltd	$367,424.92	McLaughlin's Rd Open Channel
21.12.06	McLaughlin Park Ltd	$333,482.62	McLaughlin's Rd Pump Station
21.12.06	McLaughlin Park Ltd	$116,726.66	McLaughlin's Rd Extension
21.12.06	Pacific Bridge	$20,684.53	Lot 6, McLaughlin's Rd
21.12.06	Silverpoint	$86,072.19	Tahiti House
		$1,026,790.57	

[14] The parties have reached an agreement which I recorded in a minute at the beginning of the hearing before me in the following terms: *First, there is a statutory demand dated 21 December 2006 which WEL has issued against Favona Developments Limited in the amount of $112,399.65. WEL agree that Favona has an arguable claim to set-off the amount of $450,000 against the two invoices issued by Wedding Earthmovers Limited that are the subject of the Favona demand. While conceding the existence of an arguable claim, WEL says in effect that Favona is precluded from bringing it by virtue of the provisions of s 79 of the Construction Contracts Act. The basis upon which this concession is made is for the purposes of the argument concerning the application to set aside WEL's statutory demand, it is not sought to bind the parties in any other proceedings.*

[15] The position taken by MPL is that the claims are subject to genuine disputes on the following grounds:

a) in respect of the "open channel" invoices, a substantial reduction needs to be made to reflect credits previously provided;

b) in respect of the "pump station" invoices, there are significant costs savings on a development that need to be taken into account;

c) in respect of any invoices that are due and owing, McLaughlin is entitled to apply against them debts owed to it by WEL and debts owed by WEL to Favona.

[16] As to Pacific Bridge Ltd, that company says that WEL owes money to it, and that the invoice on which the statutory demand is based was mistakenly addressed to it rather than to the correct recipient, MPL.

[17] In the case of SPL, the defence is that the claimant was obliged to wait for payment until the outcome of a proposed tender became known, and, alternatively, that SPL was a type of joint venture to which a number of entities made contributions either by supplying money or services for which they were not to be paid.

Principles applicable to applications to set aside statutory demands

[18] Williams J in ***Willows Group Limited v Inghams' Enterprises (NZ) Pty Ltd*** HC, Gisborne, SC2-O1, 10 August 2001 stated the principles governing applications of this kind: *The application is brought pursuant to the Companies Act 1993 s 290 which gives the Court power to set aside a statutory demand if there is a substantial dispute as to whether or not the debt claimed is owing or whether the recipient of such demand has a counterclaim, set-off or cross-demand which exceeds the amount sought or roughly equates it apart from a sum of less than $1,000. There is also a general power to set aside.*

It is accepted by the parties that the test to be applied is whether there is a fairly arguable basis on which Willows could claim that it is not liable to ***Inghams (United HoFmes 1998 Ltd and United Homes 1994 Ltd v Workman*** (CA 68, 69 and 70/01, 25/5/01, para 27 p 7; See also ***Covington Railways Ltd v Uni Accommodation Ltd*** [2001] 1 NZLR 272 at 272-275 para 11).

The statutory demand that WEL served on Favona

[19] The first claim that I will consider is that relating to the statutory demand dated 21 December 2006 that WEL served on Favona Developments Limited pursuant to which an amount of $102,399.65 was claimed.

[20] The parties were not able to agree on the basic point of whether this contract was a written contract or an oral arrangement. The applicant has produced in evidence a document entitled *"Tender Documents Civil Works Contract Harania Park Estate for Favona Developments Limited"* which was prepared by Babbage Consultants. There are then produced what purport to be extracts from that contract including a special condition saying that the contract was a "measure and value" type contract.

[21] On 28 June 2005 WEL wrote to Favona forwarding a price schedule of quantities for the works and stating in the accompanying letter that the basis of the contract works was measure and value with monthly progress claims to be paid in full by the 25th day of the month following completion of the work. The schedule of quantities to which the letter referred set out amounts that were allowed in respect of various items *including "preliminary and general", "earthworks and miscellaneous site works",* and other scheduled items. Opposite each item in the schedule appeared a money sum with the total of all of the money sums being $498,296.50. These scheduled items were further broken down in schedules of quantities and rates for each category. For example, the schedule of quantities and rates for the second item in the schedule, "*earthworks and miscellaneous site works",* set out a number of allowances including cubic metres that were provided for and the cost of the same for doing that part of the work. Other parts of the schedule of quantities and rates had provision for a "*lump sum"*. Still others contained provision for a *"contingency sum*" with a fixed amount being included which was to be expended only on the written instruction of the engineer.

[22] In the first place, I consider that while the evidence is not entirely satisfactory on the point, I have before me sufficient evidence to justify the conclusion that the parties entered into a written contract for the Harania Park work on the basis of the contractual documents which were prepared by Babbage Consultants. Those documents were entitled "Tender Documents". Mr Askew when submitting WEL's tender said in his covering letter of 28 June 2005:

Please find attached our priced schedule of quantities for Civil Works to be undertaken on the above project located at 103-105 Favona Rd, Mangere.

The attached schedule was included in the Babbage Consultants Ltd Tender Documents reference number 42215 dated May 2005 received by Wedding Earthmovers Ltd on 10 June 2005.

Basis of the contracts is Measure and Value. Monthly progress claims are to be paid in full by 25th day of the month following completion with no allowance having been made for the with holding of retention monies"

[23] In my view, it is at least fairly arguable that the contract was a written one which contained clause 14.1.7 to which I make reference below.

[24] The claim centres on two separate invoices which related to civil works carried out by Wedding Earthmovers on a development called Hariana Estate in Favona, Auckland. The two invoices were:

a) *Invoice 11011, dated 14 March 2006. That invoice was issued in the amount of $151,868. It appears that on 28 April 2006, an amount of $125,000 was paid in respect of this invoice, leaving a balance of $26,868.48. The latter sum is included in the Favona demand.*

b) *Invoice 1924 dated 20 October 2006 in the amount of $75,531.70.*

[25] Both invoices were marked with the words

This is a payment claim under the Construction Contracts Act 2002

The issues relating to the Favona invoices

[26] Favona says that WEL claimed to be entitled to abandon the contract and leave the site. But, in the submissions for Favona, it was claimed that WEL had no right to do this, or at least they have not established that there is some evidence which supports their entitlement to leave the job or leave the site. Mr Barker said that WEL having decided to leave the site, Favona elected to resume possession and that in those circumstances 14.2.3 of the contract applied. That clause reads:

14.2.3 If the principal elects to resume possession of the site under the provisions of 14.2.1 or 14.2.2 it may:

a) forthwith expel the Contractor without terminating the contract or relieving the Contractor from any of its obligations under the contract; and

In any such cases the Contractor shall not be entitled to any further payment until the completion of the contract works.

[27] Mr Barker said that under that provision, WEL is not entitled to any further payment until completion of their contract works. The time for payment would not arrive until then: ***Construction Service Company (Wellington) Limited (in Rec) v Wellington Waterfront Limited*** (HC, Wellington, 13/9/06 Gendall AJ).

[28] Mr Barker also submitted that invoice 1924 did not represent an amount that was actually payable under the contract, because it was calculated on the wrong basis. That is to say, he submitted that the contract which underlay WEL's entitlement to claim provided that the contract price was to be determined on a "measure and value" basis. But instead invoice 1924 was prepared on a cost plus basis. That being so, not only was it not payable but WEL's actions in endorsing that invoice as a payment claim pursuant to the Act, was of no effect and did not call for a payment schedule in response because WEL did not have contractual entitlement to what they were claiming.

