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

**CIV 2005-404-3656**

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|---|---|---|
| | UNDER | Section 290 of the Companies Act 1993 |
| | IN THE MATTER OF | of an application to set aside a statutory demand |
| | BETWEEN | SCI DEVELOPMENT & CONSTRUCTION LIMITED<br>Plaintiff |
| | AND | NZ BUILT LIMITED<br>Defendant |

Hearing: 5 December 2005

Appearances: R Iyer for Plaintiff
T Rea for Defendant

Judgment: 23 December 2005 at 12.15pm

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**JUDGMENT OF ASSOCIATE JUDGE D.H. ABBOTT**

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*Solicitors:*
*Callaghan & Co, PO Box 1434, Auckland*
*Glaister Ennor, PO Box 63, Auckland*

[1] This is an application to set aside a statutory demand issued by the defendant, NZ Built Limited, claiming the sum of $50,233.32 for amounts outstanding under a construction contract in respect of work undertaken by the defendant on two properties at 9 Ashlynne Avenue, Papatoetoe.

[2] The application is made on all three grounds set out in s.290(4) of the Companies Act 1993, which reads:

> **290 Court may set aside 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.

[3] The application is opposed on all grounds.

[4] The following issues arise:

a) Whether there is a substantial dispute whether or not the debt is owing or due;

b) Whether the plaintiff has, and can bring, a counterclaim or cross demand of a sufficient amount; and

c) Whether the demand ought to be set aside on some other ground.

**Background**

[5] The plaintiff and defendant entered into two written contracts in November 2004 for the renovation of two residential properties known as Units 2 and 3, 9 Ashlynne Avenue, Papatoetoe. In each case the contract comprised a written

quotation for a fixed price and the standard form residential building agreement and conditions of contract prepared by the Registered Master Builders' Federation of New Zealand (Inc). The standard form agreement provided that it was between the defendant as Registered Master Builder and the plaintiff as owner, but the plaintiff was also specifically referred to as developer. The standard form agreement was signed by Matiu Ranapia on behalf of the plaintiff.

[6] In its quotations, the defendant listed items of work that were included in the price, as well as specific items that were not. Amongst items excluded were retaining walls and public drainage. The defendant gave a possible start date of 22 November 2004 and an estimated time frame for construction of six to eight weeks (with both units to be constructed at the same time). The quotation also stipulated that payment was to be by monthly progress claims, and identified a contractor's margin and labour charge for any variations.

[7] The defendant commenced work on or about 24 November 2004. It submitted progress claims in respect of each contract at the end of November and December 2004, and January and March 2005. There was also a further small (wash-up) claim on Unit 2 at the end of April 2005.

[8] Between December 2004 and April 2005, the defendant also issued six variation orders for a total of $26,111.30 (GST inclusive) and undertook the work identified in those variation orders The cost of these variations was included in the progress claims. A seventh variation order was also issued but not accepted, and that work (related to fencing) was not undertaken.

[9] From the time of the first progress claim (30 November 2004) the plaintiff made three payments to the defendant totalling $244,546.16. The plaintiff credited these payments towards claims made on another (earlier) construction contract, invoices for charges separate to the construction contracts, and the claims in respect of the Ashlynne Avenue contracts. The defendant advised the plaintiff of this by fax on 14 April 2005.

[10] It appears the only dispute raised in relation to the manner in which the defendant applied these payments was that one sum of $70,000 was in respect of a payment for shares (a matter that is addressed further later in this judgment). If so, that worsens the plaintiff's position in relation to the demand. In any event, the plaintiff acknowledges (in an undated document headed "Costings schedule" produced as part of its evidence) that it has paid only $179,159.48 towards the outstanding claims on the Ashlynne Avenue contracts.

[11] On 24 June 2005 the defendant issued its demand on the plaintiff for $50,233.32. It is not clear how the sum claimed in the defendant's demand is derived, but that is immaterial for present purposes as it is less than the gap of $54,901.42 evidenced by the Costings schedule. That sum comprises $44,789.15 which the plaintiff says it has withheld, and $10,535.71 of variations which it does not accept.

