#96

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1907

	BETWEEN	79 MANNERS STREET LIMITED Plaintiff
	AND	BJ PYE SHEET METALS LIMITED Defendant

Hearing: 2 February 2010

Appearances: M. Singleton - Counsel for Applicant
No appearance for Respondent

Judgment: 10 February 2010 at 3.15 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 10 February 2010 at 3.15 pm pursuant to r 11.5 of the High Court Rules.

Solicitors: DLA Phillips Fox, Solicitors, PO Box 2791, Wellington

Introduction

[1] This is an application to set aside a statutory demand issued by the respondent, BJ Pye Sheet Metals Limited ("BJ Pye"), seeking the sum of $32,146.59. The statutory demand is based on a debt alleged to be due from the applicant, 79 Manners Street Limited ("79 Manners"), for structural steel and metal work supplied to it by BJ Pye.

[2] 79 Manners contends that the demand should be set aside on the basis that there is a genuine and substantial dispute in respect of the debt, that it has a counterclaim against BJ Pye and that BJ Pye's claim is time-barred.

Background Facts

[3] 79 Manners is the registered proprietor of apartments in Tory Street, Wellington ("the apartments"). On 3 May 2002, the parties entered into an agreement whereby BJ Pye was to supply 79 Manners with structural steel and metal work for the apartments. It was agreed that BJ Pye would submit a monthly progress report and invoice to 79 Manners for work completed during that month. The work would then be certified by Gill Consultants Limited to confirm that it had been completed and, upon certification, BJ Pye would be paid.

[4] In July 2002, BJ Pye commenced the structural steel and metal works on the apartments. Progress claims were issued monthly. In July 2003, it issued its last progress report and invoice for work completed up to this point, setting out what work had been completed, the relevant cost, and what work remained outstanding. The work claimed for in this progress report was certified as being completed on 25 July 2003. BJ Pye has not undertaken any further work on the project since. In particular, it is alleged that BJ Pye failed to install an important bond beam.

[5] On 12 August 2008, BJ Pye issued the statutory demand claiming $32,146.59 against 79 Manners under s 289 of the Companies Act 1993. The statutory demand was stated to be for structural steel and metal work supplied to 79 Manners.

[6] On 28 August 2008, 79 Manners filed and served the present application to have the statutory demand set aside. On 21 November 2008, BJ Pye filed a notice of opposition, together with an affidavit of its director. 79 Manners advised BJ Pye that issuing the statutory demand was improper and an abuse of the Court's process.

[7] On 16 February 2009, 79 Manners made an offer that the proceeding be discontinued, with costs to lie where they fall.

[8] 79 Manners has since filed two amended applications, dated 2 April 2009 and 24 August 2009 respectively. BJ Pye has filed a notice of opposition but only to the earlier amended application on 27 April 2009.

[9] On 31 July 2009, counsel for BJ Pye sought leave to withdraw. That application was granted.

[10] Following numerous adjournments, the matter was set to proceed to hearing on 2 February 2010, regardless of whether or not first BJ Pye had appointed new representation or secondly, it would be in attendance at the hearing. When the matter was called before me on 2 February, there was no appearance for BJ Pye but the hearing proceeded.

The Application

[11] 79 Manners brings this application pursuant to s 290 of the Companies Act 1993, which sets out the basis on which a statutory demand may be set aside:

> **290 Court may set aside statutory demand**
>
> (1) The Court may, on the application of the company, set aside a statutory demand.
>
> ...
>
> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
>
> (a) There is a substantial dispute whether or not the debt is owing or is due; or
>
> (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
>
> (c) The demand ought to be set aside on other grounds.

[12] The principal grounds relied upon by 79 Manners in bringing this application are that BJ Pye's cause of action is statute barred under s 4(1)(a) of the Limitation Act 1950, that there is a substantial dispute as to the debt under s 290(4)(a), and that 79 Manners has a counterclaim for an amount exceeding the amount specified in the demand under s 290(4)(b).

Is BJ Pye's cause of action statute barred?

[13] 79 Manners submits that, because it is now over six years since the alleged breach of the contract in question here occurred, any claim BJ Pye has to recover the alleged debt is statute barred. This submission is made in reliance on s 4(1)(a) of the Limitation Act 1950, which provides that actions founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.

[14] BJ Pye's statutory demand was issued on 12 August 2008 which is only five years after the alleged breach of contract, so it would appear on its face to have been filed within the limitation period. 79 Manners however, submits that a statutory demand is not an "action" for the purposes of the Limitation Act 1950, but that it merely confers a right to bring insolvency proceedings to recover a debt upon expiration of the demand. In other words, 79 Manners argues that the statutory demand was issued in respect of an alleged debt that has now ceased to be due and owing, as the cause of action accrued more than six years ago and the statutory demand itself does not qualify as an "action".