[29] Favona also submits that WEL having "*walked off the site*" and Favona having resumed possession of the site, WEL's entitlement to payment was postponed until the works had been completed - necessarily by other contractors; and that WEL's claim for payment is premature. It says that the invoices, even if "*payment claims*" within the meaning of the Construction Contracts Act 2002 (the "CCA"), are therefore claims for something that WEL is not entitled to.

[30] Favona also says that it has cross-claims arising out of the quality of the work that was carried out. As I have recorded above, WEL while accepting that Favona has arguable claims arising out of defects in its performance of the contract, insists that Favona is prevented from raising the claims because of the provisions of s 79 of the CCA.

[31] Mr Andrews for WEL made the following submissions:

50. It is submitted:

a) *clause 14.2.3 only applies if, there being a default, the Principal elects to resume possession but in the present dispute, it was WEL, the contractor which terminated the agreement.*

b) *clause 14.2.3 refers to an entitlement to payment. It does not preclude the issuing of payment claims.*

The question of whether S14.2.3 applies and whether or not WEL was entitled to payment are matters for adjudication following the issue of a properly constituted payment schedule. It is not a precondition to the contractor issuing a payment claim.

[32] The main point that is taken by WEL with respect to this claim is that the statutory demand should not be set aside because it is based upon payment claims, as that term is used in the Construction Contracts Act, and there is no basis for Favona to raise any counter-claim in the face of unanswered claims under the CCA. Mr.Andrews submitted that the two invoices were the subject of payment claims. He submitted that no payment schedule at all was offered in response to the payment claim contained in invoice 11011. He submitted that what Favona relied upon as a payment schedule in response to 1924 did not meet the requirements of the CCA.

[33] The response that Favona relies upon as a payment schedule was set out in a letter dated 24 October 2006 which said, in part:

We dispute that the claimed sum of $75,531.70 (inclusive of GST) is owing as per your schedule #3 appears to have been submitted on a Cost Reimbursement basis.

The Civil Works Contract was awarded to Wedding Earthmovers Ltd on a Measure and Value basis.

We would remind you of your correspondence of 29 August 2006 in which advised Favona Developments Ltd of your intention to terminate the Civil Works Contract at Harania Park Estate immediately.

As you are aware the Principal resumed possession of the site effective 4 September 2006 and under the terms of the contract the contractor shall not be entitled to any further payments until the completion of the Contract Works.

[34] He said Favona did not specify a scheduled amount in the document which it proposed paying WEL, therefore the respondent submits that this does not satisfy the third requirement of s21.

[35] Mr Barker submitted that there was evidence that Mr Askew indiscriminately stamped accounting documents emanating from WEL with the words "*this is a payment claim under the Construction Contracts Act 2002*". I was reminded that Mr Askew confessed to having endorsed accounting documents in this way, (even credit notes he said).

[36] The next point in this part of the claim concerns Favona's alleged entitlement to raise in response to payment claims, its counter-claims arising out of what it alleges to be defective performance of the drainage work. If Favona is able to rely on a cross-claim for breaches of contract, then it would have an answer to the statutory demand based upon the two invoices. Mr Andrews for WEL argued that the present case falls squarely within the authority of Volcanic Investments. He said that the section of the CCA as Randerson J interpreted it in Volcanic Investments prevents Favona from raising any type of cross-claim and arguing that it is entitled to set-off the cross-claim against any debt owed to WEL.

Determination of issues relating to the Favona invoices other than s 79 point

[37] I do not believe that on an application to set aside a statutory demand I am able to determine any dispute whether or not clause 14.2.3 applies to the factual circumstances of this case. There is some credible evidence before the Court establishing that it does. I will therefore assume in favour of the applicant that it does.

[38] If it is assumed that 14.2.3 applies, the next issue is whether or not it can defeat the operation of the provisions which permit enforcement of payment claims.

[39] It is my opinion that the points that have been raised relating to clause 14.2.3 of the New Zealand standard form of contract do not "trump" the mechanism provided in the CCA. Providing there is a what purports to be a payment claim, then if no payment schedule is provided by the payer in response, the amount claimed will become payable. It is not open to the payer in proceedings for the recovery of the debt where there has been an unanswered payment claim to argue that a provision of the contract relating to abandonment of the works in the circumstances disentitled the payee from making his/her claim. I say more about the provisions of the CCA below and this part of my judgment is broadly based upon the observations I make in later sections where I consider the provisions in more detail. Determination of the issue whether abandonment of contract occurred and whether it disentitled the payee from receiving payment can only be determined in subsequent substantive proceedings brought for that purpose. They cannot be erected as a defence where the payee moves to enforce a debt under the CCA.

[40] One of the matters which the Act requires is that the method of calculation of the scheduled amount should be set out in the payment claim: s 20(2)(e). A person who receives a payment claim is entitled when responding to a payment claim to state the manner in which the payer calculated the scheduled amount and the payer's reason or reasons for the difference between the scheduled amount and the claimed amount: s 21(3).

[41] I agree that the proper focus is on the substance of the document which is said to be issued in conformity with the Act and the Court will be influenced by substantive considerations rather than technical quibbles: see George Developments Ltd v Canam Construction Ltd (CA, 9/2/05, CA244/04). I agree that the letter 24 October 2006 did not refer to a scheduled amount that Favona said was in fact owing. However, I regard it as being fairly arguable for the purposes of an application of the kind now before the Court, that such an omission is not fatal. It is at least implicit in the letter that Favona rejected liability to pay any amount. That is, the schedule, fairly construed, conveyed to the intended reader that the amount owed was zero dollars. The arrangement contained in the CCA does not seem to require that in every case a party confronted with a payment claim must offer some amount of money. It is possible to assert in a payment schedule that no amount at all is owed.

[42] As to the final point, the indiscriminate stamping of documents with the payment claim stamp, my conclusion is that even if that occurred, it would not defeat the validity of either tax invoice as payment claims under the CCA. Whether the person drawing up the payment claim properly turned his or her mind to whether the document being issued was appropriately to be termed a payment claim is beside the point. The Court can only give effect to the document viewed objectively. That is, if it appears to be a valid payment claim and contains all the necessary elements prescribed by the Act, then the fact that the person who drew the document up may not have properly adverted to the propriety of his/her actions in presenting the document as a payment claim is irrelevant.

[43] Subject to the next point therefore which I intend to consider, the applicability of s 79 of the CCA, my conclusion is that the amount said to be owing in terms of invoice 11011 is enforceable but the amount claimed under invoice 1924 is not. That is because a payment schedule was issued in response to the latter but not the former.

Possible counterclaims arising from defective drainage works as an answer to WEL's statutory demand based on invoice 11011- s 79 CCA

Introduction

[44] I mentioned earlier that Favona claim that the cost of remedying the defective drainage works as part of the Favona contract is in the vicinity of $450,000 and that cost should be laid at the feet of WEL as the head contractor. In short, Favona asserts that it has a counterclaim, cross-demand or set off which neutralises any liability it might have to WEL. That brings into focus the provisions of s 79 of the CCA which provides:

S 79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand

In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if

(a) judgment has been entered for that amount; or

(b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[45] The issue that arises is whether WEL can invoke the provisions of s 79 of the CCA to bar Favona from raising any cross claim in response to the statutory demand.

