

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-3320

UNDER the Companies Act 1993

IN THE MATTER OF an application under section 290 of the
Companies Act 1993

BETWEEN AMSTAR INTERIORS LIMITED
Applicant

AND AIS INSULATION LIMITED (IN
LIQUIDATION)
Respondent

Hearing: 8 September 2011
(Heard at Auckland)

Counsel: M. Lake - Counsel for Applicant
B. Hojabri - Counsel for Respondent

Judgment: 8 September 2011

ORAL JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

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Introduction

[1] Before the Court is an application by Amstar Interiors Limited (Amstar) to set-aside a statutory demand issued by the respondent, AIS Insulation Limited (in liquidation) (AIS) and served on the applicant Amstar on 23 May 2011. The statutory demand initially claimed the sum of \$22,149.91 said to be due and owing to AIS for insulation work completed under a Sub-Contract Agreement dated 23 October 2007. That amount has now been modified by AIS to a claim for the sum of \$20,036.26. The statutory demand effectively covers the amounts of two invoices numbers 4101 and 4109 issued by AIS to Amstar. Amstar's grounds for setting-aside the statutory demand are essentially that there is a substantial dispute as to whether or not the alleged debt in the statutory demand is due and owing.

Background Facts

[2] Amstar entered into a contract with Sky City Cinemas for the construction of a cinema complex at Westfield Shopping Centre, Albany, Auckland (the Head Contract). Amstar were required to supply and install wall and ceiling insulation as part of the work under the Head Contract (the Insulation Works).

[3] On 23 October 2007 Amstar and AIS entered into a sub-contract under which AIS agreed to perform the Insulation Works (involving the supply and installation of insulation materials) for a lump sum price of \$62,292.00 (plus GST) (the Sub-Contract).

[4] Some work was carried out by AIS in November 2007 and on 27 November 2007 Amstar received AIS's invoices 4101 and 4109. Invoice 4101 was, as I understand it, for a Variation Order No. 1 under the Sub-Contract and totalled \$13,187.80 (plus GST). Invoice 4109 was for fibreglass/acoustic insulation to walls and totalled \$6,491.00 (plus GST).

[5] As I understand the position a payment claim table issued by AIS provided further detail on the work purportedly completed under Invoices 4101 and 4109. This table accompanied the invoices.

[6] On 3 December 2007 AIS went into voluntary liquidation.

[7] On 6 December 2007 (and it appears again on 11 December 2007) Mr Wayne Steven Lobb (Mr Lobb) a director of Amstar advised the liquidator of AIS first, that he was aware that AIS was in voluntary liquidation, secondly that AIS were in breach of the Sub-Contract, and thirdly he requested that the liquidator urgently advise whether AIS would complete work under the Sub-Contract which was still outstanding.

[8] On 12 December 2007 Amstar received a further Invoice No. 4171 dated 11 December 2007. This claimed for works completed by AIS up to 4 December 2007. Subsequently AIS's liquidator acknowledged that AIS did not complete the works claimed in this Invoice and it has not pursued payment of Invoice 4171. It is not in issue here.

[9] Finally, on 14 December 2007, the liquidators of AIS confirmed that the company would not be completing the Sub-Contract.

[10] Then, it seems, Amstar contracted with another company Potter Interior Systems Limited (Potter) to complete the Sub-Contract works that AIS had not completed. Amstar agreed to pay Potter on the basis of AIS's Sub-Contract rates. It seems that AIS's foreman had become Potter's foreman and it appears also that the materials on-site or ordered (but not yet installed) that AIS's liquidator had sold back to the supplier, were purchased from that supplier by Potter.

[11] From about 16 May 2008 onwards the liquidators of AIS made various requests of Amstar for payment of the outstanding Invoices 4101 and 4109 (and initially Invoice 4171 though later this was not pursued). Amstar responded by stating that the amounts claimed by AIS were in dispute.

[12] Finally, on 23 May 2011, AIS served on Amstar the statutory demand the subject of this proceeding.

