IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-386

BETWEEN	GULF HARBOUR INVESTMENTS LIMITED Applicant
AND	Y GULF HARBOUR LIMITED (FORMERLY GLOBAL YACHT FINISHERS LIMITED) Respondent

CIV 2006-404-387

AND BETWEEN	MARINE PAINTING SOLUTIONS LIMITED Applicant
AND	Y GULF HARBOUR LIMITED (FORMERLY GLOBAL YACHT FINISHERS LIMITED) Respondent

Hearing: 13 March 2006

Counsel: GAD Neil for Applicants
SD Carpenter for Respondent

Judgment: 16 March 2006 at 10:00

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN
Application to set aside statutory demands

Solicitors: Meredith Connell, PO Box 2213, Auckland for applicants
Gaze Burt, PO Box 91 345, Auckland for respondent

[1] The respondent, formerly named Global Yacht Finishers Limited ("GYF"), served statutory demands on each of the abovenamed applicants on 17 January 2006. Those demands claim that $94,989.68 is due and owing by the applicants pursuant to payment claims under the Construction Contracts Act 2002 (the "Act"), such payment claims having issued on 6 December 2005. In the absence of any formal step being taken by the applicants pursuant to the Act the respondent served its statutory demand on the applicant companies.

[2] The respondent's position is that, as a matter of law (pursuant to the Act) there cannot be any substantial dispute that the debt is due and payable jointly and severally by the applicant companies.

[3] The applicants' application is made on the grounds that a substantial dispute exists as to whether any debt is owing or due; the plaintiffs have a counterclaim or set off; and the use of the statutory demand process is appropriate in the circumstances.

[4] An affidavit by Mr T Warren in support of the application chronicles the extensive background of the relationship between the applicants and the respondent. He details the reasons for the breakdown in the relationship between the parties and provides his assessment of it and the reasons in support of a claim that there is an arguable case to set aside the statutory demands.

[5] But for the provisions of the Act I would have no hesitation but to set aside the statutory demands. The question is whether because of the Act I am compelled to the contrary conclusion.

[6] Also, as noted, identical statutory demands have been served on separate companies. This raises the issue of a whether either or both of those companies has properly been served with the statutory demands and whether there is some doubt about which of the applicants contracted with the respondent and, therefore, whether

there is an arguable case for referring this matter to trial to determine the true identity of the contracting partner concerned.

Background

[7] Mr T Warren is the General Manager of both applicants and as well Gulf Harbour Marina Limited ("GHM"). GHM is the owner of Gulf Harbour Marina complex. Gulf Harbour Investments Limited ("GHI") has a contract with GHM to manage the marina and Marine Painting Solutions Limited ("MPS") is a company that was specifically incorporated to provide boat painting and other related services at the marina.

[8] In 2004 GHI resolved to commence business as a boat painting company operating from the Marina. It was envisaged that customers would contract directly with GHI for the provision of boat painting and related services and that those services would then be subcontracted to a reputable boat painting company. In that respect, and for that purpose, discussions were had with Mr J Hamilton of GYF in June 2005. Mr Warren recalls telling Mr Hamilton that GHI intended to commence an on-site business to provide anti-fouling, touch up and repair and repainting services.

[9] Mr Warren said he with Mr Hamilton on 13 July 2005 discussed the basis of a relationship between GHI and GYF. He said he informed Mr Hamilton it was his intention to incorporate a company through which to run the boat painting business and hence the reference in the Heads of Agreement naming the parties as GHI or "Nominee Company" and GYF. He said he informed Mr Hamilton that once the new company was incorporated GHI would nominate it as the principal to the agreement and that the contractual relationship would then be between the new company and GYF. According to Mr Warren, Mr Hamilton took no issue with what was proposed.

[10] Messrs Hamilton and Warren discussed matters including the duration of the relationship, projections of work, labour requirements and turnover. In general GHI would arrange the bookings and GYF would be expected to provide the skill and the

labour to handle the work subcontracted to them. The Heads of Agreement required GYF to contract solely to GHI and in effect to move into and to utilise its painting sheds and, within, its hard-stand in which yachts would be held whilst painting and related work was carried out on them. The Heads of Agreement referred to a fixed charge out rate payable to GYF and in addition it established the basis upon which the materials could be charged.

