IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2012-463-000640
[2013] NZHC 555

BETWEEN	GILLIES ELECTRICAL & REFRIGERATION LIMITED Plaintiff
AND	MOHAMMAD AL-MARIDI Defendant

Hearing: 19 March 2013

Appearances: G R Webb for the Plaintiff
WJC Wynyard for the Defendant

Judgment: 20 March 2013

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
20.03.13 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
G Webb, Nolans, Gisborne – G R Webb, Nolans, Gisborne - gordonw@nolans.co.nz
W Wynyard, Olphert & Associates Ltd, Rotorua – admin@olphert.co.nz

Application to set aside statutory demand

[1] The defendant's statutory demand dated 10 August 2012 was served upon the plaintiff on 27 August 2012. It demanded payment of $90,620 within fifteen working days. On 10 September 2012 the plaintiff applied to set the statutory demand aside. The grounds for its application included:

(a) There was a genuine and substantial dispute as to whether the debt was due.

(b) It has a counterclaim of at least equal amount.

(c) It is solvent and able to pay its debts as they fall due.

[2] The plaintiff is required to show an arguable basis upon which it is not liable for the amount claimed. In reviewing the evidence the Court needs to be satisfied that a plaintiff's claim of a good faith defence passes the threshold of credibility and at least has the appearance of sufficient reliability.

Background

[3] The plaintiff's claim arises against a background of a Construction Contract Act 2002 (CCA) contract dated 21 October 2009 and entered into between the plaintiff and Beta Refrigeration Limited. Contract work finished by May 2010 for on 3 May 2010 Mr J R Gillies and Mr A J Gillies for the plaintiff and Mr Al-Maridi met to discuss the balance due by the plaintiff for payment. Mr Al-Maridi trades as Beta Refrigeration. Although the contract referred to Beta Refrigeration Limited there has never been a registered company with that name. There appears not to have been any misunderstanding from the beginning that the plaintiff was subcontracting certain refrigeration engineering elements of its work to Mr Al-Maridi.

[4] The plaintiff places much significance on its claim that an agreement was reached at the 3 May 2010 meeting. Mr J R Gillies for the plaintiff deposed:

> The purpose of the meeting was to try and resolve the outstanding monies that were owed under the contract and consequential claims. At that stage, not all the costs which Gillies had incurred were known (some did not become apparent until later 2010) but to resolve matters, and despite the imbalance not being in Gillies favour, the three of us agreed to settle matters as they were, and that each party would make no further claim on the other... I distinctly recall the conclusion to that meeting because having agreed to leave matters where they were, we all shook hands.

[5] There is no reference in this letter to matters having been resolved earlier by agreement on 3 May 2010. Nor does the letter identify sums of money remotely like an amount well in excess of $200,000 which the plaintiffs now claim is available to them by way of set off or counterclaim. Yet, it is the plaintiff's claim that because Mr Al-Maridi did not more or less immediately respond to that letter that it also, albeit separately, is an agreement by which any dispute was resolved.

[6] Subsequently Mr Al-Maridi wrote to the plaintiff on 5 June 2010 with an explanation outline of his calculations of a balance payable to him. The response of the plaintiff's principals, J R and A J Gillies on 14 July 2010 raised issues regarding performance and delays; reference was made to costs incurred by the plaintiff which it says exceeded any amount that may have been due to Mr Al-Maridi. Their final paragraph noted:

> We have been advised by our solicitors that we would be justified in claiming payment of this full amount from you, which would have you owing Gillies Electrical a substantial sum of money after full credit is given for any amount owing under your sub contract. However, in an endeavour to resolve this matter simply and quickly, and without incurring any further unnecessary costs for either of us, Gillies Electrical is prepared to leave matters as they are. If you do not require Gillies Electrical to make any further payments to you, we will not make any claim against you for the additional costs Gillies Electrical has incurred to remedy the defaults under your subcontract. If this offer is not accepted, Gillies Electrical deserves the right to claim the full amount of the additional expenses it incurred in remedying your defaults and to ensure that the work was completed on time.