**Legal principles**

[12] The principles on which the Court acts in exercising its discretion under s.290 of the Companies Act 1993 are well settled. They are helpfully summarised in the following extract from Brookers Company and Securities Law at paragraph CA 290.02(1):

> **CA290.02 Setting aside a statutory demand**
>
> **(1) General principles**
>
> 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 v Ellis* 23/7/99, Master Faire, HC Auckland M471IM99; *Forge Holding Ltd v Kearney Finance (NZ) Ltd* 20/6/95, Tipping J, HC Christchurch M149/95, *Queen City Residential 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; 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.

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.

e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

[13] It is also well accepted (*Brooklyn Holdings Limited v Able Handyman Services Limited* (2005) 9 NZCLC 263, 930, Gendall AJ, following *Medisys Limited v Getinge Castle Limited*, HC Auckland, M1426/00, 9 February 2001, Master Kennedy-Grant and *Rocklands Park Limited v Logan Samuel Limited* (2004) 9 CLC 263, 535) that the purpose of serving a statutory demand being to create a presumption of inability to pay debts, the demand must be set aside if the recipient company satisfies the Court that it is "arguably solvent".

[14] It is generally accepted that this is one "other ground" for setting aside under s.290(4)(c).

**Whether there is a substantial dispute**

[15] The plaintiff claims that there is a substantial dispute in two respects. First, it says that the defendant has failed to complete the contract work. It points to a final inspection report issued by Manukau City Council in a letter dated 22 March 2005 advising that a code compliance certificate cannot be issued until the following requirements were met:

a) Surveyor Siting certificate required;

b) Engineer to supply PS4;

c) Retaining wall on boundary must have safety barrier to comply with acceptable solution B1/AS2;

d) As built drainage plans required;

e) Lower ORG to max level with a brick rebate;

f) Landscaping to complete;

g) Re-inspection required.

The plaintiff did not expand upon the contractual responsibility for, or the nature and work content of, these requirements, nor the likely cost of carrying them out.

[16] Secondly, the plaintiff said that there was a dispute over the variations claimed. It said that work claimed under the variations formed part of the main contract work. Further, it says that certain of the variations have not been authorised in accordance with the terms of the contract.

[17] The defendant says that there is no basis for an arguable dispute, either in law or in fact. Counsel relied on ss.20 to 23 of the Constructions Contracts Act 2002 (which are incorporated into the standard terms of the two construction contracts in this case). He submitted that the amounts claimed by the defendant in its payment claims are deemed to be a debt due by the plaintiff, as a consequence of the plaintiff having failed to provide a payment schedule in accordance with s.21 of the Act. He submitted that these amounts are recoverable, together with actual and reasonable costs of recovery awarded by any Court, as a debt due pursuant to s.23(2) of the Act.

[18] In its evidence in support of the application to set aside the demand, the plaintiff acknowledges receipt of the payment claims, and that it did not provide the defendant with payment schedules in response. Initially, in the affidavit of Matiu Ranapia sworn on 11 July 2005, the plaintiff claimed it had been unable to prepare payment schedules, and had made lump sum payments, because it had been unable "to clarify with any sort of precision the work that has been carried out" because of "sparse" details of the work covered by the claim.

[19] The defendant's director, Paul Belcher, states (in an affidavit dated 12 September 2005) that the defendant served regular payment claims as work progressed, the plaintiff never responded to any of those claims with a payment schedule, and at no time made any complaint or requested further details regarding the content of the payment claims. Mr Belcher also noted that Mr Ranapia was on-site at Ashlynne Avenue as the plaintiff's project manager and knew the state of the contract works at all times.