[15] The word "action" is defined in s 2 Limitation Act 1950 as meaning "any proceeding in a Court of law other than a criminal proceeding". Rule 1.3 of the High Court Rules defines the term "proceeding" as "any application to the Court for the exercise of the civil jurisdiction of the Court, other than an interlocutory application". In my view, there is nothing in the wording of these definitions to suggest that an application for a statutory demand is not an "action" for the purposes of the Limitation Act 1950.

[16] Limitation principles clearly embody a tension between finality in civil litigation, and the difficulty of disproving stale claims, on the one hand, and justice being done in an individual case on the other: *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 at [147]. Based on these principles, it would seem to me to be inconsistent to accept 79 Manners proposition here that issuing a statutory demand is <u>not</u> an action for the purposes of the Limitation Act 1950, although the respondent of such demand has received adequate notice of an applicant's claim and the grounds upon which it is made.

[17] Although it is true that a statutory demand is not in itself strictly speaking a vehicle to enforce a debt, this does not appear to be a statutory requirement, as s. 4 Limitation Act 1950 merely refers to "actions *founded* on simple contract" (my

emphasis). Moreover, a successful liquidation application based upon a statutory demand amounts to judicial recognition of the existence of the debt, providing a basis for such an application, and thus should not be regarded as without effect.

[18] Based on these considerations, it is my view that issuing a statutory demand may well constitute an "action" for the purposes of the Limitation Act 1950. It follows therefore that BJ Pye's claim for the alleged debt cannot be considered to be time-barred in the present circumstances.

Is there a substantial dispute or a sufficient counterclaim as to the debt?

[19] 79 Manners submits that there is a genuine and substantial dispute as to the existence of the debt because BJ Pye never completed the work it was contracted to carry out. It claims that only part of the work contracted for was completed when BJ Pye finished work on the apartments in July 2003, and that the balance of the work remains incomplete to date.

[20] Moreover, 79 Manners contends that the work that was completed by BJ Pye was substandard, as it failed to meet the manufacturer's specifications, did not meet common trade practices, and left much of the building in an unsafe and dangerous condition.

[21] The approach the Court is to adopt when considering applications relying on s 290(4)(a) requires an applicant to show a fairly arguable basis upon which it is not liable for the amount claimed in the statutory demand: *Forge Holdings Limited v Kierney Finance (NZ) Limited* HC Christchurch N149/95, 20 June 1995 and *Queen City Residential Limited v Patterson Co Partners Architects (No. 2)* [1995] 3 NZLR 307. This formulation was approved by the Court of Appeal in *United Homes (1988) Limited v Workman* [2001] 3 NZLR 447 at 451-2.

[22] In other words, 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 that dispute to be resolved through the liquidation provisions of the Companies Act 1993 rather than by actions in the usual way: *Taxi Trucks Limited v Nicholson* [1989] 2 NZLR 297 and *Pink Pages Publications Limited v Team Communications Limited* (1986) 3 NZCLC 99, 764.

[23] In determining whether there is a genuine and substantial dispute as to the existence of the debt, it is not usually appropriate to resolve disputed questions of

fact on affidavit evidence alone, particularly when issues of credibility arise: *Androcles Investments Ltd v Highway Publications Ltd* HC Christchurch M455/00, 14 February 2001 at [6]; *Carpet Plus 2003 Ltd v A Team Flooring Specialist Ltd* HC Auckland CIV-2008-404-4725, 19 January 2009 at [4].

[24] To succeed in setting aside a statutory demand on the basis of a counterclaim pursuant to s 290(4)(b), the applicant has only to show a "fairly arguable basis", and must provide some material short of proof: *United Homes (1988) Ltd v Workman*, *Te Uenga Limited v R. Kendell & Co Limited* HC Auckland M286-IM99, 11 May 1999.

[25] In *Covington Railways Ltd v Uni-Accommodation Ltd* [2001] 1 NZLR 272 the Court of Appeal gave guidance as to what an applicant seeking to set aside a statutory demand must prove in dealing with a set-off or counterclaim (at 274-5):

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

[26] It appears that BJ Pye's statutory demand here comprises the sum of $10,538.28, which was allegedly owed on the balance of its invoices to 79 Manners and the sum of $21,608.31, based on a 10% retention from progress payments pursuant to the parties' contract. The contract provides that "10% of the progress payment will be held as retentions until the entire completion of the tendered works".

[27] In its Notice of Opposition, BJ Pye appears to accept that there is a dispute as to quantum, with a sum of $11,346.73 remaining in dispute. BJ Pye now appears to claim a 10% retention payment of the sum of $10,261.58 and outstanding progress payments it is said amounting to $10,538.28 for completed work. It further contends,

however, that there is no substantial dispute between the parties in respect of this remaining sum of $20,799.86. In his affidavit, Mr Pye refers to the certification by Gill Consultants Limited as evidence that the works which his company had invoiced 79 Manners for had in fact been completed. Annexed to his affidavit are copies of ten progress claims for the period from June 2002 to July 2003.

