IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2009-441-348

BETWEEN	AINSWORTH & COLLINSON LIMITED Applicant
AND	GREGORY JOHN AND LESLEY DENISE EDUMUNDS Respondents

Hearing: 17 September 2009

Appearances: R. Wynne-Griffiths - Counsel for Applicant
Respondents (in person)

Judgment: 7 October 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 7 October 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] This is an application to set aside a statutory demand dated 21 May 2009 issued by the respondents, Gregory and Denise Edmunds, seeking from the applicant, Ainsworth & Collinson Limited, the sum of $72,229.17. The statutory demand is based on what is said to be a final payment schedule issued on 27 February 2009 under a construction contract made between the parties in January 2007.

[2] In its present application, the applicant contends either that there is a genuine and substantial dispute with respect to this demand, or that it has 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. Alternatively, it is argued that the demand ought to be set aside on other grounds.

Background Facts

[3] In January 2007, the applicant agreed to build a house for the respondents at 26 Elbourne Street, Napier, for a price of $304,060.99 plus GST. The general conditions of the contract were the NZIA Standard Conditions of Contract SCC 2005. The applicant, as the contractor, was required to complete the dwelling and associated work as set out in the contract, and the respondents, as the principals, were required to pay the applicant contractor "as stated in Section 14" of the contract. The contract also provided that the designated architect was to have the role of representing the principals. Originally, the architect specified in the contract was Gary Pidd Architects Limited, but on 4 December 2007 this company was replaced by Kevin Longman Hawkes Bay Limited.

[4] Of particular relevance to the present case are sections 14 and 15 of the General Conditions. Section 14 provides for the submission of monthly payment claims by the contractor to the architect, who must then assess the claim and issue payment schedules in response. In doing so, the architect must comply with the time limits prescribed by section 14. Similarly, section 15 provides for the submission of a final payment claim by the contractor to the architect, which must then be followed

up by the architect with a final provisional payment schedule and a final payment schedule. Again, the time limits specified in section 15 are applicable.

[5] Under the contract, the time for completion of the contract works was to be five calendar months after the date for possession. The contract provided for the applicant to pay liquidated damages for late completion of $150.00 per day. In 2008, issues arose over the construction of the roof and other matters, and the parties referred the dispute to adjudication.

[6] On 9 July 2008, the Adjudicator determined that the respondents were liable to pay to the applicant the balance of the contract price of $44,832.62 once the applicant had been allowed to remedy the roof, had done so, and when it had achieved practical completion. The payment of that sum was to be subject to the respondents' entitlement to set off liquidated damages of $35,400.00 as well as any future liquidated damages and any other matters which were outside the scope of the adjudication.

[7] Moreover, the Adjudicator determined that the applicant was entitled to an extension of time to undertake the roof remedial work, starting from 21 February 2008 to the date 14 days following the applicant being allowed to commence the remedial work. Within this period he determined that the respondents were also liable to pay $8.43 plus GST per calendar day for extended contract insurance.

[8] Finally, the Adjudicator made no determination as to costs, but concluded that if one of the parties had paid more than their share of his fees, the other party was required to reimburse that overpayment.

[9] On 11 December 2008, the applicant issued a payment claim for $17,196.81 (GST inclusive) to the architect. The claim was described as "Final claim for new home" and demanded the release of retentions by the respondents as principals. The respondents did not pay this sum of $17,196.81 as set out in the claim. Instead, the architect informed the applicant that he could not assess the claim until the end of the defects liability period.

[10] On 12 February 2009, the architect issued a Defects Liability Certificate confirming that the period of liability had expired. The architect also issued a document entitled "Progress Payment Schedule (Provisional)", which provided that the total amount payable to the applicant was $17,265.51. Based on the architect's calculation, the applicant was entitled to a payment of $1,365.66 for extended insurance, and the respondents were entitled to deduct liquidated damages of $36,533.33 plus GST.

[11] On 27 February 2009, the architect issued the final payment schedule, which provided that the applicant was to pay a total amount of $72,229.17 to the respondents. It appears that, following the issue of the provisional payment schedule on 12 February 2009, the respondents notified the architect of a number of amendments and deductions which the architect accepted in their entirety. The result was that the final payment schedule indicated an overpayment had been made to the applicant of $72,229.17.

