

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

**CIV 2011-404-006062
[2012] NZHC 648**

UNDER the Companies Act 1993

IN THE MATTER OF an application under s290 of the Companies Act 1993 to set aside a statutory demand

BETWEEN ABSOLUTE QS LIMITED
Applicant

AND ASCOT ALUMINIUM LIMITED
Respondent

Hearing: 2 April 2012

Appearances: K M Quinn for the Applicant
T J Herbert for the Respondent

Judgment: 4 April 2012

**JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

*This judgment was delivered by me on
04.04.12 at 4:00pm, pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

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The application

[1] The Applicant (Absolute) applies to set aside a statutory demand dated 8 September 2011 which “demands payment of \$47,432.53 due... in respect of the supply of aluminium joinery...”.

[2] Absolute pleads three grounds in support of its application:

- (a) That the debtor was not Absolute but instead Mr R I Giddy, the owner of the property who ordered the goods from the respondent (Ascot) pursuant to a contract of supply and manufacture.
- (b) At all material times Absolute was acting as agent for Mr Giddy (a disclosed principal).
- (c) At all material times Ascot knew that Absolute was acting only as agent.

[3] The application is made in reliance on s 290 of the Companies Act 1993. Section 290(4)(a) provides:

290 Court may set aside statutory demand

- (4) The Court may grant an application to set aside the statutory demand if it is satisfied that –
 - (a) There is a substantial dispute whether or not the debt is owing or is due; or
 - ...
 - (c) The demand ought to be set aside on other grounds.

[4] The Court’s approach in these matters is to determine whether there is a substantial dispute about whether or not the debt is owing or is due. An applicant must show a fairly arguable case upon which it is not liable for the amount claimed. If that position is reached the statutory demand should be set aside and the dispute disposed of, if necessary, by other proceedings in the ordinary way. If there is no

dispute as to a company's liability for payment the company cannot usually avoid paying a debt because it says, and can demonstrate, that it is not insolvent. Rather the issue for solvency will be a matter for consideration in due course if an application for liquidation is filed.¹

The opposition

[5] It relies on the following:

- (a) Absolute was the only party to the construction contract with Ascot.
- (b) On 25 July 2011 Ascot, in accordance with their contract, provided a payment claim to Absolute, pursuant to s 20 of the Construction Contracts Act 2002 (the Act), for the sum of \$41,245.68.
- (c) Payment under that claim was to be made on delivery.
- (d) Ascot failed to provide a payment schedule on delivery, being the due date for payment.
- (e) Pursuant to s 23 of the Act, Absolute has become liable to pay the full amount claimed under the payment schedule, plus interest and costs.
- (f) If in the alternative, on or around 28 July 2011 Absolute responded to the payment claimed by providing a payment schedule to Ascot under s 21 of the Act, approving the sum of \$32,482.55 (GST incl.) for payment by 20 August 2011.
- (g) Pursuant to s 24 of the Act Absolute is indebted to Ascot in the sum of \$32,482.55 (GST incl.) plus interest and costs.

¹ *AMC Constructions Ltd v Frews Contracting Limited* [2008] NZCA 389, (2008) 19 PRNZ 13 at [7].

Evidence in opposition

[6] At the core of the application of Absolute is its claim it was a mere agent for Mr Giddy in relation to its contract with Ascot.

[7] Mr Giddy had built the house for himself and his family and had engaged Absolute to provide quantity surveying and contract administration services for the construction of it. Mr Giddy used a labour only builder and various subcontractors, who all contracted directly with him. One of the suppliers was Ascot which was engaged in the manufacture and supply of the aluminium joinery. Mr Giddy said the contract between he and Ascot was made on his behalf by Absolute and it is this fact of Absolute's role as agent which appears to have led to confusion.

[8] On 8 July 2011 Absolute submitted a purchase order to Ascot as agent for Mr Giddy. The purchase order was headed "Rick Giddy, P O Box 174, Silverdale" and listed Mr Giddy's home as the job address.

[9] Page 2 under the heading "Purchase Order No R Giddy/585" set out the terms of the contract of supply, including:

Payment for the above mentioned works will only be deemed as due and claimable on the completion of all works as detailed above, monthly payment claims are not applicable to this contract.

Invoices/claims to be submitted on completion of works, payment terms as detailed herein.

... These works constitute a contract under the NZCCA 2002.