[28] In response, Mr Hawker, who is 79 Manners' construction and project manager, contends that Gill Consultants Limited was only certifying that the work had been completed for the purpose of certifying progress payments, but that it was not certifying the sufficiency or quality of the works undertaken. He says that 79 Manners incurred significant costs as a result of BJ Pye's failure to install the bond beam, as the beam had to be removed and stored at another location. In addition, Mr Hawker maintains that the cost of installing the beam will now be significantly greater. It is said that the total amount claimed in respect of the inadequate or incomplete installation of the bond beam may amount to about $100,000.00.

[29] Mr Pye contends that it was the responsibility of 79 Manners to demolish a brick wall prior to the installation of the bond beam, but that it failed to undertake the work despite several requests from him. As time was said to be of the essence, Mr Pye alleges that 79 Manners breached the terms of the contract by delaying the completion of these works.

[30] Mr Pye does accept that 79 Manners requested a quote for the demolition work, but says that he never received the letter from 79 Manners accepting the quote. As a result of this, BJ Pye contends it was unable to install the bond beam, and deducted the costs of the installation work from its final invoice dated 18 November 2005. It appears that later, in July 2006, BJ Pye inquired of 79 Manners whether it intended BJ Pye to remedy the work in order to complete the contract, but the parties apparently failed to reach an agreement.

[31] In response to 79 Manners' claim that it was forced to incur significant costs by instructing another firm to carry out the demolition work, BJ Pye asserts that the costs of the demolition and installation work would have been significantly lower if 79 Manners had completed the demolition work – or accepted its quote - in a timely manner. In addition, Mr Pye says that the claimed storage costs allegedly incurred by 79 Manners are unsubstantiated, and that it would not have been required to incur the storage costs if the demolition work had been completed as required.

[32] 79 Manners in turn makes the further claim that BJ Pye's metal work on the external balconies and handrails at the apartments was substandard and defective,

and that it left the building in an unsafe condition. Mr Hawker says that the cost of rectifying these problems is estimated to be between $5000 and $7000.

[33] Mr Pye disputes the claim that the work was of substandard quality. He says 79 Manners failed to provide a normal maintenance list despite several requests from BJ Pye between May 2005 to May 2007. In addition, Mr Pye says that no safety issues were ever raised during the Council's inspection of the apartments, and that in July 2008 the Council issued 79 Manners with a Code Compliance Certificate.

[34] In my view, the applicant has done enough here to show on a fairly arguable basis that there is a substantial dispute as to the debt. Based on the affidavit evidence available to me, it is clearly disputed whether BJ Pye completed the entire tendered works and therefore became entitled to the 10% retention payment of $10,261.58. Mr Hawker denies that it is 79 Manners which is to blame for the incomplete installation of the bond beam, and clearly it is impossible and inappropriate to resolve the dispute within the context of the present application.

[35] In addition, I conclude that 79 Manners would appear to have a counterclaim within the meaning of s 290(4)(b) if BJ Pye did fail in its obligation to install the bond beam. Since the initial quote by BJ Pye for the installation work was provided in 2002, gas pipes and fittings and an extractor fan had been installed behind the columns. Because these pipes and fittings would now have to be removed prior to the demolition and installation work being commenced, the installation costs would have increased significantly. A qualified quantity surveyor has estimated the cost of carrying out the installation work to be $65,000. This contrasts with approximately $10,000 at the time of the parties' agreement. And it should be noted here that the Construction Contracts Act 2002 is not applicable to the present proceeding, as the contract was entered into before 1 April 2003.

[36] Moreover, I accept that 79 Manners has done enough here to raise a valid question as to whether BJ Pye's work may have been substandard. While BJ Pye's evidence may suggest that 79 Manners' claims could in the end turn out to be unfounded, it is not appropriate for this Court on the present application to make a finding to this effect.

[37] It follows, therefore, that there is sufficient doubt whether BJ Pye was entitled to the outstanding sum claimed of $20,799.86, given that it is alleged to have failed in its contractual obligations, and that the statutory demand must be set aside on that basis. 79 Manners has been able to put before the Court enough here to show

there is a genuine and substantial dispute as to the debt claimed and also a fairly arguable basis for its stated counter-claim.

Result

[38] For the reasons outlined above, the present application succeeds.

[39] 79 Manners submits that it is entitled to indemnity costs here because the statutory demand was improperly issued, and that the issue of the demand constituted an abuse of the Court's process. No argument on costs was advanced for BJ Pye.

[40] Under all the circumstances here, I am of the view that this is not one of those clear situations where indemnity costs are warranted. BJ Pye's claims may well have merit when thoroughly explored in some venue other than this companies' Court. 79 Manners is, however, entitled to costs here on a 2B basis which are awarded together with disbursements as fixed by the Registrar.

'Associate Judge D.I. Gendall'