

# 117

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

**CIV-2010-485-912**

BETWEEN                      REDICAN ALLWOOD LIMITED  
   Plaintiff

AND                              RAB CONTRACTING LIMITED  
   Defendant

Judgment:    9 November 2010

---

**JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL**

---

*This judgment was delivered by Associate Judge Gendall on 9 November 2010 at  
3.30 pm under r 11.5 of the High Court Rules.*

Solicitors:            Gibson Sheat, Solicitors, Private Bag 31905, Lower Hutt  
                                 Hughes Robertson, Solicitors, PO Box 2513, Wellington

## **Introduction**

[1] This judgment relates to costs. The applicant in this proceeding, Redican Allwood Limited (“Redican”), applied to set aside a statutory demand which had been issued by the respondent, RAB Contracting Limited (“RAB”). RAB claimed that it was owed outstanding retentions under a construction contract of \$21,453.81 for painting and plastering work. In its application to set aside the demand, Redican claimed that it had a counter-claim, set-off or cross-demand which exceeded the amount of the demand. In particular, Redican claimed that it was entitled to liquidated damages and costs of carrying out remedial work of at least \$55,098.03.

[2] RAB subsequently withdrew the statutory demand. Counsel for RAB indicated that the reason for withdrawing the statutory demand was that he had now received instructions from the respondent RAB to file a claim in the District Court for the full amount of its alleged entitlement under the Construction Contracts Act 2002.

[3] Redican seeks indemnity costs, or alternatively increased costs, on its application to have the statutory demand set aside. RAB takes the position that the question of costs should be deferred until resolution of the proceedings under the Construction Contracts Act 2002. Alternatively, RAB concedes that costs here should be awarded to Redican but only on a 2B basis.

## **Background**

[4] On 14 May 2010, RAB issued Redican with a statutory demand claiming outstanding retentions of \$21,453.81 for the provision of plastering services on a construction project in Te Aro, Wellington. Redican was the head contractor on the project. Practical completion of the overall project, however, was not achieved by the stipulated date.

[5] On 20 May 2010, Redican applied to have the statutory demand set aside. It claimed that it had “applied contra charges of \$44,000.00 against any monies that may be due to RAB”. These charges formed part of substantial liquidated damages

that Redican alleges it incurred as a direct consequence of RAB's poor performance and delay on the project, and which Redican claims it is entitled to pass on pursuant to cl 9 of its subcontract with RAB. It appears that an additional \$11,098.03 has been "contra-charged" for remedial work. However, Redican claims that RAB's liability will be significantly greater than \$44,000.00. Redican claims that it incurred \$534,130.00 in liquidated damages for delays on the project, and that RAB was a significant cause of that delay.

[6] Prior to the statutory demand being issued, the solicitors to Redican and the solicitors to RAB entered into correspondence regarding Redican's decision to include the "contra-charges" of \$44,000.00 in its payment schedule to RAB. Redican's solicitors warned that the issue of a statutory demand in respect of the withheld sum would be "wholly inappropriate", and that increased costs would be sought if a demand was issued. On 14 May 2010, RAB's solicitors advised that there were in fact two outstanding sums, the first being retentions in the sum of \$21,453.81, and the second being a balance of \$82,844.79 pursuant to RAB's invoices. The demand was then issued for \$21,453.81.

### **Counsel's Arguments**

[7] Redican seeks an award of indemnity costs of \$10,900.00 in this proceeding on the basis that RAB was given advance notice in writing on at least three occasions that Redican had a cross-claim or counterclaim for liquidated damages that exceeded the amount of RAB's statutory demand. Redican also submits that allegations of insolvency by RAB were based on mere speculation and that the issuing of the demand unfairly tarnished its reputation.

[8] Redican relies on r 14.6(4)(a) and (b) High Court Rules, which provide as follows:

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; ...

[9] Alternatively, Redican seeks increased costs under r 14.6(3)(b)(i) and (ii):

(3) The court may order a party to pay increased costs if—

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

...