[7] The evidence discloses that on 18 September 2009 Mr Rouse of the head contractor had emailed Mr J A Gillies expressing concerns about delays. In overview of that email it appears those concerns refer mainly to the plaintiff's employee 'Ben', although in part they refer also to Mr Al-Maridi, who had also been an employee of the plaintiffs before subcontracting the works the subject of the parties CCA contract.

[8] Nothing further was heard from the defendant until the plaintiff received a letter of demand from EC Credit Control dated 20 June 2012 demanding the sum of $9,675. In response to that, the plaintiff's solicitor initially wrote:

> This matter has been a longstanding dispute between our client and Mr Al-Maridi.

[9] There was no mention by the solicitor of matters having earlier been resolved by agreement. Then later on 26 June 2012 the plaintiff's solicitor wrote to EC Credit Control raising concerns about Mr Al-Maridi's performance as a subcontractor which caused cost and loss to the plaintiff. The lawyer noted:

> As a consequence of having to take this additional action, Gillies Electrical incurred significant additional costs because of Mr Al-Maridi's failure to perform his sub-contract. Those costs are several times the $9,765 being sought by Mr Al-Maridi. If Mr Al-Maridi pursues his claim, then Gillies Electrical will be counterclaiming for its additional costs. In our view, it would be unwise for Mr Al-Maridi to pursue any claim he believes he has against Gillies Electrical.

[10] Again there was no reference in the lawyer's letter to the parties' dispute having been settled earlier on 3 May 2010 or by the terms of a letter dated 14 July 2010.

[11] In response to the lawyer's letter Mr Al-Maridi wrote on 27 June 2012 advising inter alia that the amount being sought on his behalf through EC Credit Control was "for a job that was not done under the original contract clause this is a separate job".

[12] The defendant's case is that the amount which was the subject of the statutory demand was that which was owed pursuant to the parties CCA contract, and did not include the amount of $9,765 being pursued on his behalf by EC Credit Control.

[13] Some confusion has been caused in relation to what the defendant says is a separate claim for $9,675 inclusive of GST. The defendant says this was the subject of a separate contractual arrangement which was not part of the CCA contract because it related to work not covered by the CCA contract. The plaintiff says it is not a separate claim but is included in the amount for which the defendants CCA payment claim dated 29 June 2012 issued and which is the subject of the defendant's

statutory demand. The Court is satisfied from the evidence that indeed the amount in question is the subject of a second claim and is not included in the amount sought as due under the CCA contract for which a payment claim issued and which was the claim in the defendant's statutory demand. The sum of $9,765 is subject to a separate claim filed in the Disputes Tribunal. Although the separate claim could have been included in the payment claim dated 29 June 2012, there was no obligation upon the defendant to do so.

[14] It was only in correspondence involving lawyers at about the time the defendant's statutory demand was issued that claims were advanced on behalf of the plaintiff that their dispute had been resolved – and this in the context of claims that the CCA could not apply because there was no longer any contract between the parties.

Overview of plaintiff's opposition

[15] It begins with a claim that the parties settled their dispute on 3 May 2010 and/or as is evidenced by the plaintiff's letter dated 14 July 2010, or that it is reasonably arguable this was so. In any event because it is said the defendant took no action for about two years following the letter of 14 July 2010 he, by his silence, is now estopped from arguing that no agreement had been reached. Therefore the contract was at an end and none now exists which could be the subject of a CCA claim. But, if there was no agreement to settle then a right of offset or counterclaim arises in a sum much larger than the defendant claims to be owing pursuant to its statutory demand because notwithstanding s 79 of the CCA, s 290 of the Companies Act preserves a claim for set off or counterclaim. Regardless, there are significant technical deficiencies with the defendant's claim which should encourage a Court to be hesitant about confirming the existence of a right to claim.

There was an agreement to settle

[16] The plaintiff says an agreement was reached on 3 May 2010. The defendant had travelled some distance to be at the meeting which was organised to discuss the defendant's claim for payment. The plaintiff claims there was reference in general

terms to costs it had incurred due to the defendant's work performance. Mr J A Gillies said that when an agreement was reached, the parties shook hands.