[11] The Heads of Agreement provided:

> Payment will be made to Global Finishes Yacht Limited on a weekly basis consisting of the cleared funds received in the preceding week. It is anticipated that this will be done on a Monday. Initial payments during the ramp-up period may be done on a twice a month basis for the initial four months or earlier, subject to agreement, after which the weekly payments will commence.
>
> Additionally:
>
> All quotations, invoicing and other contractual and financial communication with a customer will be undertaken by GHI in the capacity of a primary contractor.
>
> ...
>
> All customer invoicing and debt collection will be the responsibility of GHI.
>
> In the event that there is a quality control dispute between Global Yacht Finishes Limited and the boat owner or their representative as to the standard of work undertaken, then GHI will make a decision on the remedy. The decision on the dispute shall bind Global Yacht Finishes Limited ...

[12] Mr Warren said it was envisaged GYF would commence operating at the Marina on or around 1 August 2005. He said the new company, through which the boat painting business was to be run, was incorporated on 1 August 2005 and then, by email dated 25 August 2005, he provided confirmation that GHI nominated MPS as the principal to the agreement, which resulted in the commencement of a contractual relationship between GYF and MPS. He said following nomination MPS assumed the responsibility upon GHI pursuant to the Heads of Agreement that all quotations, invoicing and other contractual and financial communications with customers were undertaken .

Novation

[13] The applicants accept that the nomination of MPS as principal to the agreement in itself is not sufficient to create a contractual relationship between MPS and the respondent. The applicants state that in the circumstances novation clearly occurred and this had the effect of substituting MPS for GHI as a party to the agreement and discharging GHI from the contractual relationship. Although Ms S Warren, for the respondent, asserted she had always considered, and the respondent had always considered, that GHI remained party to the agreement as the principal contractor, the applicants say that the reason for that view has not been detailed; therefore the claim of Mr Warren to the contrary remains unchallenged.

[14] In submissions to me Mr Carpenter submitted that both applicant companies were jointly and severally liable for the debt. He said GHI remain liable as principal contractor when MPS became its "nominee" or agent under the contract, but without discharging GHI from the contract. He avers there is no separate document or writing that evidences the substitution of MPS for GHI. No distinct request was made by GHI and, at best, any implication from conduct is equivocal.

[15] I am not satisfied with the applicants' explanation of the events surrounding their claims that novation has occurred. GHI managed the marina facility and had control over the paint sheds, the hard-stand and other marine facilities made available to the respondent for the purpose of it carrying out its contract. It is not sufficient that Mr Warren may have indicated GHI's intention with a view to establishing a nominee for contract purposes, nor even to conduct business with the respondent through the instrument of MPS in circumstances where no formal acceptance of nomination has been sought, much less obtained.

[16] It is in rare circumstances that a court would accept evidence of conduct alone in support of a claim novation has occurred. What is required is conduct from which it can unquestionably infer that the respondent accepted the substitution of MPS under the contract so that no liability remained with GHI. I am not prepared to make that inference on the basis of the evidence available to this Court.

Does the Construction Contracts Act 2002 apply?

[17] The Act applies to every construction contract (with limited exceptions that have no application in this case) that relates to carrying out construction work in New Zealand (s 9). The term "construction contract" is defined in s 5 of the Act as follows:

> "Construction contract" –
>
> (a) Means a commercial construction contract or a residential construction contract; and
>
> (b) Includes any variation to the construction contract; but
>
> (c) Does not include the lease or licence under which a party undertakes to fit out, alter, repair or reinstate the leased or licensed premises unless the principal purpose of the lease or licence is the carrying out of construction work.

[18] The terms "commercial construction contract" and "residential construction contract" are defined in s 5 as follows:

> "Commercial construction contract"
>
> Means a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract.
>
> "Residential construction contract"
>
> Means a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract.