[46] The leading authority on the effect of the CCA on liquidation proceedings is Volcanic ***Investments Ltd v Dempsey & Wood Civil Contractors Ltd*** (2006) 18 PRNZ 97. A number of judgments have applied that authority. Volcanic Investments was an application under s 290(4) of Companies Act 1993 to set aside a statutory demand. The section so far as relevant provides:

290 Court may set aside statutory demand

(1) The Court may, on the application of the company, set aside a statutory demand.

(2) The application must be

(a) Made within 10 working days of the date of service of the demand; and

(b) Served on the creditor within 10 working days of the date of service of the demand.

(3) No extension of time may be given for making or serving an application to have a statutory demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the 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 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; or

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

[47] In ***Volcanic Investments*** the respondents, Dempsey & Wood Civil Contractors Limited ("Dempsey & Wood"), were building contractors who entered into a contract with Volcanic Investments Limited ("Volcanic") to carry out construction work on a property in Auckland. Dempsey & Wood made a claim from Volcanic for payment which was not met. They referred the matter to adjudication under Part 3 of the CCA. Volcanic claimed that it had suffered losses as a result of delays on the part of Dempsey & Wood in completing the work. The adjudicator determined the matter in favour of Dempsey & Wood who then issued a statutory demand to Volcanic under s 289 of the Companies Act 1993. Volcanic then applied for an order under s 290 of the Companies Act 1993 setting aside the demand. In the course of his judgment, Randerson J considered the effect of s 79 of the CCA.

[48] Randerson J referred to the statutory scheme of the Act and noted that the apparent intention behind the legislation was to ensure that payments due under construction contracts were promptly made. He referred to the fact that Dempsey & Wood were entitled to recover the amount assessed by the adjudicator "in any court" which is defined by s 5 of the CCA as meaning the High Court or a District Court. He noted that the CCA provided for the entry of judgment in the District Court for the amount of any debt due under the Act but that there was nothing in the CCA which would preclude (para [17]): ... *other modes of recovery by lawful process.*

[49] He considered the meaning of s 79 of the Act and said, at paragraph [19], that that section clearly contemplated that proceedings would be issued for the recovery of a debt due under ss 23, 24, or 59 of the CCA. At para [19] of his judgment he said:

[19] There is no definition of the expression *"proceedings"* in the Act but there is nothing to suggest that there is any limitation in the types of proceedings for a recovery of a debt which might be relied upon. These could include an application under s 73 for entry of judgment or the issue of civil proceedings for recovery of the debt by way of summary judgment or otherwise.

[20] Where the debtor is a company, there is nothing in the Act to suggest the issue of a statutory demand under the Companies Act is not a proceeding contemplated by s 79 for recovery of a debt. It is an integral step in the winding up process and is the usual preliminary to a winding-up application under Part 9A of the High Court Rules. An application to set aside a statutory demand is a "proceeding under the High Court Rules". It is brought as an originating application under Rule 458D(I)(a)(vi) and falls within the definition of a proceeding under Rule 3. An application to wind up a company is also a proceeding under the High Court Rules (RR 700A and 7000). I conclude that recovery of a debt by the lawful process of the issue of a statutory demand and the bringing of

winding up proceedings against a debtor company are "proceedings" contemplated by s 79. Indeed, it was not submitted otherwise.

[50] His Honour then went on to set out his view that the prohibition in s 79 applied to liquidation proceedings. At para [22] he said:

[22] In summary, Volcanic's claim to a set off against the amount of the statutory demand cannot have any effect unless:

a) the amount of the set off is a liquidated amount; and

b) judgment has been entered for that amount, or there is not in fact any dispute in relation to the claim for that amount.

[51] In Volcanic, the amount of the claimed set off was not a liquidated amount and because judgment had not been entered for that amount and nor was it the position that there was no dispute in relation to the claim, it followed that the Court was forbidden from giving effect to the set off by virtue of s 79 unless s 290(4) of the Companies Act 1993 overrode it. Having noted that inconsistency between those two sections, Randerson J expressed his view that Parliament intended s 79 of the CCA to prevail over s 290(4) of the Companies Act 1993.

[52] Favona submit that Volcanic was wrongly decided. The company argues that WEL cannot rely on s 79 to defeat an application to set aside a statutory demand.

Counsel's submissions concerning Volcanic Investments

[53] Mr Barker submitted submitted as follows:

3.27 The impact of s79 of the CCA on an application to set aside a statutory demand turns on whether such a proceeding is properly characterised as "proceedings for [the] recovery of a debt under section 23 or section 24 or section 59.

3.28 At a general level, it is difficult to see how the present application could come within that definition.

(a) There are innumerable references to the long established rule that the statutory demand procedure is not to be used as a debt recovery tool. To do so has been consistently described as an abuse of process. See the authorities referred to in Brookers, "Company and Securities Law in NZ", at para CA 289.07 (Tab 1).

(b) Regardless of these general statements as to the purpose of the statutory demand procedure, it is difficult to see how an application to set aside a statutory demand could ever be described as "proceedings for the recovery of a debt", when the structure and purpose of such an application is considered. Such an application is not a proceeding brought by a "creditor" to recover an amount of money that is due and owing. They are proceedings brought by a "debtor" to set aside the statutory demand. The reason such a proceeding is brought is because of the presumption of an inability to pay debts if the company fails to satisfy the demand. This evidential presumption is a ground for liquidation.

(c) These points have been forcefully made by John Ren in a recent article, "Enforcing Payment Obligations under the Construction Contracts Act 2002" (2002) 4 NZBLQ 336 at 354 (Tab 5):

"The payer company's application to the High Court to set aside the statutory demand bears no resemblance to a proceeding for the payee to recover a debt. If anything, it is the opposite: the company is resisting the payment of the debt by initiating the proceedings. Moreover, if the statutory demand is set aside, it does not mean that the company does not owe a debt due to the payee defendant. The defendant is still entitled to start legal proceedings for ascertaining and recovering the debt under the CCA or otherwise. If the statutory demand is not set aside or liquidation is ordered on the basis of the statutory demand, it does not mean that the company owes a debt due to the person who issued the statutory demand. The company or the liquidator is entitled to start legal proceedings regarding the debt."

[54] Mr Barker also referred me to further passage in the same article, at p 354, where the writer said: *The payee's application to the High Court for an order to liquidate the payer company is obviously a legal proceeding before the High Court, but it is not a debt recovery proceeding. By making the application, the payee is saying "please order the company to be liquidated", not "please order the company to pay the debt", even though the proceeding is a legitimate tool to apply pressure on the company and get the debt paid and the payee may subjectively have that purpose in mind. This can be compared with debt recovery proceedings in which the creditor is saying "please ascertain that the debtor company owes me a debt and order the debtor to pay the debt".*

[55] Mr Barker also made a submission on what he described as the "philosophy" of the Act:

3.32 There is also the broader issue concerning the "philosophy" of the CCA, which Randerson J relied on. It is submitted that the philosophy of the Act is to be found in its provisions. It is not correct to say that the CCA simply requires prompt payment. The CCA sets out quite detailed provisions relating to how claims are to be dealt with. These provisions suggest that a contractor must first obtain a judgment from a Court before it can look to other enforcement avenues. There are good reasons for this. That is the appropriate context in which to address questions that may arise as to the validity or otherwise of payments claims, for example.