[12] The "claim rationale" provided by the respondents was that from 21 February 2008, the contract should have been able to progress to completion, and that the applicant's failure to proceed with a roofing material warranty led the applicant to incur extra-ordinary costs. In particular, the respondents claimed deductions for liquidated damages from 21 February 2008 to the date of practical completion (in addition to the adjudicator's award), legal and adjudication costs, costs for supervision of the remedial work, a reversal of the adjudicator's award to the applicant of extra insurance and interest, and interest.

Counsel's Arguments and My Decision

[13] The applicant brings this application pursuant to s 290 of the Companies Act 1993, which sets out the basis on which a statutory demand may be set aside:

> "**290 Court may set aside statutory dema**nd
>
> (1) The Court may, on the application of the company, set aside a 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. ”

[14] The principal ground relied upon by the applicant in bringing this application is that set out in s 290(4)(a). It submits that there is a genuine and substantial dispute as to the existence of the debt because the final payment schedule is invalid and not binding on the parties because it was not issued in accordance with the terms of the contract. In particular, the applicant argues first that the claim was not endorsed as “Final Payment Claim”, as required by clause 15.1.3. The applicant suggests that the architect was accordingly required to issue a provisional payment schedule under clause 14.3.1 within five working days of receipt, and a payment schedule within ten working days (clause 14.6.1). Because the architect did not issue a payment schedule within that time, it is contended that the payment claim was due and payable seven working days after the date on which the payment schedule should have been issued.

[15] Moreover, the applicant submits that clause 15.7, which allows the architect to issue a final payment schedule if the contractor fails to submit a final payment claim, is not applicable to the present case, as the architect could not issue a provisional final payment schedule under clause 15.7 without first making an assessment and sending it to the applicant. This submission is undoubtedly correct, and I did not understand the respondents to argue otherwise.

[16] A second argument for the applicant, however, is to the effect that if its payment claim of 11 December 2008 in fact amounted to a final payment claim, then the architect was required to respond within the time limits prescribed by clause 15.2.4 and 14.4.2 by issuing either a final or a provisional payment schedule. According to the applicant, the architect failed to serve a payment schedule within the time allowed, being one month and five working days after the date of service of the final payment claim, and the debt therefore became due to the applicant on 28 January 2009.

[17] Certain consequences are said to flow from the contention that the payment claim became due on this date. More specifically, the applicant argues that, by 28 January 2009, there was no longer any final payment claim for the architect to assess. Hence, the architect's provisional final payment schedule dated 12 February 2009 (and consequently the final payment schedule) could not be issued in accordance with the contract.

[18] The second ground upon which the applicant attempts to resist the statutory demand is that, even if the final payment schedule was issued in accordance with the contract, it did not give rise to a debt because it was contrary to the Adjudicator's determination. As noted previously, the Adjudicator determined that the respondents were to pay $17,242.34 to the applicant once it had achieved practical completion. The Adjudicator also decided not to make a determination as to costs. It appears that the respondents' claim for liquidated damages was required to exclude the period from 21 February 2008 to the date 14 days following commencement of the remedial work. The respondents' final payment schedule, however, appears to ignore this and includes a claim for liquidated damages for 161 days, starting from 21 February 2008 to completion date. In addition, it includes claims for costs and for interest and extended insurance costs originally awarded to the applicant.

[19] The applicant submits that the Adjudicator's determination is binding upon the parties and the respondents are not entitled to use the contractual mechanism for making amendments and deductions to the sum certified in the provisional final payment schedule as a way to circumvent or reverse the Adjudicator's determination.

[20] Finally, the applicant appears to contend that clause 15.5.1 provides only for payment of the final payment schedule by the principal and that, as a contractor, the applicant is therefore not obliged to make any payment to the respondents.

[21] In response, the respondents submit that the final payment claim was valid, as it was notated as such and met the requirements of clause 15.1. Moreover, it is disputed that the provisional final payment schedule was not issued in accordance with the terms of the contract. On the contrary, the respondents maintain that the architect could only assess the final payment claim once the defects liability period

had ended. Because the provisional final payment schedule was issued on the same day as the defects liability certificate, it is said to have been issued in compliance with the timeframes specified in clause 15.2.