[13] Then, as I understand the position, on 1 June 2011 Amstar wrote to the liquidator of AIS again noting the existence of the dispute but now offering to pay an amount that it assessed was due to AIS which it said was \$4,592.22 plus GST. This offer was rejected by AIS in a letter from the liquidator dated 7 June 2011.

[14] On 15 June 2011 it seems that Amstar obtained from the Sky City Cinemas Project Quantity Surveyor, Mr John Anthony Giles (Mr Giles) an independent assessment of the insulation works that had been completed at the cinema complex during November 2007. This assessed the value of all insulation works completed by AIS and the materials on site at the sum of \$11,830.00 (plus GST). As I understand the position from Mr Lake, counsel who appeared before me for Amstar, Amstar takes the view now that this \$11,830.00 (plus GST) represents a fair professional assessment of the true value of work done by AIS as at 30 November 2007. I will say more on this later in this judgment.

Counsels' Arguments and My Decision

[15] The applicant brings the present application pursuant to s 290(4)(a) Companies Act 1993. This provides that the Court may grant an application to set aside a statutory demand if it is satisfied that there is a substantial dispute whether or not the debt in question is owing or is due. At the outset I note that questions as to the solvency of Amstar do not seem to be in issue here. Solvency does not appear to be seriously disputed.

[16] The principles relating to s 290(4)(a) Companies Act 1993 are well settled. The authors of *Brookers Insolvency Law & Practice* provide the following succinct summary at para CA290.02:¹

CA290.02 The general principles applicable to applications under s 290(4) are now well established. These principles, which can be discerned from cases such as *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447; (2001) 9 NZCLC 262,605 (CA); *Fletcher Homes Ltd v Ellis* 23/7/99, Master Faire, HC Auckland M471IM99; *Forge Holdings Ltd*

¹ *Insolvency Law and Practice* (online looseleaf ed, Brookers) at [CA290.02]; adopted in *North Harbour Equine Hospital Limited v Little* HC Auckland CIV-2006-404-7585, 19 February 2007 at [17]; *Carpet Plus 2003 Ltd v A Team Flooring Specialist Ltd* HC Auckland CIV-2008-404-4725, 19 January 2009 at [4] and *Trinity Hills Retreat Ltd v Kroehl* HC Nelson CIV-2010-442-101, 12 August 2010 at [5].

v Kearney Finance (NZ) Ltd 20/6/95, Tipping J, HC Christchurch M149/95; *Queen City Residential Ltd v Patterson Co-Partners Architects Ltd (No 2)* (1995) 7 NZCLC 260,936; *Rennie v Prospect Resources Ltd* 3/11/95, Tipping J, HC Greymouth M14/95; *Crown Transport Services Ltd v Waipa District Council* 2/7/08, Associate Judge Faire, HC Hamilton CIV-2007-419-1711; and *Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297; (1989) 1 PRNZ 390 (CA), are as follows:

- (a) The applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt. The task for the Court is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due. The mere assertion that there is a genuine substantial dispute is not sufficient: *Queen City Residential Ltd v Patterson Co-Partners Architects Ltd (No 2)* (1995) 7 NZCLC 260,936 (HC).
- (b) The mere assertion that a dispute exists is not sufficient. Material, short of proof, is required to support the claim that the debt is disputed.
- (c) If such material is available, the dispute should normally be resolved other than by means of proceedings in the Companies Court.
- (d) An applicant must establish that any counterclaim or cross demand is reasonably arguable in all the circumstances. The obligation is not to prove the actual claim. Such an obligation would amount to the dispute itself being tried on the application.
- (e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

[17] As I have noted above, the grounds advanced here by Amstar for setting-aside the statutory demand are essentially that there is a substantial dispute as to whether or not the alleged debt is due and owing.

[18] Before addressing these issues, two preliminary matters arise and need to be addressed.