[20] In a further affidavit sworn on 11 November 2005, Robyn Case, sole director of the plaintiff, exhibits (without any explanation) the document referred to in paragraph [10] above as "Costings schedule". It is undated. It is not addressed to anyone. There is no evidence of it having been provided to the defendant at any stage, let alone as a payment schedule pursuant to s.21 of the Construction Contracts Act. I see no basis for treating it as such, particularly in face of the statements of Mr Ranapia in his affidavit of 11 July 2005 and the evidence of Mr Belcher that no payment schedules were provided.

[21] The Court of Appeal has recently considered what constitutes a valid payment claim (for the purpose of s.20 of the Construction Contracts Act), and the appropriate response by the recipient of a claim where the recipient was uncertain as to what it covered: *George Developments Limited v Canam Construction Limited CA 244-04, 12 April 2005*. It considered the layout of the claim form in question. As in the present case it was organised in a tabular form showing contract value, percentage complete and total claim to date, with payments already received being subtracted from the total claims to date to give the amount of the particular claim. The form also included a schedule of variations. The Court recognised in that case that there could be improvements to the claim form but did not regard that as invalidating the payment claim. Of relevance to the present case, it commented:

> "If George could not understand the claim it could have obtained clarification by using the framework contained in the Act. It is not without significance, in assessing the reality of this challenge, that George had not complained about the comprehensibility of previous payment claims that were made in a way that mirrored the form of PC-15. The Associate Judge commented at [68] "In any event it is clear from PC-15 and other progress claims previously submitted that this process was not only identified but well understood by the parties"."

And later

> "It could have obtained particularisation through a payment schedule response".

[22] I do not accept the plaintiff's arguments that it could not prepare payment schedules. The claim forms (as exhibited to the affidavit of the plaintiff's consultant Mr Ranapia) set out progressively the total value of claims (including variations) and have associated calculations both in respect of the main contract items and in respect of variations.

[23] In my view the amounts claimed have become debts due which the defendant is entitled to recover from the plaintiff in accordance with s.23 of the Construction Contracts Act 2002.

[24] I turn now to consider the effect of the disputes raised by the plaintiff, in light of s.79 of the Construction Contracts Act 2002. That section reads:

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—
>
> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[25] The plaintiff's claim in respect of alleged failure to complete the work (the requirements of Manukau City Council for the issue of a code compliance certificate) has not been quantified. It clearly cannot be raised as a set-off having regard to s.79 of the Act.

[26] The same applies to the alleged dispute over the variations. They, too, are unavailable as a set-off against unpaid payment claims pursuant to s.79 of the Act. Although they are for a liquidated sum, they are clearly in dispute if they are tenable at all. In this last respect I note that the first and last two in time have been signed as

approved by Mr Ranapia, and that the last two incorporated the value of all of the preceding variation orders. Further, the two variations which appear to have been rejected by the plaintiff in its "Costings schedule" document clearly appear to be outside the contract work identified in the defendant's quotation. Variation No.2 for $1,608.75 for alarms is unlikely to have been added except at the request of the plaintiff. Variation No.3 for $8,926.97 appears to be for excavation work and retaining walls – both items which were expressly excluded from the contract price.

[27] Finally, the sums involved in these disputed items are well short of the outstanding amounts of the payment claims.

[28] In conclusion, I do not find there to be any basis for setting aside the demand on the basis of a substantial dispute over the amount claimed.

**Arguable counterclaim**

[29] The second general ground of opposition raised by the plaintiff is that it has a counterclaim or cross demand to set-off against the outstanding payment claim, based on delay.

[30] The plaintiff alleges that the contract was due to be completed by mid to late January 2005 but work carried on into March 2005, and the final work needed for issue of the code of compliance certificate has still to be completed. In this latter respect, counsel again referred to the letter from Manukau City Council of 22 March 2005 reporting on its final inspection. The plaintiff alleges that the defendant is responsible for these delays, and as a result of them it lost a sale for one of the properties (entered into in anticipation of the original completion date) and is still seeking to sell both.