[22] The respondents further argue that, pursuant to clause 15.3, they were entitled to make amendments to the provisional final payment schedule, and that they did so within the prescribed ten working days in compliance with the requirements of the contract. Similarly, it is submitted that the final payment schedule was issued in full compliance with clause 15.4, stating the sum due and the terms of repayment.

[23] Because the applicant failed to pay the amount due within ten working days of the date of the final payment schedule (as required by clause 15.5), the respondents claim that they are entitled to recover the amount as a debt due pursuant to s 24 of the Act. It is pointed out that the applicant did not dispute the final payment schedule within the prescribed timeframe of 20 working days (clause 15.8). The applicant does not appear to contest this fact.

[24] In response to the applicant's argument that clause 15.5.1 provides only for payment by a principal, and that, in order to be valid, a final payment schedule thus cannot show a negative balance, the respondents contend that a negative balance is still a valid debt due under the contract, provided the final payment schedule is procedurally correct.

[25] With respect to the applicant's reliance on the Adjudicator's determination, the respondents submit that the amendments and deductions were justified as they arose from the applicant's failure to provide a roofing warranty before September 2008, although the warranty had been made available to the applicant in February 2008. It is argued that, had the applicant provided the warranty in February, no adjudication would have been necessary and ongoing legal and adjudication costs would have been avoided.

Substantial Dispute as to the Debt

[26] The approach the Court is to adopt when considering applications relying on s 290(4)(a) requires an applicant to show a fairly arguable basis upon which it is not liable for the amount claimed in the statutory demand*: Forge Holdings Limited v Kearney Finance (NZ) Ltd* HC Christchurch M 149/95 20 June 1995 and *Queen City Residential Limited v Patterson Co-Partners Architects Ltd* [1995] 3 NZLR 307. This formulation was approved by the Court of Appeal in *United Homes (1988) Limited v Workman* [2001] 3 NZLR 447 at 451-2.

[27] In other words, it must be shown that there is a genuine and substantial dispute as to the existence of the debt, and further that it would be unfair to allow that dispute to be resolved through the liquidation provisions of the Companies Act 1993 rather than by actions in the usual way: *Taxi Trucks Limited v Nicholson* [1989] 2 NZLR 297 and *Pink Pages Publications Limited v Team Communications Limited* (1986) 3 NZCLC 99,764.

[28] Turning now to the provisions of the Construction Contracts Act 2002 ("the Act"), s 3 relevantly provides that it is the purpose of the Act to facilitate regular and timely payments between the parties to a construction contract, and to provide remedies for the recovery of payments under a construction contract. In considering this general purpose, the Court of Appeal's observations in *Salem Limited v Top End Homes Ltd* CA 169/05 27 September 2005 are apposite (at [11]):

> "The whole thrust of the Act is to ensure that disputes are dealt with promptly and payments made promptly, because of the disastrous effects that non-payment has, not only on the head contractor, but also on its employees, subcontractors, and suppliers: *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177; (2005) 18 PRNZ 84 (CA) at paras 41-42. It is relevant to note, for instance, that employers cannot set up counterclaims, set-offs, or cross-demands as a bar to the recovery of a debt under s 23 of the Act, unless the employer has a judgment in respect of its claim or there is not in fact any dispute between the parties in relation to the employer's claim: s 79. The fundamental position under the Act is that, if a progress claim is made and the employer does not respond within the period stipulated in the construction contract or, by default, within the time specified in the Act, the amount of the claim becomes payable forthwith."

[29] Part 2 of the Act provides a procedure for making and responding to payment claims. Sections 16 to 18 contain a number of default provisions for progress

payments under commercial (but not residential) construction contracts but it is clear that parties to any contract are free to agree on their own payment provisions in a construction contract: s 14. As mentioned previously, the parties here relied upon the NZIA Standard Conditions.

[30] Although largely replicated in the contract here, it might be helpful to briefly set out the overall scheme of the procedures as provided for in the Act:

- Section 20 provides for payment claims to be served on the payer for each progress payment, and prescribes that certain information must be included in such claims. For example, a payment claim must be in writing, and must indicate a claimed amount and the due date for payment.