[10] The first batch of joinery was delivered to Mr Giddy's property on 12 July 2011. Ascot issued an invoice dated 25 July 2011 which Absolute says was received on 28 July 2011. It was addressed to "Absolute Limited, 32 Forge Rd, Silverdale" but stated that delivery was to Mr Giddy's home address. The total amount payable was \$41,245.68 plus GST. Mr Giddy's evidence is that defects were identified with the joinery supply and that Ascot was informed of this.

[11] A payment schedule was issued by Absolute in late July 2011 – Mr Dalzell of Absolute asserting that it was issued as agent for Mr Giddy. It noted the defects identified.

[12] Ascot removed the joinery and later returned it after attention was given to remediation of defects. Then further defects were found.

[13] Eventually on 22 August 2011 Ascot was advised in writing they were no longer welcome on Mr Giddy's property. Later Ascot was informed that an alternative contractor had been engaged to supply the joinery.

[14] On 8 September 2011 Ascot served a statutory demand on Absolute.

[15] On 19 September 2011 Absolute issued and delivered a second payment schedule to Ascot. It provided that \$40,886.61 had been held back to remediate defective joinery, and showed that a balance of only \$418.78 was owed to Ascot.

[16] In summary Absolute's case is that it was at all times the agent for Mr Giddy, as Ascot was at all times aware or at least as much is arguable. It is for this reason Absolute says there is a substantial dispute about claims it owes anything at all to Ascot.

Agency

[17] Usually when an agent has actual authority from a principal to contract with a third party and purports to act on behalf of a disclosed principal (whether identified or unidentified) the general rule is that the agent is not liable to the third party.² As discussed in the commentary to Article 97 of *Bowstead*, the reason why the agent is not liable is that the objective interpretation of the dealings between the parties indicates a contract between principal and third party only. Thus, the mere fact that a person acts as agent and is known to do so does not necessarily negate his involvement in the transactions.

² Bowstead and Reynolds on Agency (19th Ed, Sweet and Maxwell, 2010), Article 97 at [9 – 001].

[18] Bowstead also notes that it has been said in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corp* [1981] AC 787 at 795:

... It is not the case that, if a principal is liable, his agent cannot be. The true principle of law is that a person is liable for his engagements (as for his torts) even though he acts for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negated his personal liability.

Absolute's case for an agency claim

[19] It is based on what Absolute's witnesses say was told to Ascot's Mr Sim; and also focuses upon the manner in which relevant documents were addressed and where documents were delivered to. It also focuses upon how relevant documents ought to be viewed for the purpose of constructing the parties' contract for manufacture and supply. Absolute's case is that the product delivered was defective and contrary to Ascot's claims the works had not been completed by 25 July when Ascot's payment claim was provided. Absolute's backup position is that Ascot's payment claim was invalid because if it had been served upon Mr Giddy as it should have been, it failed to advise him as a residential contractor of the requirements provided by s 20(4) of the Act. The fact that Absolute, on or about 28 July 2011 issued a payment statement in response to Ascot's payment claim did not mean that the payment claim was thereby validated.

[20] Mr Dalzell and Mr Giddy both depose that Mr Sim, Ascot's contractor administrator, knew that Mr Giddy was Mr Dalzell's principal and that Absolute was acting as Mr Giddy's agent; that Mr Giddy owned the property to which the joinery was delivered, and that Mr Giddy would be responsible for paying for it.

[21] Counsel for Absolute, Mr Quinn, submits there is a fairly arguable case that Absolute disclosed to Ascot both the fact that it was acting as an agent and the identity of the principal, Mr Giddy. Reliance is placed on the fact that Mr Giddy's name headed the purchase order. Also:

- (a) Ascot's quotation referred to the supply of joinery to a property which was Mr Giddy's residential address.

- (b) Ascot's invoice dated 28 July referred to delivery to the property – which was Mr Giddy's residential address.
- (c) Ascot delivered the joinery to Mr Giddy's address and his representatives installed the joinery there.
- (d) Absolute's second payment schedule dated 19 September 2011 referred to the fact that Mr Giddy was listed as the Payer.

[22] Mr Quinn submits an objective interpretation of the correspondence (principally the purchase order) and the parties' dealings strongly point in the direction of a contract for supply of joinery to Absolute as agent for Mr Giddy.