[31] In reply to these claims, the defendant denies that there was any delay for which it was responsible, but in any event says that, at best, the plaintiff would have an unliquidated claim which it is unable to set-off against the payment claims by reason of s.79 of the Construction Contracts Act.

[32] In my view, even if I consider that there is a basis for counterclaim (which is by no means certain) this point is answered by s.79 of the Construction Contracts Act.

[33] The plaintiff alleges that the defendant was late starting the work but has given no specific evidence as to start date. Against that, Mr Belcher has given evidence that work commenced two days after the indicated commencement date, on 24 November 2004. That is borne out by the quantum of the first progress claim submitted on 30 November 2004 (a total of $39,982 exclusive of GST).

[34] The second source of delay alleged by the plaintiff is delay caused by drainlayers. This is said to have delayed the work until April 2005. In his affidavit evidence, Mr Ranapia attributes this to poor project management of the drainlayer by the defendant. In his affidavit in reply, Mr Belcher says that the drainlayer was engaged directly by the plaintiff to undertake work that was outside the scope of the construction contract (he refers to the specific exclusion of public drainage work in the quotation) and says that Mr Ranapia was the drainlayer's project manager.

[35] Mr Belcher's responses on these factual points are not challenged in later affidavits filed for the plaintiff.

[36] The defendant also points to the uncontested fact that Mr Ranapia, rather than the plaintiff, is the registered proprietor of the properties, and any alleged loss of sale would, therefore, be suffered by Mr Ranapia rather than the plaintiff. The plaintiff has not produced any evidence of a claim by Mr Ranapia on the plaintiff. It has produced (as an attachment to the affidavit of the plaintiff's director, Ms Case, dated 11 November 2005), a document purportedly dated 6 July 2005, addressed "To whom it may concern", and signed by Mr Ranapia as consultant for the plaintiff. In that document Mr Ranapia claims that the plaintiff and he, (without any differentiation) have suffered losses of over $150,000 due to delays on the contract work and loss of the pre-existing sale.

[37] At the hearing counsel for the plaintiff produced, with the consent of counsel for the defendant, a copy of an agreement for sale and purchase of 9B Ashlynne Avenue. Mr Ranapia is shown as vendor to D & S Property Development Trust as purchaser. At the hearing, counsel for the plaintiff acknowledged that the purchaser was a related party, and this appears to be borne out by loan documents which were produced with the agreement. The possession date is shown as 1 October 2004. The agreement is not subject to finance but the attached finance documents show that a loan for the purchase was approved by Westpac on 7 October 2004. There is no evidence of the alleged cancellation other than Mr Ranapia's general assertion.

[38] It is clear from the above that, at the very best, the plaintiff might have an unliquidated and highly contestable counterclaim to pursue. It is this kind of claim that is barred as a set-off or other form of resisting payment of a contract claim by s.79 of the Construction Contracts Act.

[39] This Court recently considered the effect of s.79 of the Construction Contracts Act on a claim for set-off in an application for stay under s.290(4) of the Companies Act in *Volcanic Investments Limited v Dempsey & Woods Civil Contractors Limited* (2005) 11 TCLR 256. His Honour Justice Randerson considered the statutory scheme under the Construction Contracts Act, the meaning of s.79, and whether or not s.290(4) of the Companies Act over-rode s.79 of the Construction Contracts Act. His Honour concluded that s.79 prevailed and precluded the Court from giving effect to a set-off in that case. With respect, I agree with and adopt his reasons, as follows:

> [31] First, s 290(4) is a provision relating to the recovery of debts generally. In contrast, the Construction Contracts Act is special legislation dealing with the recovery of specific types of debt under a specific type of contract, namely construction contracts as defined in the Act. As such, the usual rule applies and the later specific legislation should prevail over the earlier general enactment. If it were otherwise, s 79 would be of no effect in this context.