[17] The plaintiff asserts it is strongly arguable that its letter of 14 July 2010 amounted to an agreement to settle because there was silence for almost two years after that letter before the defendant took further action to obtain recovery from the plaintiff. The plaintiff also says that the meeting on 3 May settled all matters. If however there was no agreement then the plaintiff says the defendant is estopped from pursuing his claim because he has been silent regarding the plaintiff's compromise proposal.

[18] The plaintiff's case is that the essence of the 14 July 2010 letter is a 'mutual forbearance to sue'; that the defendant was silent for two years and the plaintiff assumed he had agreed; that the silence, given the wording of the plaintiff's letter, was a promise or representation; that it was intended to end the parties contractual relationship and suspend their ability to enforce each of their rights against the other; that the defendant knew it was acted upon because the plaintiff did not issue proceedings against him for a much larger amount; that the plaintiff altered its position in reliance on the representation and that it did not seek to enforce its rights under the contract; and that the plaintiff suffered a detriment as a result because it forewent trying to recover the difference between what it was owed less what the defendant claimed.

There is a substantial dispute giving rise to a right of set off or counterclaim of at least equal amount

[19] The plaintiff says if there was no settlement agreement it has a counterclaim that could amount to $224,586.95; that s 290(4) of the Companies Act 1993 (the Act) gives the Court a discretion to set aside a notice of demand where there is a substantial dispute as to whether or not the debt is due or owing.

[20] The plaintiff's case challenges claims of primacy being given to s 79 of the CCA. Whilst acknowledging the pre eminence given to s 79 by the High Court in

Volcanic Investments Ltd v Demsey & Wood Civil Contractors Ltd [1] followed, as plaintiff's counsel acknowledges, by a large number of higher court authorities since, this Court is invited to reconsider that approach in light of the judgment in *Silverpoint International Ltd v Wedding Earth Movers* [2].

[21] Counsels submission is that s 79 CCA cannot trump section 290(4)(b) of the Act. Counsel submits that s 79 is concerned with "any proceedings for the recovery of a debt under section 23 or section 24 or section 59 which refer to proceedings for recovery of a sum of money in any Court; that the Court of Appeal in *Layward* [3] (whilst preferring the *Volcanic* approach) did not thoroughly address the question of whether a statutory demand or an application to set aside the statutory demand is a proceeding for the recovery of a debt.

There are significant technical deficiencies with the defendant's claim

[22] The payment claim is dated 29 June 2012 and required payment on or before 29 July 2012. Therefore payment was required inside the statutory 20 working day period stipulated for in section 18 of the CCA.

[23] The contract is between the plaintiff and Beta Refrigeration Ltd whereas the progress claim is from the defendant who trades as Beta Refrigeration, and is not from the company that contracted with the plaintiff.

[24] Mr Al-Maridi, the named creditor in the payments claim is not a party to the contract and if the plaintiff paid Mr Al-Maridi it would not extinguish the alleged act because under the construction contract it is said to be owing to another i.e. Beta Refrigeration Limited.

[25] The payment claim dated 29 June 2012 refers to a contract between the plaintiff and Beta Refrigeration Limited and the statutory demand is based on non payment of the amount claimed under that payment claim; that therefore the issuer of

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[1] (2005) 18 PRNZ 97 (HC).
[2] 23 April 2007 CIV 2007-404-104, Doogue AJ.
[3] *Layward v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243.

the payment claim and the statutory demand is not a party to the construction contract.

The statutory demand claim is oppressive

[26] The plaintiff claims there is a substantial injustice based on the fact the amount claimed includes a claim for costs and interest which substantially alters the amount required to be paid.

In summary that the Court should exercise its discretion to set aside the statutory demand

[27] Counsel submits that the Court should appropriately weigh the factors of:

(a) A strong likelihood there was an agreement to settle.

(b) The defendant's approach to leave matters in abeyance for as long as he did.

(c) That there is a substantial dispute; and because of the technical difficulties.

(d) That the Court should be minded to exercise its discretion to set aside the statutory demand.

Discussion

The separate claim

[28] It is clear that the claim of $9,765 (inclusive of GST) does not form part of the claim for which the statutory demand issued in respect of the defendant's payment claim of 29 June 2012. The separate claim was for additional work commenced in February 2010 and post the contract of 21 October 2009 upon which the defendant's claim is based. The evidence is clear that the separate claim is the subject of a separate proceeding which is before the Disputes Tribunal. The separate

claim has never been included in the defendant's payment claim of 29 June 2012 upon which the statutory demand is based.