- Following service of a payment claim, the payer may respond by way of a payment schedule, which must also contain certain information: s 21.

- If the payer does not provide the payee with a payment schedule within the time required by the contract, the payer becomes liable to pay the claimed amount on the due date in the payment claim: s 22.

- The payee may then recover the unpaid claimed amount from the payer as "a debt due" in any Court: s 23.

- Alternatively, the payee may recover the unpaid scheduled amount as "a debt due" if the payer provides a payment schedule in response to the payee's payment claim within the time allowed by the contract, but the payer fails to pay the scheduled amount: s 24.

[31] Based on these provisions, it is evident that a payer's failure to issue a payment schedule, or to issue a payment schedule within the timeframe prescribed by the Act or the contract, may result in liability to pay under ss 23 or 24: see

Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd HC AK CIV-2005-404-1320 24 May 2005.

[32] As I have noted above, the statutory demand at issue here claims the unpaid balance of what is said to be a final payment schedule issued by the architect on 12 February 2009. The present case is therefore somewhat unusual, insofar as the respondents, who are the principals under the contract, effectively seek to rely on the applicant contractor's payment claim.

[33] The immediate issue, however, is whether the parties complied with the relevant procedures for submitting, and responding to, the applicant's $17,196.81 payment claim, as prescribed by the contract and Part 2 of the Act. In particular, any failure by the respondents (or their architect) to provide a payment schedule within the time allowed by the contract it is argued must necessarily signal an end to the respondents' present statutory demand. This is because in terms of s.22 of the Act and clauses 14.4.2 and 15 of the contract, such failure must mean that the respondents become liable to pay the claimed amount to the applicant on the appropriate payment date for the claim. No suggestion of any debt due from the applicant to the respondents at that point can arise.

[34] As is evident from the parties' submissions, the starting point in this case must be the applicant's payment claim for $17,196.81. Although there was some confusion regarding the exact date of this claim, it appears that it was in fact issued on 11 December 2008. I did not understand the applicant to dispute this, and nothing turns on the matter for present purposes. No issue was raised with respect to service of the claim, and I proceed on the assumption that it was served on the day that it was issued.

[35] There is some disagreement between the parties concerning the nature of the payment claim, and more specifically whether the payment claim was a final payment claim within the meaning of section 15 of the contract. If it was not a final payment claim, it is subject to the terms set out in section 14 of the contract. If it was a final payment claim, section 15 will apply. For the purposes of the Act, a final payment under the contract is included in the definition of "progress payment" (s 5),

with the effect that the provisions in Part 2 of the Act are equally applicable to final payment claims.

[36] Clause 15.1 provides for the submission of a final payment claim in the following terms:

> "15.1.1 After the certificate of Practical Completion has been issued to the Contractor and no later than the time stated in the Specific Conditions or within such additional time as the Architect may reasonably allow, the Contractor's final Payment Claim must be submitted to the Architect. The Contractor must send a copy of the final Payment Claim to the Contractor.
>
> 15.1.2 Except for any amount resulting from a disputes procedure and the correction of any clerical or accounting error, no further Payment Claim may be submitted after submission of the final Payment Claim.
>
> 15.1.3 The final Payment Claim must:
>
> (a) be in writing and be endorsed "Final Payment Claim";
> (b) identify the construction contract to which it relates;
> (c) identify the construction work and the relevant periods to which it relates;
> (d) state the due date for payment which is 10 Working Days after the date of the Final Payment Schedule;
> (e) state the claimed amount and the manner in which it was calculated, including:
> (i) the value of the work done, including the value of Variations carried out;
> (ii) if provided for in the Specific Conditions, the value of any fluctuations;
> (iii) all outstanding claims.
> (f) where the final Payment Claim is to be a Payment Claim under the Construction Contracts Act 2002, state that it is made under the Act;
> (g) where the final Payment Claim is made under the Construction Contracts Act 2002 and the Principal is a "residential occupier" under the Act, include the information set out in Schedule 1, Form 1 of the Construction Contracts Regulations 2003.
>
> 15.1.4 The information provided by the Contractor must be sufficient for the Architect to fully assess the validity of the claim."