[19] The term "construction work" is defined in s 6 of the Act as follows:

> 6 Meaning of construction work
>
> (1) In this Act, unless the context otherwise requires, construction work means any of the following work:
>
> (a) the construction, erection, installation, carrying out, alteration, repair, restoration, renewal, maintenance, extension, demolition, removal, or dismantling of any building, erection, edifice, or structure forming, or to form, part of land (whether permanent or not and whether constructed wholly or partly on, above, or below ground level):

(b) the construction, erection, installation, carrying out, alteration, repair, restoration, renewal, maintenance, extension, demolition, removal, or dismantling of any works forming, or to form, part of land; including—

(i) any road, motorway, aircraft runway, wharf, docks, harbour works, railway, cableway, or tramway:

(ii) any canal, inland waterway, pipeline, reservoir, aqueduct, water main, well, or sewer:

(iii) any electricity, water, gas, or telephone reticulation:

(iv) any telecommunication apparatus or industrial plant:

(v) any installation for the purposes of land drainage or coast protection:

(c) the installation in any building or structure of fittings forming, or to form, part of land; including heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, security, and communications systems:

(d) the alteration, repair, maintenance, extension, demolition, or dismantling of the systems mentioned in paragraph (c):

(e) the external or internal cleaning of buildings and structures, so far as it is carried out in the course of their construction, erection, alteration, repair, restoration, or extension:

(f) any operation that forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraphs (a) to (d); including—

(i) site clearance, earthmoving, excavation, tunnelling, and boring; and

(ii) laying foundations; and

(iii) erecting, maintaining, or dismantling scaffolding or cranes; and

(iv) prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere; and

(v) site restoration, landscaping, and the provision of roadways and other access works:

(g) the painting or decorating of the internal or external surfaces of any building or structure.

(2) Despite subsection (1), construction work does not include any of the following work:

(a) drilling for or extracting oil or natural gas:

(b) extracting (whether by underground or surface working) minerals, including tunnelling or boring, or constructing underground works, for that purpose.

[20] For the purposes of their submissions both counsel have focused upon s 6(1)(g) and the respondent contends its contract was for the painting or decorating of the internal or external services of any structure. Although the preceding subparagraphs of s 6(1) (save for (6)(i)) each refers to buildings or structures "forming, or to form, part of land", subsection (1)(g) does not, neither does subsection (1)(e). The respondent contends therefore that those two subsections are in a category all of their own. It follows, submits Mr Carpenter that, in the absence of those words in subsection (1)(g) "construction work" can include work in relation to chattels, including boats and aircraft.

[21] The term "structure" is not defined in the Act. Mr Carpenter submits therefore the natural or ordinary meaning there should apply. He refers to the Compact Oxford Dictionary of Current English defining "structure" as:

> (1) the arrangement of and relations between the parts of something complex. (2) a building or other object construction from several parts.

[22] Mr Carpenter submits that a yacht is definitely included within the above definition as being "a thing constructed" and an "object constructed from several parts". Moreover, these definitions clearly include the concept of a chattel, rather than just an object fixed to land.

[23] Mr Carpenter notes that the contract works in this case do not come anywhere near the excluded categories of s 6(2) of the Act. Therefore if Parliament had wanted to exclude boats, aircraft or any other movable "structure" then it could have done so by specific exclusion as has been done in the Building Act 2004 (s 9) and Building Act 1991 (s 3) which are sister Acts to the Construction Contracts Act, being similar in their scope and application.

[24] Mr Carpenter refers to the Occupiers Liability Act 1962 defining "structure" to include "any vessel, vehicle, or aircraft" (s 2), for the purposes of making persons occupying or controlling such chattels liable for damage caused to visitors or invitees (s 3). The Earthquake Commission Act 1993 defines "residential building" to include "any building or part or a building, or other structure (whether or not fixed to land or to another building, part of structure) …" (s 2). Mr Carpenter submits this

Act could well apply to owners of yachts except for the fact that the Act specifically excludes them (along with aircraft and other movable chattels) under Schedule 1, something that the Construction Contracts Act does not do.

[25] Mr Carpenter submits that the essential purpose/policy of the Act (s 13) relates to subcontractors getting payment apart from whether the head contractor has been paid.

[26] Regarding the definitions of "commercial construction contracts" and "residential construction contract" which both use the phrase "the premises that are the subject of the contract", Mr Carpenter submits these do no more than delineate two different categories of construction contract for the purpose of assigning to each a different set of rights and obligations under the Act. Therefore "the premises that are the subject of the contract" is more a description of the background context/environment in which "construction works" take place. It should not therefore be read as confining the definition or scope of "construction work" under s 6 of the Act. It is submitted therefore that the phrase, "the subject of the contract" should be read as "the site or place of the construction work". For the purposes of the present case therefore the word "premises" and the definitions of "commercial construction contract" and "residential construction contract" mean that commercial premises owned by the applicants, including their hard stand in which the various vessels were held for the purpose of the contract works.