[19] The first involves the provisions of the Construction Contracts Act 2002. Initially, as I understand the position, AIS endeavoured to advance the argument that the invoices in question here, Invoices 4101 and 4109 were valid payment claims in terms of s 20 Construction Contracts Act 2002 and, as no proper payment schedules had been provided in response by Amstar, no proper defence to the statutory demand could be raised before me – *Laywood v Holmes Construction Wellington Limited* [2009] 2 NZLR 243(CA).

[20] Ms Hojabri counsel for AIS before me, however, acknowledged that there were some possible difficulties with this argument which arose for AIS. As I

understand it, these related to difficulties in establishing proof of service of the payment claims. For the purposes of the present application therefore, AIS conceded that the invoices in question were not payment claims in terms of s 20 of the Act. I say nothing more as to this aspect.

[21] The second preliminary matter raised before me concerned a suggestion made by Mr Lake for Amstar in his written submissions that, as the invoices in question he said were not proper payment claims, they were therefore “null and void” and this meant that no demands had been made and no monies were in fact owing by Amstar to AIS. His argument continued, as I understand it, that any sums claimed by AIS would need to be properly submitted to Amstar in a new payment claim under the Construction Contracts Act 2002.

[22] In his oral submissions before me, however, Mr Lake did not press argument on this point. In my view there is little in it. As I see the position, even if AIS may not have strictly complied with the Construction Contracts Act 2002 and the specific terms of the Sub-Contract by providing initially proper invoices for its claims for work completed, subsequent dealings between the parties and their advisers, including lengthy correspondence, payment demands and the like over a considerable passage of time would to a large extent rectify this position. If the work in question was completed in whole or in part under the Sub-Contract then, as I see it, there is little merit in the argument advanced for Amstar that it is not ultimately liable in any way to pay for this work because of some perceived technicality over the issue of an invoice.

[23] I turn now to the real substantive issue which is before me. This is the question as to whether Amstar has satisfied the Court that proper grounds exist here to set-aside the statutory demand on the basis that there is a genuine and substantial dispute as to whether the debt claimed is due and owing. As I have noted above, this debt as acknowledged by AIS now is for a total sum of \$20,036.26.

[24] On this question, before me Mr Lake for Amstar effectively conceded at an early stage of the hearing that a part of this debt being \$11,830.00 (plus GST) representing the assessment by the quantity surveyor, Mr Giles, noted at para [14]

above is effectively due and owing and is not disputed. Mr Lake confirmed that this is a professional assessment of the true value of the work completed under the Sub-Contract as at 30 November 2007, it is the best evidence which is before the Court as Mr Giles was the independent quantity surveyor supervising work on site at the time, and it is effectively unchallenged.

[25] That said, I find therefore that this portion of the debt claimed in AIS's statutory demand cannot in any sense be said to be the subject of a genuine and substantial dispute and, as I will note later, the demand is to stand at least for this amount.

[26] I turn now to consider the remaining issue which relates to the balance of the debt claimed by AIS in the statutory demand. This represents the sum of about \$8,200.00 (presumably including GST).

[27] Before me Mr Lake for Amstar contended that this amount, however, was clearly the subject of a genuine and substantial dispute. On this he relied on the unchallenged evidence of the quantity surveyor, Mr Giles, which I repeat certified the value of work undertaken by AIS up to 30 November 2007 as limited to the sum of \$11,830.00 (plus GST). On this Mr Giles has provided an affidavit in this proceeding sworn 8 July 2011 which confirms at para 9 that this \$11,830.00 (plus GST) assessment "... to the best of my knowledge was a correct and accurate assessment of all insulation works completed and the materials on site as at 30 November 2007."

[28] Interestingly, AIS has provided affidavits in support of its opposition to the present application first, dated 13 July 2011 from Mr Rea, one of the joint liquidators, and secondly, dated 21 July 2011 from Mr R Mcaneaney a director of AIS both of which were sworn after the affidavit by Mr Giles, but neither make any reference to or comment about Mr Giles assessment in his 8 July 2011 affidavit.