[10] Redican also refers to the following passage in *McGechan on Procedure* at HR14.6.02(2)(i):

Increased costs, sometimes significantly increased, are routinely awarded against parties who proceed with an inappropriate statutory demand, in the face of a warning by the applicant company: *Jones Odell Motor Bodies Ltd v Hard Core Ltd* (2005) 17 PRNZ 809; *Summer Construction Ltd v Bakker* 10/11/06, Associate Judge Gendall, HC Wellington CIV-2006-485-1499 at para 29.

[11] Here, Redican acknowledges that it is not usually appropriate for the Court to form a view of the merits of a claim without the benefit of a hearing. It is submitted, however, that it is strongly arguable in the present case that Redican was contractually entitled to “contra-charge” RAB for liquidated damages incurred as a result of a failure by RAB to complete within a reasonable period of time. Reference is made to the correspondence between the parties’ solicitors, in which RAB was warned repeatedly that the issue of a statutory demand in the face of Redican’s counterclaim would be inappropriate. Redican submits that RAB was clearly aware of the existence of the counterclaim at the time of issuing the demand and that it proceeded at its own risk.

[12] Redican also claims that the statutory demand had the result of tarnishing its reputation. It appears, for example, that a local District Health Board became aware of the demand and voiced concerns regarding Redican’s solvency in the context of a tender application. Redican submits that the Health Board’s concerns are a reflection of the fact that the issuing of a statutory demand signals to the public an impression that a company is in financial trouble. It submits that the issuing of a statutory

demand is a very serious matter, referring to *Keystone Ridge Limited v City Sails Limited* HC Auckland M549/02, 9 July 2002, and that it was therefore incumbent on RAB to ensure that the demand was issued on a proper basis.

[13] Issue is also taken with “a large proportion of RAB’s affidavit evidence”, which Redican says is based on hearsay and opinions and which gives the impression that Redican is in financial distress without any evidential foundation. In one of the affidavits, for example, it is alleged that:

Mr Lee does not disclose the financial difficulties which the company must have experienced as a result of its handling of the Torrens Terrace contracts ... I am ... aware that Redican has stopped paying a number of its contractors now on the Kapiti Coast and is causing a great deal of anguish, particularly to smaller contractors who have to take what they are offered.

[14] Redican submits that, as a result of these allegations, it felt compelled to file an affidavit from an independent expert accountant to confirm that the company is solvent, and that RAB’s use of the statutory demand procedure was opportunistic and improper.

[15] RAB, on the other hand, contends that Redican’s assertions as to damage to its reputation are not appropriately brought into a costs application such as the present application before the Court. It claims that Redican “arbitrarily deducts funds from subcontractors”, knowing that subcontractors do not have the resources to enter into a legal battle to obtain recovery, and that this conduct should not be rewarded through an award of costs.

[16] Of more relevance here perhaps, RAB submits that, at the time that the statutory demand was issued, Redican had already deducted \$44,000.00 “as its settlement of liquidated damages”, but that it also held \$21,453.81 in retentions to which it was not entitled. According to RAB, it was only subsequent to the issuing of the statutory demand that Redican attempted to assert that there were further sums due to it by way of liquidated damages. RAB then decided to approach the matter in a “commercially pragmatic way” by pursuing a claim for the entire amount that it says it is owed, including the retentions, under the Construction Contracts Act 2002.

[17] Finally, I note briefly that Redican has also objected to “further speculative comments” in RAB’s last affidavit and seeks an order striking out the paragraphs of most concern pursuant to r 9.76(2). Redican claims that RAB’s allegations are based on opinion and hearsay. I agree with that submission, and note at this point that I do not take into account any of these objectionable paragraphs in determining this application for costs.

### **My Decision**

[18] Claims for indemnity costs will only succeed in rare cases, “generally entailing breach of confidence or flagrant misconduct”: *Prebble v Awatere Huata* (No 2) [2005] 2 NZLR 467 at [6]. Accordingly, indemnity costs are not to be awarded in cases of mere unreasonableness, but require exceptionally and distinctly bad behaviour: *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 at [26] and [28].