Was there a settlement of the contract?

[29] The Court agrees with Mr Wynyard that there has been no settlement of the contract concerning the defendant's CCA payment claim issued on 29 June 2012 and upon which the statutory demand is based. The plaintiff claims its issues with the defendant were resolved by its letter dated 14 July 2010 but earlier, by its letter dated 22 June 2010, the plaintiffs noted the matter was now with their lawyer and invited the defendant to communicate with him. When the lawyer was contracted he appeared to know nothing of the matter in dispute.

[30] Regarding a claim by the plaintiff of an agreement on 3 May 2010 it was not until 30 August 2012 that it was asserted there was an agreement reached more than two years earlier. There is no reference in the letter dated 14 July 2010 to an earlier agreement having been reached. In any event claims of a 3 May 2010 agreement occurred in circumstances where the plaintiff's account of a set off or cross claims were not articulated except in general terms and at a time when the measure and responsibility for these was unclear.

[31] The plaintiff's lawyers response dated 22 June 2012 to EC Credit Control on behalf of the defendant, did not suggest that any settlement had been concluded between the parties. Indeed, the plaintiff's lawyer's letter four days later on 26 June 2012 appears to reject claims of a settlement between the parties – because it indicated that there was a dispute between them.

Does the CCA apply?

[32] In this case there is insufficient evidence to suggest the defendant ever accepted that he owed the plaintiff a substantial sum of money. The plaintiff's claims are based on claims of the head contractor which focussed much more upon the actions of Ben the plaintiff's employee rather than upon the actions of Mr Al-Maridi.

Does the principle of estoppel apply?

[33] The plaintiff says that if there was no agreement and the contract still exists then it would be inequitable to permit access to the defendant to the CCA recovery process. It says its letter of 14 July 2010 was worded as an offer and that since because the defendant had refrained from enforcing his rights for nearly two years it was reasonable for the plaintiff to assume the defendant had promised to forbear from claiming further. Estoppel can operate in situations where there has been silence or inactivity.

[34] The Court does not accept principles of equity apply in this case. The letter for 14 July 2010 is little more than an invitation to "if you won't we won't". There is no suggestion of any time limit within which the defendant should have indicated his acceptance of an agreement not to act, much less by which date that ought to be assumed and in the outcome of which an agreement was reached.

[35] Silence can be an indicator of estoppel in appropriate circumstances but there is nothing in this case to suggest that such silence nullified the defendant's payment claim. Also there is nothing in the CCA which sets a time limit for the lodging of payment claims after completion of a construction contract.

[36] It was not until the plaintiff's application to set aside the statutory demand that an issue of estoppel was raised. It was not the subject of the plaintiff's solicitor's response to claims on behalf of the defendant's credit representative when the payment demand under the separate contract was made.

Does the CCA apply?

[37] It is the plaintiff's position that the letter of 14 July 2010 brought an end to the parties' contract and asserts therefore there can be no basis for the issue of a payment claim as was done by that which issued on 29 June 2012. The Court does not accept there was the agreement contended for. The CCA does apply notwithstanding that the payment claim in question issued more than two years after

the defendant's contract works had been completed. The CCA does not require delivery of a payment claim within a certain time after the conclusion of the contract.

[38] The plaintiff says that if the CCA does apply it can advance its set off counterclaim regardless. The plaintiff claims it spent an additional $224,586.95 to rectify defects with the defendant's contract performance.

[39] This position raises issues regarding the primacy of the CCA if at all over s 290 of the Companies Act. Earlier note was made of the argument that proceedings upon a setting aside application are not proceedings for recovery of a debt, as urged by Associate Judge Doogue in *Silverpoint*. [4]

[40] Notwithstanding the view taken by the learned Judge in the *Silverpoint* case it is clear from the authorities that whenever the Courts have directly addressed an apparent disagreement concerning those provisions it has adopted the position that the CCA does not admit any dispute of a payment claim other than by the process prescribed by it for that purpose and in the absence of such process being engaged counterclaims and set off claims may not subsequently prevent the operation of legislative requirements for a payment claim to be met. That does not preclude such set off and counterclaim being raised at a later date but it is clear it does not prevent a claimant receiving payment of a claim when such dispute has not been engaged in terms of CCA's requirements.

