

16.11.11
**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-7295

IN THE MATTER OF Section 290 of the Companies Act 1993

BETWEEN WESTPARK MARINA LIMITED
Applicant

AND AUTOMATED SOLUTIONS LIMITED
Respondent

Hearing: 30 November 2011

Counsel: M J Ruffin for Applicant
S Clark (on agency instructions) for Respondent

Judgment: 30 November 2011

ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors: Kevin McDonald & Associates, PO Box 331-065, North Shore City 0740
Counsel: M J Ruffin, PO Box 1662, Auckland 1140
S Clark, PO Box 2066, Auckland 1140

[1] This application to set aside a statutory demand arises out of a contract between the parties for the respondent to supply and install barrier arms and equipment to operate those arms automatically, in a car park on the applicant's property. The applicant has paid for the erection of the barrier arms, but there is a dispute over the operation of camera equipment and software which comprises a number plate recognition system which operates with the barrier arms.

[2] The applicant says that there is a dispute over the effectiveness of the plate recognition system which needs to be determined in an appropriate forum, if the parties are unable to resolve the matter between themselves. The respondent apparently contends that the sum sought in the statutory demand is payable, regardless of the dispute, pursuant to the Construction Contracts Act 2002.

[3] I have said that the respondent's position appears to be that, because Mr Clark appears today on agency instructions, and the respondent has not filed notice of opposition or any affidavit in support of the opposition.

[4] Mr Ruffin, for the applicant, informs me that the applicant has offered to lodge the disputed amount in court (or secure for it in some other way) but the respondent has rejected that offer, having regard to its view that this is a payment due under the Construction Contracts Act.

[5] The critical issue, if the matter has to be determined in this court, or some other forum, seems likely to be whether the installation of cameras and computer software in barrier arms for a car park can come within the definition of construction work in s 6 of the Construction Contracts Act.

[6] The Court has a discretion under s 290 of the Companies Act 1993 whether or not to set aside a demand. That discretion can be exercised in favour of an applicant where the Court is satisfied there is a genuine dispute, or on other grounds. I am satisfied from the evidence filed by the applicant that there is at least a prima facie case of a genuine and substantial dispute. The argument that the installation of a camera and related software in the barrier arm of a car park is construction work

for the purpose of the Construction Contracts Act 2002, seems a tenuous one, but I prefer not to make a definite finding on that point.

[7] I take into account the offer made to lodge the sum in dispute into the Court or into some other secured holding. In circumstances where the respondent has not complied with obligations under the High Court Rules to file notice of opposition ahead of this hearing (the application was served on 14 November 2011), I consider that the appropriate course, taking into account the relatively modest amount at stake, is to set the statutory demand aside on condition that the sum in dispute is paid into court or otherwise secured.

[8] I make the following orders:

- (a) The application is granted subject to the condition that the applicant pay the amount in dispute into Court (or, by agreement between the parties, into some other stakeholder account) by 7 December 2011;
- (b) Costs of this application are reserved pending determination of the underlying dispute.

Associate Judge Abbott