[23] Mr Quinn submits that delivery of the joinery to Mr Giddy's property formed the contract of supply; that one of the terms in the purchase order was that Mr Giddy was the purchaser; that in its dealings with other customers Ascot issued invoices directly to those customers on behalf of whom Absolute had submitted purchase orders – and therefore the reference on Ascot's invoice to Absolute was an error by Ascot.

[24] Mr Quinn submits that Ascot's evidence that the contract for supply was between it and Absolute is weak, because:

- (a) Ascot's previous dealings with Mr Dalzell occurred while he was employed by Sovereign Homes where contracts were entered directly between Ascot and Sovereign Homes; but Absolute is not a builder of homes and is a far smaller operation than Sovereign Homes was, and therefore Ascot's previous dealings with Mr Dalzell at Sovereign Homes are irrelevant.
- (b) That although it is Ascot's requirement that all of its customers are required to sign a Trade Credit Application, as Absolute did, the fact that Mr Giddy was never required to sign such assumes no relevance

because it was within Ascot's ability to obtain that signature from Mr Giddy.

- (c) The fact that the first payment schedule submitted in late July 2011 bore Absolute's name is not unusual for it is common place that a quantity surveyor completes payment schedules on behalf of his principal.
- (d) Mr Dalzell denies any oral agreement with Mr Sim that the relationship between Ascot and Absolute would be same as previously existed between Ascot and Sovereign.

[25] Ascot claim their contract was in essence contained in their quote provided on 4 July 2011. Absolute says there must be doubt about this because in a box provided on the second page of that document Absolute did not sign where indicated it should. Besides it contained a different price than for the goods ordered or indeed delivered and which was subsequently confirmed on Ascot's payment claim for supply contained in the quote, because it referred to a 50 per cent deposit and balance on delivery which was different than that contained in the credit application earlier signed by Absolute wherein a deposit of 33 per cent was to be payable. In fact no deposit was ever demanded at all. Therefore there must be uncertainty regarding the terms of the contract in particular regarding when payments were due.

[26] Mr Quinn says the evidence indicates uncertainty about Ascot's claim to have completed delivery on 25 July and there is further reason therefore to doubt the validity of a payment claim which may have been delivered before delivery was completed, and not after as it should have been.

[27] Mr Dalzell's evidence mentions that faults were discovered in the first batch of joinery delivered on 12 July 2011. He says that Mr Thomas of the building construction company that installed Ascot's joinery found numerous faults on or about 26 July 2011 which were separate and more extensive than initially found with the first batch delivered on 12 July 2011.

[28] Mr Quinn invites the Court to infer that there is evidence suggesting that rather than the joinery having been delivered by 25 July 2011, in fact at that very date some of the joinery was offsite, it having been returned for remediation works.

[29] In summary it is Absolute's position that there is sufficient material, short of proof, to support the proposition that the true debtor was Mr Giddy. Further that the evidence raises disputed questions of fact that are not possible to resolve on the affidavit evidence alone.

Considerations

[30] If Ascot contracted with Absolute and not with Absolute on behalf of Mr Giddy then this case turns upon a consideration of the provisions of the Act for it is clear in that regard that claims of a set off for poor workmanship have no place if a payee has proved, pursuant to the Act, its entitlement to payment.

[31] If the payee (Ascot) has followed the correct procedure under the Act and the payer (Absolute) has not – in that it has failed to raise any objection to payment that it may have at the correct time, then the payee is entitled to payment. A payer is specifically barred from bringing any counterclaim set off or cross claim under s 79 of the Act – or for using such to resist a statutory demand³. There are two options available to a payer in that situation. The payer must show:

- (a) The payee did not follow the correct procedure under the Act.
- (b) The payer did, in fact, carryout the correct procedure, by objecting to the payment at the right time.

[32] In this case Absolute contends that Ascot did not follow the correct procedure; that Ascot's invoice, its payment claim, was delivered at a time when work was still incomplete, contrary to the parties' contract which provided for the submission of an invoice upon completion of the works i.e. not before.

³ Volcanic Investments Ltd v Dempsey and Wood Civil Contractors Ltd (2005) PRNZ 97.

