

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

CIV 2003 404 3379

IN THE MATTER OF the Companies Act 1993

BETWEEN FREEMONT DESIGN CONSTRUCTION
 LTD
 Plaintiff

AND BLACK STEEL MOBILE LTD
 Defendant

Hearing: 10 June 2004

Appearances: D McGill for Plaintiff
 J Hickey for Defendant

Judgment: 11 June 2004

**JUDGMENT OF ASSOCIATE JUDGE LANG
[RE COSTS]**

[1] In this proceeding Freemont Design sought an order setting aside a statutory demand issued by Black Steel Mobile seeking payment of the sum of \$16,257.32.

[2] That sum was sought in respect of structural steel works carried out by Black Steel Mobile for Freemont Design between October 2002 and February 2003. The work related to a construction project at 114 St Georges Bay Road, Auckland.

[3] Freemont filed the application to set aside the demand on the ground that the debt claimed in the demand was the subject of a genuine and substantial dispute. Freemont also claimed that it took a claim for set-off against Black Steel for an amount equaling or exceeding the amount claimed in the demand.

[4] During the hearing on 12 November 2003 counsel agreed with a suggestion from me that the most appropriate and inexpensive way for all issues between the parties to be determined was by means of proceedings brought in the Disputes Tribunal. The amount claimed in the statutory demand was duly paid into Court by Freemont and the proceeding, including the issue of costs, was adjourned to await the decision of the Disputes Tribunal.

[5] That decision was released on 11 May 2004. In it the referee concluded that neither party should make any payment to the other. In doing so the referee clearly accepted that Black Steel was not entitled to recover the amount claimed in the statutory demand.

[6] I have already authorized the release of the funds paid into Court by Freemont. It remains for me to grant the application for an order setting the demand aside, which I now do, and to resolve the issue of costs.

Arguments

[7] Mr McGill submits that Freemont's arguments have effectively been upheld by the referee, and that this demonstrates that the dispute it raised was genuine. He submits that his client's application would therefore have succeeded, and that it should be entitled to costs in relation to the significant expense it has incurred in bringing this proceeding.

[8] Mr Hickey contends that costs should be where they fall notwithstanding the fact that the ruling of the Disputes Tribunal effectively removed the basis upon which the statutory demand was issued. He submitted that the true nature of the dispute was not disclosed by Freemont until it filed the affidavit of Mr Logie in support of the originating application to set aside the statutory demand. He contended also that one of the key issues raised by Freemont before the Disputes Tribunal was that of claims made against it by a third party for late completion of the project. He argued that this had not formed part of Freemont's case in this Court.

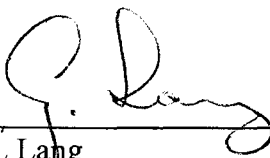
Decision

[9] I cannot give significant weight to Mr Hickey's second submission, because Mr Logie's affidavit contained express reference (at para 15) to the fact that Freemont was vulnerable to a claim from its client due to the late completion of the project. That claim had obviously materialised by the time the Disputes Tribunal claim was heard.

[10] There is more force in Mr Hickey's first submission. There is nothing to suggest that Freemont ever articulated the nature of the dispute to Black Steel until Mr Logie's affidavit was filed. When the statutory demand was received Freemont wrote to Black Steel and stated that a dispute existed. The nature of the dispute was not explained. Freemont did deduct amounts from its payment certificates to reflect the work carried out by others, but the certificates recorded the status of these deductions as "pending". I do not consider that they provided an adequate explanation of the nature of the dispute.

[11] I am also of the view that Black Steel was ultimately prepared to allow the dispute to be resolved in the Disputes Tribunal rather than in this Court.

[12] Taking these matters into account I consider that justice will be done if Freemont has an order for costs on a Category 2B basis together with disbursements as fixed by the Registrar. These costs are, however, to be calculated on the basis that the proceeding was an interlocutory application rather than an originating application. No costs are to be payable in respect of steps taken following the hearing on 12 November 2003.



G L Lang
Associate Judge

Signed at: 3.20 am/pm

on: 11 Jun 2004

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