3.33 There are also issues relating to the philosophy of the Companies Act which need to be taken into account. The end result of a statutory demand is likely to be an application to liquidate the company. A "debt due" under the CCA is at best described as a right to a contingent payment. It reflects the "pay first, argue later" philosophy of the Act. Once the focus is on a liquidation of the company, however, it is not clear why such a contingent claim should itself give rise to a right to liquidate the company, at least without regard to questions of set-off or otherwise. If, for example, the principal in Volcanic Investments, could not afford to pay the

contractor because of losses it had suffered as a consequence of the contractors delays, how it would be just and reasonable for the principal to be liquidated without some reference at least to that potential claim?

3.34 This point is even clearer when the effect of any liquidation order is considered. Under s310 of the Companies Act, the liquidator would be entitled to consider the situation of mutual debts, which would include setoff or counter-claims. The situation could well arise whereby the contractor was successful in liquidating the principal company, but in the subsequent liquidation, it is found that the contractor owed more to the company than was owed. Such a result would be plainly absurd. See Thompson & Bailey, "Have the Courts changed their minds about the purpose of statutory demands?", Lawtalk, Issue 58, 16/2/07 at p16 (Tab 6).

[56] Mr Andrews was content to assert that Volcanic was correctly decided and that there was no reason for me to depart from it.

[57] Mr Andrews summarised the submission for the applicant as being that Volcanic is wrongly decided because an application such as the present under s 290 is not a `proceeding' for the purposes of s 79 of the CCA. Mr Andrews said that an argument on that basis had been considered and rejected by this Court in the judgment of Faire AJ in ***Freemont Design and Construction Limited v Natures View Joinery Limited T/A Nebulite Waikato*** HC HAM CIV 2006-419-269 26 July 2006.

[58] He said that in Freemont Associate Judge Faire had held that it was not the statutory demand which was the proceeding for the purposes of s 79, rather it was the s 290 application which was the `proceedings'. It followed from that that the Court could invoke its jurisdiction pursuant to s 291 of the Companies Act 1993 in respect of any statutory demand by ordering payment of some or all of the debt demanded, or by appointing a liquidator in the course of disposing of the s 290 application. Thus, Associate Judge Faire concluded that the s 290 proceeding is sufficiently within the scope and purpose of ss 23, 24 and 59 of the Construction Contracts Act 2002 as to constitute a proceeding for the purpose of recovering a debt due.

[59] Mr Andrews pointed out that Faire AJ had noted Randerson J's remarks that there was nothing in the Act to suggest that the statutory demand proceeding was not a proceeding contemplated by section 79 for the recovery of a debt. The Judge said that the Volcanic conclusion had been arrived at 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. Further, Faire AJ concluded: *"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 issued under of the Companies Act 1993 are not proceedings ... 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 section 291 of the Companies Act 1993 ..."*

[60] Faire AJ's conclusion was that an application to set aside a statutory demand was a "proceeding" to which s 79 of the CCA applied.

Discussion concerning s 79 and its relationship to Companies Act 1993

Introduction

[61] In order to assess the submissions, it is necessary to focus primarily on the wording of s 79 of the CCA. However, I think it may be helpful to briefly consider the background and purposes of the CCA as well. Additionally, I will consider briefly the nature of liquidation proceedings to ascertain what light, if any, they throw on the issue.

[62] By way of preliminary comment, I suggest that it is important to keep in mind the type of proceeding Volcanic was concerned with. It was an application to set aside a statutory demand. It is important because there is, in my view, a risk of imprecision when it comes to identifying what the relevant "proceeding" is that we are concerned with. As I will explain, in my view, the statutory demand is the only possible "proceeding". As I explain later, I am of the view that an application to set aside a statutory demand is not a proceeding which serves to enforce a debt. Rather, it is a mechanism provided to restrain the use of another instrument, the statutory demand. It is the statutory demand itself which is the means of enforcement of the debt and which is the only type of process that might plausibly be viewed as a "proceeding for the recovery of a debt". I intend to assess the arguments about the correctness of Volcanic from that starting point. But first, I will mention some aspects of the CCA that I consider relevant.

Purposes and objectives of CCA

[63] While I respectfully adopt the overview of the Act contained in Randerson J's judgment in Volcanic I wish to draw attention to some features of the Act which seem to be important when considering the issue that arises for consideration in this case.

[64] Section 3 sets out the purposes of the Act and they include: *to provide remedies for the recovery of payments under a construction contract.*

[65] In the "overview" section of the Act, section 4, the effect of sections 19-24 is summarised as containing: *Provisions establishing a procedure that allows a party to a construction contract to recover a progress payment by making a payment claim ...*

[66] Section 23 which sets out the consequences of not paying an amount claimed in a payment schedule says the following:

(2) The consequences are that the payee

(a) May recover from the payer as a debt due to the payee, in any Court, -

(i) the unpaid portion of the claimed amount; and

(ii) the actual and reasonable costs of recovery awarded against the payer by that Court;

I have added the emphasis in the above extracts.

[67] A similar provision appears in section 24 where the payer, having provided a schedule setting out the amount that he or she states as being payable, does not in fact make that payment.

[68] Section 59 is concerned with the consequences of not complying with an adjudicator's determination that a sum of money is due. In that circumstance the consequences are:

- The consequences are that the party who is owed the amount (party A) may do all or any of the following:
- Recover from the party who is liable to make the payment (party B), as a debt due to party A, in any Court -
- The unpaid portion of the amount; and
- The actual and reasonable costs of recovery awarded against party B by that Court.

[69] Another form of remedy given by the Act is that a money amount ordered by an adjudicator can be enforced as by entry of judgment in the District Court under s73.

[70] Section 79 is the key provision in the present proceedings. Section 79 (1) starts out by referring to: *"Any proceedings for the recovery of a debt under s 23 or s 24 or s 59 ... "*

[71] Then the Court must not give effect to counter-claims, cross-claims and set off. Proceedings for the recovery of a debt under s 23, s 24 or s 59 refer to proceedings for recovery of a sum of money in any Court. This ties in with the opening words of s 79 which indicate that it is concerned with proceedings `for the recovery of a debt'.

[72] The arrangements contained in the CCA have provisional effect. The effect of the provisions of Part 2 is that unless a payment schedule complying with the Act is provided, the payer becomes liable to pay the claimed amount. The debt is of course of a provisional nature because the policy of the Act is to provide a "pay now, argue later" regime.

[73] The Act, though, gives priority to claims which have been the subject of unanswered notices under Part 2 or which have been upheld by an adjudication under Part 3. For claims within those categories, the usual entitlement of a contracting party to bring to account cross debts and demands, is suspended. It is for that reason that they cannot be relied upon to resist claims for payment that comply with the formalities of the Act. The effect of the regime is to prevent a disputed cross claim etc from being given effect to unless and until a Court has authoritatively adjudged whether or not the cross claim is valid. The opposing party cannot, in general terms, bring any cross demand to bear until it has been either admitted, or has been recognised in proceedings. Bringing a cross demand etc to the last stage can be a lengthy process if the claim is disputed. The policy of the Act is that the party whose debt is recognised by the Act should not have to wait for payment until disposal of the cross demand has occurred

[74] Section 79 makes it clear that in certain proceedings with which it is concerned the Court is not to "give effect to" any counter-claim etc. I will attempt to relate these particular observations to consideration of whether s 79 governs liquidation proceedings at a later point in my judgment.