[41] The policy and purpose of s 79 of the CCA is plain. Equally clear is the fact that those objectives would be at severe risk of a payee who has not engaged the CCA challenge process but who remains able nonetheless to frustrate payment of the amount due of it.

[42] It is clear that case authority supports the view that s 79 of the CCA prevails over the provision of s 290(4)(b) of the Companies Act to the extent that claims of set off and counterclaim are precluded from consideration if a payee has not, as in this case the plaintiff did not, file a payment schedule in response to the payment

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[4] Supra.

claim in which schedule detail is required to show why the payment claim is challenged.

[43] In this case had the plaintiff filed a payment schedule then in all likelihood the setting aside application could have been avoided because the statutory demand would not have issued because the parties dispute was unresolved.

[44] The plaintiff's own failure to engage the CCA process explains why it has fallen victim to a rigorous process.

[45] These comments notwithstanding, the Court does not accept on the evidence available to it that there is sufficient evidence of a set off or counterclaim, much less in an amount sufficient to challenge the statutory demand claim sum. As previously indicated these claims are vague and unparticularised.

Do deficiencies in the process preclude recovery?

[46] The plaintiff claims the defendant's payment claim is deficient in a number of respects.

[47] The payment claim did require payment within the statutory 20 working day period. However, no steps in opposition were taken by the defendant until well after the 20 day period had expired. In the circumstances the Court considers no breach of s 18 of the CCA arises.

[48] Although the defendant is not the limited liability company referred to in the CCA it is clear the parties engaged the contract upon the basis that it bound the defendant and all obligations involved committed the defendant in absence of there being a limited liability company. No issue in this regard has been raised except upon the plaintiff's application. Indeed, before then, the plaintiff's solicitor referred to the matter as a "minor, but related matter".

[49] To the extent that the defendant's payments claim (reiterated by its statutory demand) includes elements of costs and payment of interest, they are not sufficient reasons to disallow it to the extent of striking out a statutory demand.

[50] Those factors are within the discretion of the Court to make appropriate allowance for. They should not be grounds for claiming the statutory demand is a nullity.

Conclusions

[51] The defendant has not compromised his claims by agreeing not to proceed against the plaintiff, in consideration of the plaintiff's undertaking not to pursue a contract performance claim in a much greater amount. The evidence does not seriously suggest there was such an agreement.

[52] Despite the plaintiff's claims of a substantial dispute, those cannot be admitted pursuant to ss 19 – 24 of the CCA in circumstances where following the issue of a payment claim the plaintiff has not taken appropriate steps to respond. In those circumstances the requirements of the CCA apply and the plaintiff must resort to whatever recourse it claims in respect of a set off or counterclaim but not at the expense of its obligations to meet payment of the defendant's payment claim.

[53] This is not an appropriate case for the Court to consider that because there is a claim of a substantial dispute, therefore a properly issued payment of claim should be deferred for later dispute pursuant to the Act when a disputant payer has not availed itself of the strict CCA processes.

[54] In this case there is nothing to prevent the plaintiff from doing that which before now it could have done namely to commence proceedings for recovery of the alleged counterclaim. The provisions of the CCA do not prevent that.

[55] To the extent that the plaintiff's claims rely upon allegations of poor workmanship by the defendant, it is clear that the evidence is equivocal to the extent it can support claims against the defendant as opposed to claims against the plaintiff's own employees.

Judgment

[56] The plaintiff's claim in opposition to the defendant's acknowledged CCA rights, fails notwithstanding claims of poor work performance or an agreement to resolve those issues. The CCA prevails over s 290 considerations. Besides the evidence to support the plaintiff's claims does not achieve a requisite threshold of credibility, nor is sufficiently reliable for this Court to entertain an application to set aside a statutory demand.

Result

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

[58] The date for compliance with the defendant's statutory demand is extended until **5 April 2013**.

[59] Costs are awarded to the defendant on a 2B basis together with disbursements approved as by the Registrar.

Associate Judge Christiansen