[37] Clause 15.2 goes on to deal with the architect's assessment of the final payment claim. Clause 15.2.1 states:

> "15.2.1 The Architect must assess the final payment claim."

And clause 15.2.3 provides:

> "15.2.3 When all claims have been assessed, the Architect must prepare a certificate in the form of a provisional Final Payment Schedule. The

> provisional Final Payment Schedule must contain the information referred to in s. 14 r 14.4.1 and must be issued to the principal with a copy to the contractor."

[38] The payment claim is not endorsed specifically with the words "Final Payment Claim", as required by clause 15.1.3(a). It is clear, however, that the applicant intended the payment claim to be final: The claim number is stated as "8 – Final", and the claim itself is described as "Final claim for new home". The due date for payment was specified as 22 December 2008, which neither complies with the due date specified in clause 15.1.3(d) nor the due date to be included in payment claims under clause 14.1.2(d).

[39] The applicant appears to suggest that his failure to include the correct due date may have rendered the payment claim invalid in any case, whether it was final or not. My initial reaction is that this contention lacks substance. But, in any event, in light of my later conclusion that the present application to set aside the statutory demand must succeed, I do not propose to deal with this particular argument in any depth, save as to say in addition that the respondents here arguably waived the applicant's obligation to issue a payment claim that was fully compliant with clause 15.1.3(d) or clause 14.1(2)(d).

[40] Similarly, I do not think it necessary to resolve the question of whether the payment claim was a final payment claim under section 15 of the contract, or a mere payment claim under section 14, as I consider that the applicant must succeed here in any event. The finality of payment claims, provided for in clause 15.1.2, suggests that any formal requirements with respect to the form and substance of the claim should not be taken lightly. After submission of the final payment claim, no further payment claim may be submitted, except for any amount resulting from a disputes procedure and the correction of any clerical or accounting error. Moreover, clause 15.1.3 expressly requires the claim to be endorsed "Final Payment Claim". The respondents, however, insist that the claim constituted a final payment claim, and I will proceed on the assumption that they are right in this submission.

[41] If the payment claim was a final payment claim, the architect was required to assess the claim and prepare a certificate in the form of a provisional final payment

schedule: clause 15.2.3. The contract also provides, however, that if the issue of the provisional final payment schedule took longer than one month, the architect was required to issue a certificate in the form of a provisional payment schedule in accordance with the process under section 14. This provisional payment schedule was to be accompanied by a statement setting out the reasons why the provisional final payment schedule could not be issued. Set out in full, clause 15.2.4 provides as follows:

> "15.2.4 Should the issue of the provisional Final Payment Schedule take longer than 1 month, the Architect must issue a certificate in the form of a provisional Payment Schedule for all amounts due under the Contract which can be certified at that time and the process under Section 14 rules 14.3 to 14.7 will apply. The provisional Payment Schedule must be accompanied by a statement setting out the reasons why the provisional final Payment Schedule cannot be issued."

[42] Clause 14.3 in turn provides that the architect must issue a provisional payment schedule within five working days of receiving the contractor's payment claim. The principal must then make any amendments or deductions within three working days of the date of the provisional payment schedule, and the architect must issue the payment schedule within 2 working days of receiving the Principal's advice, or in any event no later than ten working days after the receipt of the contractor's payment claim: clauses 14.5 and 14.6.

[43] It does not appear to be disputed that the architect here did not issue a provisional final payment schedule within one month of the final payment claim. The final payment claim was issued on 11 December 2008. It was not until 12 February 2009 the architect issued a document entitled "Progress Payment Schedule (Provisional)". Based on a generous interpretation of the provisions, the architect was required to issue either a provisional final payment schedule on or around 11 January 2008, or a provisional payment schedule on or around 18 January 2008. Regardless of whether the schedule issued on 12 February 2009 was a provisional final payment schedule or merely a provisional payment schedule, it did not satisfy the timing requirements as set out in clause 15.2.4.

[44] The respondents argue, of course, that the architect could only assess the final payment claim once the defects liability period had ended. The defects liability

certificate was issued on the same date as the provisional (final) payment schedule, on 12 February 2009. According to the respondents, it follows that the provisional schedule was issued in accordance with clause 14.3.