[29] Instead, the argument advanced before me on behalf of AIS as to this balance debt of some \$8,200.00 appears to rely principally on a number of work sheets completed by employees of AIS at the time. According to Ms Hojabri for AIS, those

work sheets support the claim by AIS for the total \$20,036.26 now said to be due under the statutory demand.

[30] In response, Mr Lake for Amstar queried the accuracy of these job card work sheets and raised a number of criticisms of them. These included questions as to whether or not bales of insulation material required for the project and claimed in the invoices in question had, in fact, been delivered on site. Certainly, as I see it, the job cards raised some question concerning the recording accuracy in this area.

[31] In addition, a suggestion was made by Mr Lake that the invoices in question involved significant front-end loading of various charges to the extent that some invoices were issued for work which had not, at that point, been completed. This appeared to some extent to be confirmed at least on one occasion in evidence before the Court on behalf of the liquidator.

[32] Further, the information before the Court in the various job cards provided on behalf of AIS does not appear to me to tally with the independent evidence of the quantity surveyor Mr Giles noted above. No explanation is provided to the Court on behalf of AIS as to this aspect.

[33] Before me, a final issue was raised concerning the work undertaken and materials applied to the Sub-Contract by AIS. This involved questions as to the return of certain materials back to a company known as Autex who I understand was the principal supplier of materials to AIS. Before me counsel raised certain issues regarding the crediting of these materials returned (presumably by the liquidators) and also issues concerning evidence provided on behalf of AIS as to whether insulation material provided by Autex to AIS may in fact have found its way to the Amstar job.

[34] As I see it, however, the significance of these matters is somewhat uncertain. Suffice to say in my view it does not assist the position here and merely adds to what I see as a clouding of what might be the true situation concerning the claim by AIS to this final \$8,200.00 payment.

[35] I am mindful here that the application before me is one to set aside a statutory demand issued against Amstar and that, as I have noted at para [16] above, on such applications any disputes raised between the parties are normally to be resolved by means other than proceedings such as the present one in the Companies Court.

[36] That said, I am satisfied here for the reasons I have outlined above, that Amstar has shown there is arguably a genuine and substantial dispute with respect to this significant portion of the amount claimed under the statutory demand (but only as to this \$8,200.00 amount noted above). The statutory demand therefore cannot remain for that amount.

[37] That leaves, however, the \$11,830.00 (plus GST) claim which is effectively undisputed and acknowledged as such.

[38] I find therefore that Amstar owes this sum of \$11,830.00 (plus GST) to AIS and this amount should be paid.

[39] I am satisfied too that the proper approach in addressing the present application therefore is to allow the statutory demand to stand, but only in that reduced figure of \$11,830.00 (plus GST) on the basis that it is an undisputed debt – *United Homes (1988) Limited v Workman* [2001] 3 NZLR 447 at 451 and *Air Tahiti Nui SAEML v Pounamu International Limited* [2001] NZCCLR 16.

Orders

[40] I therefore now make the following orders:

- (a) The statutory demand in question is set-aside except as to the sum of \$11,830.00 (plus GST).
- (b) The applicant, Amstar Interiors Limited is to have a period of 10 working days from the date of this judgment to pay to the respondent, AIS Insulation Limited (in liquidation) that sum of \$11,830.00 (plus GST) failing which the respondent can proceed with an application to have the applicant placed into liquidation.

Costs

[41] As to costs, counsel have requested that these might be the subject of memoranda to be filed. In this regard, I note at this point, that the present application before me has technically succeeded to a limited extent in that the statutory demand is set-aside but only as to part. Effectively however, the respondent AIS has been successful in substance.

[42] That said, it is hoped that counsel may be able to sensibly resolve the issue of costs between them. If this is not able to occur then they may file memoranda sequentially on the question of costs which are to be referred to me, and in the absence of either party indicating they wish to be heard on the matter, I will decide the question of costs based on the material before the Court.

‘Associate Judge D.I. Gendall’