The process of liquidation

[75] There is no doubt that the existence of a debt owed to the plaintiff may be indirectly relevant to the process of liquidation of a company in a number of ways.

[76] One way it is relevant, is that it is the basis for issuing a statutory demand. The function of statutory demands, in turn, is to assist a party in establishing that a company is insolvent for the purpose of liquidation proceedings. Failure to comply with an effective statutory demand gives rise to a rebuttable presumption that the company is unable to pay its debts. The existence of a debt may therefore be relevant to liquidation proceedings because it is the foundation of a statutory demand which in turn is relied upon to assist the creditor to prove in the liquidation proceedings that the company is insolvent.

[77] However in my judgment, the statutory demand is not a proceeding for the recovery of a debt. It is a preliminary step that frequently accompanies a winding up proceeding - which itself may be intended to recover a debt. But a statutory demand is not a "proceeding" as that term is normally understood, in the sense of being an application to a Court for a remedy.

[78] The Volcanic decision referred to the statutory demand procedure being an "integral step" in the winding up process. The point of that comment, I understand, is to demonstrate that even if the statutory demand could not be regarded as a proceeding for the recovery of a debt in its own right, its close link to the winding up process provides the necessary nexus, so that it, too, can be justly described as a proceeding for recovery of a debt. If I

am correct in my understanding, it is necessary to revisit the issue of whether a liquidation proceeding is such a proceeding, and I do so at paragraphs [79] to [83] below. That is because if the process of liquidation viewed overall is not one that is concerned with the recovery of a debt, then it would seem wrong to view a subsidiary aspect of that overall process, the issue of a statutory demand, and thereafter the application to set aside statutory demand, as individually, or cumulatively amounting to such a recovery process.

[79] The primary object of liquidation proceedings has been described as the collection and distribution of the assets among unsecured creditors after payment of preferential debts: In re Commercial Bank Corporation of India and the East, Smith and Fleming and Co's case (1866) 1 Ch Applicant 538 at 545. An order placing a company in liquidation may result in the creditor receiving part of any distribution that results from the liquidator applying the assets of the company in satisfaction of preferential and non-preferential claims.

[80] A creditor is prevented from enforcing his/her debt from the onset of liquidation because of the provisions of s 248(1)(c) Companies Act 1993 which provides:

> *(c) Unless the liquidator agrees or the Court orders otherwise, a person must not*
>
> *(i) Commence or continue legal proceedings against the company or in relation to its property; or*
>
> *(ii) Exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company:*

[81] The creditor may however participate in any distribution that the liquidator may make. The right to participate in such a distribution is limited to those who come within the category of "creditors" - i.e. the company owes them debts: s 240(1) Companies Act 1993. There can be no doubt that a payment which a creditor receives from a liquidator has the effect of reducing or extinguishing the individual creditor's debt. However, there is a good argument that whatever payment is ultimately received, strictly speaking it cannot be said to have been recovered "in the proceedings" which led, in the first place, to the order placing the company in liquidation. That is because liquidation proceedings do not result in a Court order adjudging that the defendant is indebted to the plaintiff for a sum of money. Those are the elements that are usually contemplated when one speaks of recovery of a debt in proceedings. Liquidation proceedings are only the beginning of a process that, indirectly, may lead to part or entire satisfaction of a debt. But they are not proceedings for the recovery of a debt.

[82] An order placing a company in liquidation and for appointment of a liquidator results in the holder of the office of liquidator becoming interposed between the company and its creditors. The liquidator will only make a payment to the creditor if he/she is satisfied that the creditor's claim is a proper one: see for example the power of the liquidator to admit or reject the claims of unsecured creditors under s 304 (3) Companies Act 1993. The liquidator, though, does not make any determination that has the status of a judgment that the debt is owed or not owed. Nor does the liquidator preside over a process that compels the company to pay the debt. Payment, if it occurs, ensues from the liquidator taking control of the assets and complying with his statutory obligation to distribute the surplus.

[83] My conclusion is that while liquidation proceedings are de facto used to exert pressure on company to pay their debts, the end in view and the objective of, such a proceeding is not a "proceeding for the recovery of a debt". Therefore preliminary step leading up to those proceedings, the issue of a statutory demand, cannot itself be a "proceeding" within the meaning of s 79.

[84] I should also mention that I respectfully differ from the view that Associate Judge Faire expressed in Freemont Design and Construction Limited that the application under s 290 to set aside the statutory demand can be viewed as proceedings for the recovery of a debt within the meaning of s 79. It is sufficient to record that I agree with the view of Mr Ren noted at paragraph [53] above.

Section 310 Companies Act 1993

[85] The next point is concerned with s 310 Companies Act 1993. That section deals with the liquidator's power to admit claims by debtors and to set those claims off against the amount owed to the company. The following reference to s 310 appears in Morrison's Company Law.

> Only claims that are provable in a liquidation may be set off under s 310. However, the kind of claims that may be admissible for proof is wide: s 303; CA303.03. These include not only simple debts but also contingent claims, debts payable in the future, and unliquidated damages: ***Aquamarine (Christchurch) Ltd v De vere*** (1979) 1 BCR 229.

[86] Were Favona to be placed in liquidation, the liquidator would have the right under s 310 to bring to account its claims against WEL. I come to that conclusion because the right to set-off contained in s 310 does not qualify as a "proceeding to recover a debt" against WEL and is therefore outside the purview of s 79 of the CCA. Yet WEL submits that at the stage where the Court is considering Favona's application to set aside the statutory demand, the cross-demand is to be ignored. That seems to me to be a logical inconsistency, which should be avoided. It can be avoided by determining that s 79 does not apply to liquidation proceedings. Once that step is taken, logical consistency requires that s 79 should not apply in statutory demand proceedings which are ancillary to liquidation proceedings.

[87] The next point is the one that Mr Barker made at paragraph 3.3 of his submissions which I have set out at paragraph [55] of my judgment. In essence, he said once the focus is on the liquidation of the company, it is not

clear why such a contingent claim should itself give rise to a right to liquidate the company, at least without regard to questions of set-off or otherwise. I agree with that submission.

Policy issues

[88] In my view, the wording of s 79 when considered in its statutory context means that the restriction contained in s 79 cannot sensibly be read as extending to liquidation proceedings. It might be possible to argue that there are strong policy considerations that would justify a wider interpretation being given to the provisions of s 79. However, I am not convinced that there is any reason to do so. I have no doubt that the objectives of the CCA are important for those who come within the scope of the Act. It is important for persons in the construction industry to receive regular and timely payments, and for there to be a speedy resolution of disputes under construction contracts. The further objective of which is to provide remedies for recovery of payments under construction contracts, is also important as s 3 of the Act makes clear.

[89] On the other hand, liquidation proceedings also have significant consequences for those who have interests in companies. They include shareholders, investors and creditors. Liquidation proceedings have the practical result of the extinction of those companies. It is difficult to see how such proceedings can be fair if the Court is required to ignore substantial set-offs, counter-claims and cross demands - which would be the effect of extending the operation of s 79 to liquidation proceedings. It is not self-evident that policy considerations require that creditors who have claims within the purview of the Construction Contracts Act 2002 should be able to insist on satisfying there claims without allowance for counterclaims etc, even at the cost of potential injustice to companies and those associated with them.

[90] Nor is it clear why that group of creditors who can define their claims as debts arising from a construction contract, should have preferred treatment over other creditors.