> [32] Secondly, there is a clear statutory intention that payments due under construction contracts should be paid and disputes resolved quickly. It is intended that the recovery of debts found to be due following an adjudication or which become payable under ss 23 and 24 of the Act, should be promptly recoverable with very limited opportunity for further dispute: see the discussion at paras 12-15 and para 18 above.
>
> [33] Those intentions are stated expressly in s 3 of the Act and are evident from the other provisions already identified. Reference may also be made to the decision of the Court of Appeal in *George Developments Ltd v Canam Construction Ltd* 12/4/05, CA244/04 at paras 3 and 41 and to the helpful discussion in Smellie R, *Progress Payments and Adjudication: Construction Contracts Act 2002 and Weathertight Homes Resolution Service Act 2002*, Wellington, LexisNexis, 2003 at paras 18, 19, 62 and 63. To permit an unproven set-off to be raised as a means of avoiding payment of an established debt would be inconsistent with the purpose and intentions of the Construction Contracts Act.
>
> [34] Thirdly, Volcanic is not prevented from pursuing the set-off in the District Court proceedings it has launched. Section 79 simply requires that the set-off may not be given effect in recovery proceedings for the amount due to Dempsey & Wood. Effectively, that debt is to be paid with the set-off pursued separately in the District Court.

For the reasons that I have already given I reject this ground for the application.

[40] I should mention that in his submissions in reply, counsel for the plaintiff sought to persuade me that the decision in *Volcanic Investments* could not stand in the face of a decision of the Privy Council in *Golden Bay Cement Co Limited v Commissioner of Inland Revenue* [1999] 1 NZLR 385. He argued that this was authority for the proposition that s.79 could not abrogate the effect of s.290(4). He referred to dicta in *Golden Bay Cement Co Limited* (at page 39, line 38):

> "The provisions of subsequent legislation cannot be invoked in order to construe an earlier Act unless the earlier Act is ambiguous ...."

In my view that dictum applies to a totally different context (construing tax statues) and does not support counsel's argument in the present case. I see no reason to depart from the reasoning in *Volcanic Investments*.

**Other grounds**

[41] The plaintiff also relies on a further four matters as grounds to set aside under s.290(4)(c):

a) The plaintiff has (recently) initiated alternative dispute resolution processes and should be allowed the opportunity to pursue them.

b) There is no authority for the defendant to issue the statutory demand.

c) The demand is oppressive given surrounding circumstances.

d) The plaintiff is solvent.

[42] Turning first to the point regarding alternative dispute resolution processes, counsel refers to the plaintiff having invoked the processes of adjudication (under the contract and the Construction Contracts Act) and arbitration (under the contract, the Construction Contracts Act and the Arbitration Act). There is a fundamental fallacy in counsel's argument. These processes can only apply if there is basis for a dispute relevant to the demand. For the reasons that I have already set out, I do not accept that this is the case.

[43] On the second point, the plaintiff has filed considerable affidavit evidence as to a dispute between the plaintiff's director, Ms Case, and the defendant's director, Mr Belcher, over an arrangement for Ms Case to take a shareholding in the defendant. Counsel for the plaintiff argued, at considerable length, that the defendant had no authority to issue the statutory demand without Ms Case's consent or a formal decision of the Board.

[44] I accept that there is an ongoing dispute between Ms Case and Mr Belcher over shareholding in NZ Built Limited. I do not accept that this is a valid ground to set aside the demand in circumstances where I have found that there is no substantial dispute over the debt. It cannot be beyond the power of a director to issue a demand for a debt due. Conversely, and assuming for present purposes that Ms Case was able

to establish an entitlement to be a director at the relevant time, it cannot be a valid exercise of her duty as a director to resist the issue of a statutory demand for a debt due by a company in which she has an interest.

[45] I do not accept that this point provides any basis for setting aside the demand.

[46] As his third point on other grounds, the plaintiff has advanced a wider argument relating to the dispute between Ms Case and Mr Belcher over their business relationship and the ownership of NZ Built Limited. He argued the statutory demand has been issued to place pressure on Ms Case in the resolution of that wider dispute. In those circumstances, he argues that the demand should be set aside as oppressive.

