IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-006516

IN THE MATTER OF	s290 of the Companies Act 1993
BETWEEN	CARLOS CONCEPTS LIMITED Applicant
AND	ROCKFORD CONSTRUCTION SERVICES LIMITED Respondent

Appearances: (On papers)

Judgment: 31 May 2007 at 10 a.m.

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***31.05.07 at 10 a.m.**, pursuant to*
Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date……..…

Mr G Bogiatto, P O Box 106-120, Auckland
Rice Craig, P O Box 72-440, Papakura, Auckland (Mr N W Woods)

[1] The respondent served a statutory demand on the applicant dated 11 October 2006. The applicant filed an application dated 25 October 2006 to set aside the statutory demand.

[2] Although I do not have any recollection of the matter, I apparently made an order setting aside the statutory demand on 7 December 2006 and reserved the matter of costs.

[3] Mr Bogiatto, counsel for the applicant subsequently applied to have costs fixed.

[4] Mr Ian Wood responded to that application on the respondent's behalf in a letter dated 1 May 2007. He said that the respondent consented to the application being set aside on the basis:

> 1. That costs were reserved; and
>
> 2. That the matter proceed either to mediation (if agreed) or directly to an adjudication pursuant to the Construction Contracts Act (before a properly qualified quantity surveyor to act as adjudicator).
>
> It was to be inferred by this arrangement that the issue of costs before this Honourable Court may be re-visited (by either party) depending on the outcome of a settlement agreement or an adjudication. The adjudication has now commenced but has not been determined.

[5] In the usual course of matters, if an application to set aside statutory demand is acceded to, there is an implicit acceptance of the fact that the statutory demand ought not to have been issued in the first place. But where consent orders are made, it is also possible for the parties to reach a different agreement on costs. If they do that, the Court cannot go behind their agreement.

[6] In this case there is no assertion by the respondent that there was an actual agreement that the statutory demand was to be set aside without costs being ordered. All that was agreed to was that costs be "reserved". This would normally imply that costs were to be considered once a further development had occurred in the case. In retrospect, I should not have agreed to make an order in those terms without some certainty being supplied as to the contingency against which costs were being reserved.

[7] Essentially, the position is that the parties agreed that the application be dismissed and they did not come to any clear agreement about the matter of costs. What seems reasonably certain is that the respondent was not agreeing to an order for costs being made then and there. Given those circumstances I do not see how I can make an order for costs now. If the parties wish to adduce evidence as to exactly what their agreement was contingent upon then in due course I might be able to revisit matters. But as things stand, I do not consider it would be just to make an order for costs as sought by the respondent.

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J.P. Doogue
Associate Judge