[91] My conclusion is that while a company is functioning and able to pay its debts, the CCA understandably seeks to expedite payment of construction debts. The Act impacts on the timing of payment of those debts. However, it is not clear to me that policy requires that a CCA claimant should be not be bound by the rules that bind creditors generally when the point is reached where the debtor's solvency is in question. Nor when that point is reached, is it clear why, the company should not be able to assert an equitable set off, for example, that it would be entitled to raise against non-CCA claimants.

[92] I am not able to perceive any clear policy reason why s 79 of the CCA needs to be given an expansive interpretation of the kind which WEL contends for in this case.

The view that the CCA prevails over the Companies Act 1993

[93] In ***Volcanic***, Randerson J took the view that there was an inconsistency between the CCA and the Companies Act 1993. In that circumstance, given that the CCA was a later enactment making special provision in an area where the earlier Act made general provision, the CCA should prevail. Essentially, the inconsistency that His Honour had in mind, was based upon the assumption that both enactments were concerned with proceedings for the recovery of debts - that point not having been argued before him. Because I take a different view on that point, there is as no resulting inconsistency and no requirement to decide that the provisions of the later Act override those of the earlier.

Conclusions concerning effect of s 79 on liquidation proceedings

[94] The present proceeding is an application to set aside a statutory demand. My conclusion is that because such an application is not a proceeding for the recovery of a debt it does not come within the statutory language used in s 79 (see paragraph [44] above).

[95] Section 79 speaks of "any proceeding for the recovery of a debt under section 23..." Sections 23, 24 and 59 say: *...the payee may recover from the payer ... as a debt due to the payee in any court..."*

[96] Section 79 must be referring to recovery in Court proceedings. A statutory demand does not seek recovery in Court proceedings.

[97] Proceedings under s 290 of the Companies Act are not for recovery of a debt but applications to set aside a statutory demand which is rather the opposite. This conclusion is not affected by the existence of power in s 291 to place a company in liquidation on the making of an unsuccessful application under s 290. In that regard, I respectfully dissent from the view expressed by Associate Judge Faire in the Freemont Design and Construction Limited case.

[98] Nor do I accept that the fact that the issue of a statutory demand is an integral step in the winding up of a company, justifies viewing such a demand as amounting to a proceeding within the intendment of s 79. For the reasons I have set out in paragraphs [75] to paragraph [83] liquidation proceedings are not proceedings for the recovery of a debt. They are therefore outside the purview of s 79.

[99] I have considered whether, notwithstanding the limited meaning of the expression "proceeding for the recovery of a debt", the statutory objectives of the CCA require me to take a wider view of what the legislature intended. I have concluded that, interpreting s 79 of the CCA as the respondent proposes is not necessary to further proper objectives of that Act, when the stage has been reached where the solvency of a debtor company is in issue.

[100] In my opinion there is no inconsistency between relevant provisions of the CCA and the Companies Act 1993. That is to say, the provisions of s 79 of the CCA do not prevent the Court from giving effect to a counterclaim, set-off or crossdemand in proceedings for the liquidation of a company.

[101] I have already noted that arguments of the kind put to me in this proceeding were not advanced to Randerson J in Volcanic. As a result, the issue went by default in that case. I respectfully disagree with the resulting conclusions expressed in that case.

[102] The claims which Favona makes against WEL in this case, are therefore able to be taken into account when considering the application to set aside the statutory demand.

Should the Court exercise its discretion to set aside the Statutory Demand?

[103] As I stated at paragraph [14] of my judgment, WEL agrees that Favona has an arguable claim to set off the amount of $450,000 against the two invoices issued by WEL. That being so, Favona's application comes clearly within the requirements of s 290(4)(b) of the of the Companies Act 1993. That is the company appears to have a counter-claim and the amount specified in the demand less the amount of that counter-claim results in their being an amount owing which is less than the prescribed amount required to give the Court jurisdiction to make an order placing the company in liquidation. No reason has been suggested why I should not exercise my discretion to set aside the statutory demand issued against Favona Developments Limited on 26 December 2006 and I therefore make the order sought.

McLaughlin Park Ltd demand # 1 for $367,424.92 re open channel job: $333,482.62 demand # 2 re pump station job

$116,726.66 demand # 3 re McLaughlin's Rd extension

[104] WEL served three separate statutory demands on MPL which are the subject of applications by MPL to set them aside. MPL's position overall is as follows:

a) The invoices that are the subject of the demands are not due and owing;
b) There are outstanding amounts owed by WEL to MPL that should be applied against these invoices;
c) If any amounts are found to be due and owing, then MPL is entitled to apply those amounts against amounts owing by Wedding Earthmovers to other members of the Ocilla Group, and in particular, the claims that were discussed above in respect of the Favona demand.

[105] In his written submissions, counsel for WEL said that the respondent's position concerning the MPL claims, in overview, was as follows:

a) Some amendment to the amount demanded is accepted as necessary; the amended balance due is therefore $245,122.57;
b) The debt is otherwise undisputable;
c) MPL cannot demonstrate an entitlement to "set-off" this debt against claims alleged against WEL by companies other than MPL; this applies to all three statutory demands served on MPL;
d) $245,122.57 is therefore due and owing.

[106] MPL's position is:

a) In respect of the "open channel" invoices, a substantial reduction needs to be made to reflect credits previously provided.
b) In respect of the "pump station" invoices, there are significant cost savings on the development that need to be taken into account.
c) In respect of any invoices that are due and owing, McLaughlin is entitled to apply against them:

[107] In his submissions, Mr Barker put matters this way:

There are three separate statutory demands collected within this application. The grounds on which McLaughlin believes these demands should be set aside vary between each of the demands, and for this reason, they will be considered separately. However, in general McLaughlin says:

a) The invoices that are the subject of the demands are not due and owing;
b) There are outstanding amounts owed by Wedding Earthmovers to McLaughlin that should be applied against these invoices;
c) If any amounts are found to be due and owing, then McLaughlin is entitled to apply those amounts against amounts owing by Wedding Earthmovers to other members of the Ocilla Group, and in particular, the claims that were discussed above in respect of the Favona demand.

This part of the submission will deal with the question of whether the invoices are due and owing first, by reference to each of the applications. It will then deal more generally with the question of set-off.

[108] As matters have developed, it now appears that MPL accepts that some of the amount claimed is owing, but it does not accept that the total amounts claimed in the statutory demands of $817,634.20 is the amount owing.

[109] MPL accepts that there are valid claims against it made up as follows:

Adjusted amount owing on Statute demand #1	174,777.50
Amount owing on Statutory Demand #2 after deduction of credit of $250,000	71,000.00
Amount owing of Statutory Demand #3	116,726.66
Less claim machinery hire	-93090.04
Less yard rental	-46,844.60
Total owed	I 222,569.52

[110] I must say that even by the end of counsel's extensive submissions before me, the figures advanced by each side lacked clarity. But as I understand it, the following is the position with respect to the amounts that MPL admits to be owing.

[111] To arrive at the figure it says is owing and which is the subject of statutory demand #2, MPL has brought to account a deduction of $250,000. MPL says this sum recognises a contractual arrangement between the parties which I set out below. While the amount of the deduction is accepted by WEL for the purpose of the present application, Mr Andrews' instructions were that apart from that limited purpose, WEL does not otherwise accept that the deduction is a proper and legitimate one.