[33] Mr Dalzell deposes that Ascot started delivering the joinery to Mr Giddy's property on 12 July 2011 and after that it was delivered in several batches over several days. He said faults have been discovered with the first batch and that Ascot had been notified and needed to deal with the problem. I earlier noted that Mr Quinn had submitted there were issues as to the nature of the contract and whether indeed delivery had been completed by 25 July because if not then the works were not completed at the time the payment claim was made in which event the payment claim was made too early – because in terms of the parties' contract payment could not be claimed until the works were completed.

[34] Mr Quinn invited the Court to infer from the evidence of Mr Dalzell and Mr Giddy that the works were not completed because some of the joinery had been returned to Ascot so that as at 25 July there were still some joinery to be delivered and therefore works had not been completed.

[35] The Court takes a different view, indeed in relation to that evidence suggesting delivery had not been completed by 25 July. Also, it is the Court's view that the various documents including the quote, the purchase order, the payment claim, and the first payment schedule all require or recognise that the contract works for the manufacture and supply of joinery were completed by delivery.

[36] The contract did not permit for any variation of this obligation notwithstanding as it happens some joinery was returned. But even in relation to that evidence of product defects it appears from Mr Dalzell's second affidavit that he was only informed about "the numerous faults in the joinery on 26 July 2011". It follows that Mr Dalzell learned of joinery defects only after delivery had been completed.

[37] What Mr Dalzell did not comment upon nor indeed did exhibit in his first affidavit was the first payment schedule he issued in response to the payment claimed delivered at that time.

[38] That first payment schedule is a significant document. It is written in the name of Absolute and refers to Ascot's delivery of joinery and the issue of the payment claim dated 25 July 2011. It refers to the contract sum which the parties

agreed upon and it identifies the fact that eight windows and sliders had been removed “due to manufacturer’s defects”. What it also did was to approve payment in the sum of \$28,246.68 (plus GST) after the deduction of a sum of \$13,000 in connection with windows removed.

[39] In short it is an acknowledgement by Absolute of a responsibility for payment of not less than \$32,482.55 on Ascot’s payment claim.

[40] The payment schedule refers to Mr Giddy but it is clear that this is a reference only to the name of the person for whose premises the product was intended. No statement was at that time made by Mr Dalzell or Mr Giddy inviting Ascot to resubmit the payment claim in the name of anyone but Absolute – indeed it was nearly two months later that it was suggested for the first time that Mr Giddy and not Absolute was the payer.

[41] It appears clear that the payment claim was made when the product was delivered as the parties agreed. The provisions of Ascot’s credit application form, the quote provided to Absolute, and the purchase order submitted by Absolute are consistent in their requirement for payment ‘upon delivery’. There is no dispute but that the works constituted a contract under the Act. Because the parties agreed for payment upon delivery the payer is unable to resort to the default provisions contained in the Act. Curiously, in this case and because of the parties’ agreement for payment upon delivery, no time was at all available for the delivery of a payment schedule.

[42] The Court believes that that was not a consequence intended by the Act. It may explain the reason why Mr Dalzell when delivering his first payment schedule noted that the due date for payment of the acknowledged sum of \$32,482.55 was to be 20 August 2011 i.e. 20 working days after delivery was complete.

[43] Mr Quinn contended that the purchase order (the only document at all which contained the name of Mr Giddy in communications between the parties at relevant times, was in fact a counter offer in response to Ascot’s quote. The Court does not accept that view, notwithstanding that the second page of the quote contained that

box within which acceptance of the quote was to be indicated. The Court's view is that the purchase order represents nothing more than the acceptance of the offer made by the quotation provided by Ascot, albeit that the purchase order was for a lesser sum – it seems because some items quoted for had not been required.

[44] Therefore any terms and conditions contained in the purchase order in so far as they may be viewed as having varied Ascot's contract and requirements cannot be considered as having been incorporated into the contract. In fact the Court does not consider they do effect a change of the requirement for payment in full on delivery.

[45] To the extent that Absolute claims the contract works had not been completed as at 25 July 2011, the Court rejects claims that it is arguable that product was not completed until the payer was satisfied they were complete. The provisions and purpose of the Act do not recognise such an argument for such a principle would enable a payer to delay payment until it was absolutely content with the works. Also there is nothing in the parties' contract appearing to reserve the right to the payer to determine when completion occurred.

Agency

[46] The Court agrees with Mr Herbert that the issue is not whether there was an agreement between Absolute and Mr Giddy about the former acting as the agent of the latter. Rather the issue is whether, objectively from Ascot's position they considered Absolute was the agent of Mr Giddy.