[19] In my view, there are no grounds for an award of indemnity costs in the present case. Redican has not pointed to any exceptionally and distinctly bad behaviour on the part of RAB. Its claim that RAB’s statutory demand was inappropriately issued in my view can be more appropriately assessed under r 14.6(3). I also consider that RAB’s alleged breaches of the High Court Rules in seeking to rely on unsupported allegations of insolvency were not so grave as to necessitate an order for indemnity costs.

[20] In essence, Redican submits that the statutory demand should never have been issued because RAB was made aware of Redican’s counterclaim for liquidated damages. Redican emphasises that the issuing of a statutory demand is a serious step that has the potential to detrimentally affect an alleged debtor’s reputation. It is, of course, well established that creditors need to be cautious before issuing statutory demands that there is in fact a genuine basis for the debt: *Keystone Ridge Limited v City Sales Limited* HC Auckland M549-IM02, 19 July 2002 at [10].

[21] However, it is not usually appropriate for the Court to inquire into the merits of a case it never heard, unless the answer is clear and obvious: *Furnz Limited v*

*Goode Industries Limited* HC Auckland CIV-2008-404-1024, 13 October 2008 at [6]. The merits of Redican's application to set aside RAB's demand here do not appear to me to be sufficiently clear-cut. There may have been issues, for example, regarding quantification of Redican's claim for liquidated damages for the purposes of s 290(4)(b) Companies Act 1993.

[22] I also note RAB's submission that, at the time that the statutory demand was issued, Redican had already deducted \$44,000.00 for liquidated damages, in addition to the \$21,453.81 for retentions. However, the correspondence between the parties that Redican seeks to rely on to show that RAB was clearly aware of the existence of Redican's counterclaim seems to be mainly concerned with the sum of \$44,000.00. While I do not accept RAB's submission that it was only subsequent to the issuing of the statutory demand that Redican asserted that there were further sums due to it by way of liquidated damages, I do not consider that a warning that damages were "expected to be significantly in excess of the currently withheld sum of \$44,000.00" made the issuing of a statutory demand for seemingly separate retentions of \$21,453.81 self-evidently inappropriate.

[23] With respect to Redican's concerns regarding RAB's allegations of insolvency, I agree that some of the affidavit evidence provided lacked an evidential foundation and was improperly adduced. In any case, however, given that the statutory demand procedure if taken to its conclusion establishes a presumption of insolvency, the onus was on Redican if it wished to show that it was solvent. In addition, it is unlikely that the fact that Redican was not insolvent would in itself have provided sufficient grounds for setting aside the demand under s 290(4)(c): on this see *AMC Construction Ltd v Frews Contracting Ltd* (2008) 19 PRNZ 13 at [7].

[24] It follows that, notwithstanding the general practice noted at [10] above to the effect that increased costs are routinely awarded in cases where inappropriate statutory demands are issued after warnings are given, I am not satisfied here that the present case necessarily falls into this category and that Redican is entitled to increased costs on the grounds that RAB has contributed unnecessarily to the time or expense of the proceeding. In addition, as to the contention from RAB that the issue of costs should be deferred until resolution of the proceedings under the

Construction Contracts Act 2002, in my view this is not appropriate here. Given that an application to set aside a statutory demand is a stand-alone proceeding, it is not usually the case that costs should be reserved pending some other event: *International Airline Trading (NZ) Ltd v Rohlig New Zealand Ltd* HC Auckland CIV-2003-404-3464, 23 February 2004 at [14]-[15]. There are no reasons for departing from this principle in the present case.

### **Conclusion**

[25] Redican is entitled to costs on the present application on a 2B basis together with disbursements as fixed by the Registrar. An award to this effect is now made against RAB.

**‘Associate Judge D.I. Gendall’**