[47] For the reasons already advanced, I do not accept that this is a valid ground to set aside a demand for a valid debt. Even accepting that Ms Case may eventually be able to establish that there is some form of commercial relationship between herself and Mr Belcher going beyond the shareholding in NZ Built Limited, there is no evidence whatsoever that this extends to the plaintiff. To the contrary, Ms Case and Mr Belcher have chosen to structure their relationship, as far as the Ashlynne Avenue properties are concerned, in the form of the two construction contracts through the separate corporate entities. There is simply no reasonable evidential foundation for going outside those arrangements. The application fails on this ground also.

[48] The final ground relied on by the plaintiff is that it is solvent. Counsel for the defendant readily accepted that this would be a ground for setting aside the demand, if established.

[49] The basis for solvency put forward by the plaintiff is a document headed "Certificate of solvency" annexed as exhibit "I" to the affidavit of Ms Case sworn on 11 November 2005. In the body of her affidavit, Ms Case states:

> "I may further add that the plaintiff company is solvent as its assets are in excess of its liabilities, as certified by the company's auditors. A copy of the certificate issued by our auditor is annexed and marked "I" ".

[50] The certificate is dated 28 October 2005. It is addressed "To whom it may concern". It is purportedly signed by one Neil J Mercer, Chartered Accountant of SCI Accountants Group Limited. Counsel for the plaintiff conceded that SCI Accountants Group Limited is a related company to the plaintiff. The certificate reads:

> "This is to certify that SCI Development & Construction Limited is a solvent entity in terms of the Companies Act 1993.
>
> The company can pay its creditors as the bills fall due.
>
> The assets of the company exceed the liabilities of the company."

[51] In an affidavit in reply dated 18 November 2005, Mr Belcher states:

> "A true copy of Companies Office records relating to SCI Accountants Group Limited is annexed hereto and marked "B". I note that Robyn Case is the sole director and shareholder of SCI Accountants Group Limited. I do not accept that the "Certificate of Solvency" provided by that company is adequate evidence as to the solvency of SCI, and I invite SCI to provide the Court with a full statement of assets and liabilities, verified by affidavit".

[52] Ms Case filed a further affidavit dated 25 November 2005. She did not take up Mr Belcher's invitation to provide any further evidence of solvency. Mr Mercer did not file an affidavit.

[53] In *Volcanic Investments* the Court was provided with a simple statement filed by the managing director of *Volcanic* in which he claimed that the company had an equity of just over $900,000 and was solvent, and that the only reason for non-payment was a claimed set-off. His Honour Justice Randerson dealt with that as follows:

> [37] I am not satisfied on the evidence presented that it has been established that the company is solvent in terms of the solvency test under s 4 Companies Act. By virtue of s 287, unless the contrary is proved, a company is presumed to be unable to pay its debts if it fails to comply with the statutory demand. That presumption has not been overcome on the basis of the evidence presented. Specifically, there is no evidence that Volcanic is able to pay its debts as they fall due.

[54] I do not accept that a bland "certificate", apparently given by an employee of a related company (albeit described as a chartered accountant), and produced in evidence by the director of the subject company rather than the provider of the certificate, as sufficient to overcome the statutory presumption. The document's provenance has not been proven, and the basis for it not established. This is notwithstanding the invitation to do so.

[55] The application fails on this ground also.

**Decision**

[56] I find that the plaintiff has not made out any ground for its application to set aside the statutory demand issued by the defendant.

[57] The application is dismissed. There was no application by the plaintiff for extension of time to comply with the demand in the event that the application was dismissed. I see no reason for the Court to make such an order on its own motion.

[58] The defendant is entitled to costs of and incidental to the application on a 2B basis, with disbursements as fixed by the Registrar.

**Associate Judge D.H. Abbott**