[112] In my view, there are sustainable arguments available to each side as to the $250,000. That said, though, my impression was that MPL did not have a strong basis for claiming the deduction. The argument for MPL was that during their trading history the parties had adopted a practice of sharing any savings that could be achieved in carrying out construction work. So, the argument runs, in the present case it turned out that MPL in conjunction with WEL came up with a less expensive way of satisfying the requirements of the local authority in regard to the pumping station. A saving of approximately $250,000 proved to be possible. Nothwithstanding that WEL had given a firm contract price, MPL assert that the agreement was that it would pass on the entire saving to MPL. Presumably MPL would do this by reducing the amount of its claim against MPL to the extent of $250,000. While I recognise the strength of Mr Andrews' contrary arguments, I consider that there is a substantial dispute concerning the debt which is the basis for the statutory demand.

[113] I record that for the purpose of this application, WEL accepts the claims for machinery hire and labour and yard rental.

[114] Subject to what follows in the next section of this judgment, having done the the best that I can with the figures, I therefore approach the matter on the basis that there is no reasonably arguable defence to WEL's claim to the extent of $222,569.52 Set-off of debt allegedly owed to Favona against amount that MPL owed to WEL

[115] MPL, while admitting that there is a balance owing by it to WEL says that it is entitled to bring to account in reduction of that amount, the amount that Favona says it will cost to make good the defects with the drainage works which WEL contracted to perform for Favona. Mr Barker said that Favona's claim should be seen as a cross-demand and therefore available under s 290(4)(b) on an application to set aside statutory demand or that is an "other" ground under s 290(4)(c) for setting aside the statutory demand. He said that the approach that he was inviting the Court to take was sanctioned by a decision of Master Kennedy-Grant in Siteworks Limited v I H Wedding & Sons Limited (1998) 2 NZCLC 261, 704.

[116] In his oral judgment in that case, the Master recorded that Siteworks Limited regularly brought concrete from I H Wedding & Sons Limited which it then supplied as part of contractual obligations it owed to various parties including Wedding Earthmovers Limited (WEL). The facts were that in the course of trading between the parties, invoices would issue from IH Wedding & Sons Limited to Siteworks Limited and from Siteworks Limited to Wedding Earthmovers Limited but there would be recorded on each invoice the word "contra" showing that the amounts were to off-set against each other. There was never any discussion about the method of payment, but it became practice, over time, for the amount owed by Earthmovers to Siteworks to be set-off against the amount that Siteworks owed to IH Wedding & Sons Limited. At a later stage IH Wedding & Sons Limited served two statutory demands on Siteworks.

[117] The Master said there was no dispute as to the facts and both parties accepted that that was the way in which they conducted their business. He considered that in "this most unusual case" the Court should intervene and grant the relief sought. He said (at para 16): "*The course of business adopted by these parties taken with the concessions made (properly in my view) by counsel as to the existence of a dispute as to the true state of account between the applicant and Wedding Earthmovers Limited make this a case in which it would be unjust or unequitable to permit the respondent, having had the benefit of the arrangement, to now disregard it and proceed to liquidate the applicant.*"

[118] Mr Barker invited me to conclude that the facts in the present case justified a similar approach being taken. He referred me first of all to the evidence of Mr O' Kane.

[119] Mr O'Kane gave evidence in general terms that the parties had co-operated together in numerous ways. He stated that the arrangements between the parties were informal and done on a "handshake". He said that on occasions Wedding has moved "resources" from job to job so that payments can be synchronised according to the availability of cash-flow from another job. He gave it as his opinion that the various demands needed to be subject of a broader reconciliation of outstanding claims between the parties following the breakdown of their

relationship. He said it was premature to do that because his group, "The Ocilla Group" had not finalised its claims but he thought that WEL owed the Group $300,000.

[120] Mr Wedding in his response to this deposition by Mr O'Kane said that while Mr O'Kane choose to describe the four individual companies (MPL, Favona, Silverpoint and Pacific Bridge) as forming the Ocilla Group, WEL had never dealt with the Ocilla Group. He said that all of WEL's dealings have been with the individual companies. He noted that the invoices were addressed to individual companies with no reference being made to the Ocilla Group.

[121] Mr Askew's evidence was also relied upon but I can find nothing in it which supports the existence of an arrangement that entitled the parties to set-off debts between the various groups, let alone entitled one party to off-set an unliquidated claim for each contract compensation against invoices rendered by WEL.

[122] Mr Andrews for WEL submitted:

33. MPL relies on some superficial similarity between the facts of Siteworks and the present case. However, there are crucial points of distinction between the two:

(i) In that case, unlike here, it was accepted by both parties that there was a group relationship with invoices being off set against the various different companies: there was no question in Siteworks that this occurred.

(ii) Siteworks was a clear example of a "closeness of association" between the three companies.

(iii) The invoices which were to be applied for the set-off were clearly recorded as "contra".

(iii) It was unjust for the respondent having "had the benefit of the arrangement" to disregard it and to liquidate the applicant (para 16).

[123] In my view, the evidence which MPL relies on does not establish that there is a fairly arguable defence that the course of dealings between the parties of business would justify a setting off of claims made by WEL against a company such as MPL of amounts said to be owed to Favona. There is no credible evidence which shows that for the purposes of this application the Court could conclude that WEL had cooperated in, and taken advantage of, the setting-off of amounts that it owed to "Ocilla Group" against amounts that the group owed to it or that it had permitted the group to off-set the other way.

[124] It is correct that WEL entered into a number of contracts with various companies that were part of the Ocilla Group. The companies were apparently all subsidiaries of a common holding company. But they are separate legal entities. When WEL entered into the individual contracts, it did so with individual companies. There was no explicit contractual arrangement that the individual Ocilla companies had the right to set off against what they owed to WEL, amounts that WEL owed to other Ocilla companies. It would be possible for such an arrangement to be spelt out from the course of dealing between the parties - if there was a basis in fact for concluding that is what they had agreed to. That is, the actions of the parties might only be explicable on the basis that an implied arrangement of the type asserted, underlay their actions. But unless the evidence was such that one could reasonably argue from it that there was an implied agreement to set-off, the supposed arrangement cannot amount to a fairly arguable defence. One would then have to revert to the starting point which is that the companies, being separate legal entities, were solely responsible for their own debts and could set-off only those credits which were actually owed to them.

[125] In my view, this is not a case where MPL is entitled to off-set against what it admittedly owes to MPL a cross-claim that it has arising out of breaches of contract relating to the insulation of drainage under contract to Favona.

[126] I have not reached that conclusion as a result of preferring the evidence of Mr Wedding to that of the deponents for MPL, particularly Mr O'Kane. My reason is that, even accepting Mr O'Kane's evidence at face value, he does not establish that there were aspects of the trading relationship between the parties from which it followed that there was customarily the type of setting-off arrangement that he now seeks to invoke to prevent WEL from relying on the statutory demand in any subsequent liquidation proceedings.

Conclusion on MPL's application

[127] In my judgment, MPL is able to point to a fairly arguable dispute whether it owes parts of the amounts that WEL included in the Statutory Demands it served on WEL. The claims relating to those parts of the demands cannot be resolved in this jurisdiction. But after allowing for arguable items, my conclusion is that $222,569 is owing. I decline to set aside the Statutory Demands against MPL.