[45] With respect, the respondents' argument misconstrues the contract. Clause 15.1 does not make reference to the defects liability period. Instead, it provides that the contractor's final payment claim must be submitted after issue of the certificate of practical completion. It appears that the practical completion date in this case was 8 September 2008. If the architect was unable to issue a provisional final payment schedule within one month of the final payment claim because the defects liability period had not yet ended, the correct approach would have been to issue a provisional payment schedule, as required by clause 15.2.4, accompanied by a statement setting out the reasons why the provisional final payment schedule could not be issued: compare *Willis Trust Co Ltd v Green* HC AK CIV-2006-404-809 25 May 2006 at [69]. The architect clearly failed to do so, with the effect that the applicant's payment claim remained unaffected by the amendments and deductions in the final payment schedule.

[46] Similar considerations apply if the applicant's payment claim was not in fact a final payment claim and must therefore be treated as a payment claim under section 14 of the contract. In that case, the due date for payment was 17 working days from the date of submission of the payment claim. The architect was required to issue a provisional payment schedule within five working days, and a payment schedule no later than ten working days after the receipt of the claim. The provisional payment schedule issued on 12 February 2009 clearly did not fulfil these requirements. It follows therefore that at this point it could not be said that any definitive debt is owed by the applicant to the respondents. I conclude therefore that there is a fairly arguable basis that the applicant is not liable to the respondents for the amount claimed in the statutory demand and it must now be set aside.

[47] Given my conclusion that the architect failed to validly respond to the applicant's payment claim, whether it was in fact a final claim or not, I do not need to address the further submission that the alleged debt owing by the applicant as shown on the final payment schedule is a "scheduled amount" that is enforceable

pursuant to s 24. In passing, I do note however that this submission does raise some potentially confusing issues. In particular, s 24 of the Act expressly provides for the *payer's* – and not the *payee's* - liability, following the *payer's* failure to pay the scheduled amount before the due date. It is clear that the section envisages the payer to have the role of providing a payment schedule, and that it does not seem to provide for the current situation, where the payer is now effectively asked to be treated as the payee. Similarly, clauses 14.7 and 15.5 of the contract impose an obligation on the principal to pay the scheduled amount, but do not provide for what would in effect be payment claims by the principal.

[48] In addition, Part 2 of the Act is clearly expressed to relate to payment claims for progress payments (s 20), which in turn are defined as "payment for construction work carried out under a construction contract that is in the nature of an instalment ... of the contract price for the contract": s 5. Within this context, there is a possible argument open that it is inappropriate for the respondents as principals to attempt to enforce their claim in reliance on s 24, as it does not constitute a demand for a progress payment under the contract. The strength of this argument, however, remains for consideration another day.

[49] And finally, given my conclusions above, I also need not address the applicant's further ground in resisting the statutory demand noted at para. [18] above, that even if the final payment schedule was issued in accordance with the contract, it did not give rise to a debt because it was contrary to the Adjudicator's determination. That also is an argument to be considered another day.

Conclusion

[50] In my view, the applicant has done enough here to show that this is a clear case where there is a substantial dispute whether or not the debt claimed by the respondents is owing in terms of s. 290(4)(a) Companies Act 1993. I am satisfied too that s. 79 of the Act does not apply here as, like the situation which prevailed in *Construction Service Co. (Wellington) Ltd (in rec) v Wellington Waterfront Ltd* High Court, Wellington, CIV-2006-485-1117, 13 September 2006, Gendall AJ, the

present case is not one where a counter-claim, set-off or cross-demand is advanced, but rather is one where there is simply no debt at this point owing to the respondents.

[51] For these reasons, and taking into account all the matters outlined above, the present application succeeds.

[52] An order is made setting aside the statutory demand dated 21 May 2009 issued by the respondents against the applicant.

[53] The applicant has succeeded here and I see no reason why it is not entitled to costs against the respondents in the usual way. Accordingly, costs on a category 2B basis, together with disbursements as fixed by the Registrar are now awarded to the applicant against the respondents on the present application.

'Associate Judge D.I. Gendall'