[47] As a general rule when an agent makes a contract for a disclosed principal, the agent is not liable for the contractual obligations undertaken on behalf of the principal. Therefore the Court needs to be satisfied that Ascot had actual knowledge of the arrangement or otherwise that the arrangement for agency was clearly very obvious. Therefore, the issue is not about the relationship of Absolute and Mr Giddy – but how if at all evidence of an agency arrangement was provided to Ascot.

[48] In this case it has not been asserted that Absolute directly represented it was acting as Mr Giddy's agent. Instead the evidence tends to suggest that Absolute 'must have known' of the agency arrangement.

[49] What the Court needs to focus upon is the presence or absence of evidence to suggest Absolute at all times acted as an agent.

[50] In his submissions Mr Quinn highlighted a conflict of an important kind wherein Mr Dalzell claimed to have advised Mr Sim of his agency whereas Mr Sim stated clearly that he was never told that anyone other than Absolute was the customer. Curiously, in Mr Dalzell's reply affidavit there was no reference to this conflict as the Court would have surely have expected it. Mr Dalzell had an opportunity to contradict Mr Sim but he did not.

[51] Absolute asserts that it is common practice for a quantity surveyor to be an agent for the builder. But, there is no evidence before the Court to support that claim.

[52] Absolute also focuses upon the documentation which in this judgment has already been referred to. This includes the purchase order. Absolute asserts that the purchase order contains an express statement that Mr Giddy is the principal on his behalf Absolute acts. The purchase order was the document produced by Absolute when confirming the order for manufacture and supply in response to Ascot's quote.

[53] In the Court's assessment and viewed in isolation from other documentation it might appear Mr Giddy was contracting for supply. But, the purchase order should not be considered independent of the other documentation. It clearly issued in response to the quote provided to Absolute. In that context the reference to the name Giddy on the purchase order is indeed just that, a reference, for Absolute's purposes.

[54] The purchase order refers to Ascot's quote and in many other respects by its very form it represents Absolute's response to Ascot – and does not suggest from that time on Ascot should consider its contract was with Mr Giddy – a person with whom Ascot did not have a signed agreement about trading terms or the provision of credit.

[55] Ascot's payment claim was invoiced to Absolute and refers to Ascot's quote to Absolute (albeit by mistakenly referring to it as "9813" instead of, as clearly it was intended, to be a reference to quote 9818).

[56] Finally and concerning the payment schedule to which the Court has already referred to in some detail, if Mr Giddy was the contracting party then why was Absolute's payment schedule written in its own name. Only an adverse inference can be drawn from the fact that this first payment schedule was not even disclosed by the first affidavit from Mr Dalzell. Its content is very significant for the Court's present purposes in assessing claims of agency.

[57] In overview a review of all the documentation contains no clarification of claims that Mr Giddy was intended to be the contracting party.

[58] An objective assessment of relevant evidence does not disclose that Absolute contracted with Ascot as Mr Giddy's agent, nor that Ascot was adequately advised about the nature of any such relationship.

The first payment schedule

[59] By it, Absolute indicated reasons for withholding part of the payment invoiced by Ascot's payment claim. It appears there may be sufficient information contained in the payment schedule to comply with s 21 of the Act.

[60] Ascot's position is that it is entitled to its payment claim sum as at 25 July 2011. The Court earlier referred to the fact that the provisions of the Act did not appear to contemplate the parties' contracting for the payment of a payment claim sum without providing the payer with an opportunity to issue a payment schedule.

[61] In the circumstances it seems appropriate to review the first payment schedule as a commitment by Absolute to pay the discounted sum referred to in it. It follows that the Court is not prepared to require payment of the full amount contained in the payment claim as a condition for extending further time within which to satisfy the statutory demand.

Summary

[62] The evidence does not disclose a substantial dispute for Absolute's failure to meet payment in terms of the statutory demand served upon it, save that in the particular circumstances of the case the sum to pay the statutory demand is \$32,482.55.

Decision

[63] The application to set aside the statutory demand is dismissed.

[64] Time for compliance of the statutory demand is extended until **4:00pm 24 April 2012** by which time the said sum of \$32,482.50 is required to be paid if the statutory demand is to be satisfied.

[65] Absolute is to pay Ascot's costs upon this application on a 2B basis together with disbursements approved by the Registrar.

Associate Judge Christiansen