

557

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 127/96

**NOT
RECOMMENDED**

IN THE MATTER of the Companies Act 1955

AND

IN THE MATTER of an application under 264 of the
Companies Act 1955 for an order setting
aside a statutory demand issued pursuant to
section 263 of the Companies Act 1955

BETWEEN **HUGHES & TUKE CONSTRUCTION
LIMITED**

Plaintiff

AND **ADVANCED DRYWALL SERVICES
LIMITED**

Defendant

Hearing: 26 September 1996

Counsel: M Farr for the plaintiff
A Vennell for the defendant

Judgment: 26 September 1996

(ORAL) JUDGMENT OF MASTER FAIRE

Solicitors for the plaintiff:
Shieff Angland
DX CP 19036

Solicitors for the defendant:
Andrew Thomas & Associates
DX CP 19045

The plaintiff applies to set aside a statutory demand served on it on the basis that there is a dispute between the plaintiff and the defendant. The background is that the plaintiff and one of its sub-contractors, the defendant, were completing a building contract in relation to residential units at 20 Sunnynook Road, Glenfield. A dispute arose concerning the work undertaken by the defendant sub-contractor. There is on file evidence of correspondence between the plaintiff and the defendant's agent, Law Debt Collection Ltd shortly before the defendant issued a statutory demand. That correspondence made the clear point that the matter was in dispute. Nevertheless, a statutory demand was issued.

The plaintiff, in making its application, filed first an affidavit consisting of some four pages plus exhibits. The parties appeared and a timetable was set. The defendant filed a one page of affidavit in answer. The plaintiff replied to that with two further affidavits consisting of three and seven pages respectively. The defendant signified at the conclusion of the filing and serving of affidavits that it would not oppose the application to set aside the statutory demand and as a result a consent memorandum dated 16 September was prepared and executed by the solicitors for both parties.

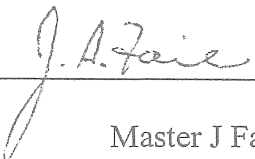
I was told from the Bar today that as a result of the suggestion made by the defendant the matter will now be referred to arbitration under provisions which are set up apparently in the head contract between the plaintiff and the plaintiff's client which in some way apply to the sub-contract. I was also told from the Bar that the plaintiff's costs to date approximate \$3,000. They had not been supplied in detail however to the defendant's counsel prior to the hearing.

In fixing costs I take account of the following matters:

1. The defendant chose a procedure which put considerable pressure on a company in the plaintiff's position by virtue of the strict time limits imposed by s 264 of the Companies Act 1955
2. The plaintiff had to file and serve an application and affidavit as to merits prepared at short notice

3. The defendant had been warned prior to the issue of the statutory demand that the existence of a dispute would be raised if the statutory demand procedure was followed. As it predicted, the outcome in this case is that the matter will now proceed on the merits for a determination pursuant to arbitration provisions
4. There has been one appearance on the merits and one appearance to argue the question of costs
5. There have been warnings given to litigants who choose to avail themselves of the statutory demand procedure in relation to orders for costs and I refer to one such example, *Sports Services v Australian Guarantee Corporation* 8 PRNZ 653 where an award of costs was made in the sum of \$1,500
6. In this case I do not have a detailed schedule of the plaintiff's costs. I was told from the Bar that they approximate \$3,000. I do not take particular notice of that because there has been no precise breakdown. I have considered the content of the application and the affidavits that were necessary both in support of the application and in reply to the affidavit filed by the defendant.

In my view, an appropriate order for costs in this case is the sum of \$1,250 and I accordingly order that the defendant pay costs of \$1,250 plus disbursements as fixed by the Registrar.


Master J Faire