Pacific Bridge

[128] The Pacific Bridge statutory demand is for $20,684.53. The statutory demand claims that the amount is the balance due to WEL for the provision of contracting services on Lt 6 McLaughlins Road, Wiri. It refers to the creditor's invoice number 10408-10409 dated 19 August 2005.

[129] Pacific Bridge says that WEL owes it amounts totalling $14,489.45 for labour which it provided to WEL. It does not state the basis on which it is entitled to "contra" these claims. However, I will treat the existence of those claims as giving rise to a set-off or cross-demand which satisfies the requirements of Section 290(4)(b) of the Companies Act 1993.

[130] Pacific Bridge says that the amount which WEL invoiced to it, $20,684.53 was wrongly invoiced. It says that the invoice is thought to have been addressed to MPL. It goes further than this and two of its deponents state that the invoices were actually `later re-issued' in the name of McLaughlin Park - to quote from the affidavit of one of the deponents, Mr O'Kane.

[131] The invoice, 10489 was issued 19 August 2005. Mr Askew as I have recorded left the employment of WEL in May 2006. He later undertook a reconciliation of the accounts between what he described as the 'Ocilla Group' and WEL. This reconciliation apparently was carried out around 28 July 2006. It appears to include and recognise the claim that WEL had against Pacific Bridge. This fact is relevant for the following reason. If Mr Askew was involved in the 'reissue' of the invoices, then he must have done that before he left WEL. He would, of course, have no authority to do so after he left. If there had been a discussion between himself on behalf of WEL and Mr O'Kane on behalf of the 'Ocilla Group' and an agreement that any invoices debited to Pacific Bridge which related to the McLaughlin development, one would have expected him to pick up in the course of preparing his reconciliation that there was still an erroneous invoice from WEL to Pacific Bridge which should have been changed to an invoice from WEL to MPL.

[132] As well, if there had genuinely been a mistake concerning the charging of the Pacific Bridge invoice, then if the Ocilla side were genuine in the matter, one would have expected to see it brought to account one way or another as a debt owed by MPL. There has been no accounting record generated to achieve that result even since the mistake was discovered and there is nothing to suggest that MPL has accepted liability for the debt.

[133] The position is then that there is an invoice which has been outstanding since 19 August 2005. The debtor claims that the account belongs to another company. It says that the records have never been corrected because of further mistakes. Pacific Bridge have never advised WEL that the invoice is not theirs. MPL has never told WEL that the invoice should be charged to them.

[134] Against that, there is the oral sworn evidence of both Mr O'Kane and Mr Askew that what they say is the true position. Mr Askew has of course now moved from one `camp' to the other. But even allowing for that, I would be slow to conclude that he has given incorrect evidence in his affidavit about the matter.

Conclusion concerning Pacific Bridge demand

[135] Not without some hesitation, I conclude there is a fairly arguable defence available in respect of the claim by WEL against Pacific Bridge which should be litigated in the normal way. Given that that is my conclusion, I am not required to consider the further matter advanced by Pacific Bridge which was that that company has cross-claims against WEL which in any event would support the setting aside of the statutory demand.

The Silverpoint demand

[136] WEL has made a statutory demand on Silver Point International Limited ("Silver Point") in the sum of $86,072.19 which is based on what it says are three outstanding invoices

(a)	WEL invoice 10481 dated 31 December 2005	$27,218.28
(b)	WEL invoice 10493 dated 31 January 2006	$44,135.91
(c)	WEL invoice 11017 dated 27 March 2006	$14,917.50

[137] The broad background to the association between WEL and Silverpoint is as follows. Those associated with the Ocilla Group developed a scheme for the manufacture of low-cost, concrete construction houses for supply to Pacific Island countries with the first `target' market being Tahiti. The principle features of the scheme were that pre-fabricated houses which were easy to transport and assemble, which were low cost and good characteristics of resilience against extreme weather were to be developed for the market. Mr Wedding personally became involved as a shareholder in a company which was formed as one of the vehicles for exploiting the technology involved. As well, a trial run was carried out in manufacturing one of the homes on land owned by one of Mr Wedding's companies. Broadly speaking what Mr Wedding was able to contribute was his involvement in and association with an aggregate supplying business.

[138] WEL issued three invoices to Silverpoint relating to the house project. The invoices were dated 31 December 2005, 31 January 2006 and 27 March 2006. That for the period 27 March 2006 gives a flavour of the type of activity involved:

> Onsite construction and supervision of a three-bedroom "Tahiti" component type house at Faahaa, Papete Tahiti for period 1 February 2006 to 24 February 2006 ...

[139] Invoice 10481 of 31 December 2005 was for the following:

> *Tahiti House*
>
> *Manufacture of precast concrete panels and supply of - internal steel frames shed roof truss components roof and verandah steel frames galvanised steel posts*

[140] When the Ocilla Group parties and WEL came to the point of difference about the amounts which WEL claimed, the initial point that Silverpoint took was that the amount of WEL's claim was not disputed but that payment would have to wait until other claims by the associated companies were resolved.

[141] As the applicant began to file additional affidavits in support of its application, its position appears to have evolved somewhat. Silverpoint then advanced the defence that it was the wrong recipient of the invoices and that the party that was properly liable was a company called Ocilla Panel Systems NZ Limited (`OPSNZ').

[142] It was next suggested that shareholders in OPSNZ had arranged to provide material and services at no charge pending the outcome of a tender which Silverpoint was putting forward to the Tahiti government.

[143] Mr Wedding in his affidavits takes issue with many of these points. He points out that WEL would not have sent out invoices if it did not consider there was money owing and if it did not expect to be paid. As to the argument that the issue of invoices is neither here nor there and that the real question is whether WEL was to be paid on the invoice or at some later, indeterminate point, Mr Wedding said it would not have been logical for WEL to come to such an agreement because the basis on which WEL was required to account for GST meant that it had to pay money out to the Inland Revenue representing the GST component of the invoices. He suggested, with some logic on his side, that an alleged arrangement that his firm would wait for an uncertain period for payment of invoices rendered was inherently unlikely. He made other points as well about the limited involvement of OPSNZ in the overall project and was firm in his belief that Silverpoint was the party that was responsible for WEL's costs relating to the project.

[144] In my judgment, the Silverpoint claim is, of all the claims, the very least suitable for determination in the Company's Court. It is simply not possible for the Court to unravel the exact nature of the agreements between the parties. Certainly, WEL is unable to negative any fairly arguable defence available to Silverpoint. My conclusion is that Silverpoint's application to set aside the statutory demand should be granted.

Overall result

[145] I grant Favona Developments Limited's application and set aside the statutory demand issued against it on 21 December 2006

[146] I dismiss McLaughlin Park Ltd's applications to set aside the Statutory Demands against it dated 21 December 2006

[147] I grant Pacific Bridge Ltd's application to set aside the Statutory Demand against it dated 21 December 2006

[148] I grant Silverpoint International Ltd's application to set aside the Statutory Demands against it dated 21 December 2006

[149] If the parties are unable to resolve the issue of costs by agreement, I will make orders. In that event, the parties should file concise memoranda (of no more than seven pages) on the matter of costs within 21 days of today's date. I would also be grateful if counsel would limit citation of authorities to a maximum of four cases. If it becomes necessary for me to determine costs, the parties should notify my Case Officer and have him list the matter for inclusion in my chambers list 6 July 2007 at 2.15 p.m. for a half hour hearing.

A Barker for Applicants
C Andrews for Respondent