[27] I reach a different view than that advocated by Mr Carpenter. Having regard to the policy objectives of the Act, had it been intended to expand the scope of the Act to specifically include works on vessels or aircraft or indeed vehicles, buses or trains then it would have been a simple exercise for those types of things to have been included with the ambit of the Act.

[28] The general policy statement set out at the beginning of the explanatory note that accompanied the Construction Contracts Bill when it was first introduced into the House of Representatives on 15 May 2001 reads:

> This Bill is intended to facilitate prompt payment and regular payments within the construction industry. Typically, construction industry contracts

> provide for work to be paid after the work has been carried out. Payments are usually made by instalments as the work progresses, but they are very seldom made in advance. This pattern of payments often means that the developer, principal, or head contractor with cash flow problems may deliberately delay payment for work done and, in effect, use those further down the contractual chain (for example, subcontractors) to partly finance the construction project. It also means that, if a developer or principal becomes insolvent, head contractors and subcontractors may not be paid at all for the work that they have already carried out.
>
> Subcontractors are in a particularly vulnerable position because of two factors. The first is that most construction contracts contain provisions (commonly referred to as "pay when paid" and "paid if paid" clauses). That makes a party's obligation to pay dependent on that party first receiving payment from someone else. Subcontractors are often the ones who are affected the most by these provisions because it is not commercially feasible for them to impose "pay when paid" provisions in their contracts with their own employees and suppliers. Furthermore, subcontractors are not always aware whether firms further up the contractual chain have actually been paid or not. This provides an opportunity for head contractors to withhold or divert payments from the subcontractors for completed work. A second factor is that any right that an unpaid subcontractor might have to suspend work is often excluded by the terms of the construction contract. Thus, subcontractors are effectively unable to suspend work even if they have not been paid. If the head contractor's business fails after subcontractors have been carrying out work for some time without being paid, the consequences for subcontractors involved are significant, including business failure and job losses for the subcontractor's employees.

[29] I am not prepared to read down the word "premises" in the manner counsel suggests. The word "premises" is not defined in the Act but it is defined in the Concise Oxford Dictionary (9th Ed.) as follows:

> Premise … a house or building with its grounds and appurtenances; houses, lands, or tenements previously specified in a document etc.

[30] I accept Mr Neil's submission that the natural meaning of the word includes within its scope houses or buildings with their grounds and appurtenances, lands and tenements. When the word "premises" is considered in light of the definition of "construction work", which includes in effect all works that are carried out on land, it is evident that the natural meaning of the work was intended. It follows that a boat or vessel does not come within the ambit of the natural meaning of "premises". Therefore says Mr Neil, the agreement entered into between GHI and the respondent is not a "construction contract".

[31] A vessel is not a building and therefore to come within s 6(1)(g) it must be a "structure".

[32] Counsel inform me that the word "structure" has not been judicially considered either under the Act, or pursuant to the United Kingdom's Housing Grants, Construction and Regeneration Act 1996, or the New South Wales Building and Construction Industry Security of Payment Act 1999, both of which contain identical provisions to s 6(1)(g).

[33] In my view the natural and ordinary meaning of the word "structure" is a permanent, fixed, edifice in the nature of a building, that forms, or is to form, part of the land. By comparison a boat, a ship and a vessel are usually defined by reference to their association with water and their means of propulsion.

[34] I accept Mr Neil's submission that the purpose of the Act was explicitly designed to reform the construction industry's methods of paying contractors and subcontractors, as well as providing new dispute resolution procedures and remedies for the recovery of moneys due. The provision's aim is to protect traditionally vulnerable construction subcontractors from the inequitable payment practice of those above them in the contractual chain. A decision that the Act applies beyond land base construction and includes the painting or decorating of a vessel, could lead to the opening of the flood gates to industries well outside the scope of this policy. If structures referred to vessels then it should also refer to cars, buses, aeroplanes and trains. Therefore s 6(1)(g) would also have to have application to a wide variety of contractors including automotive engineers, vehicle painters and upholsterers. Even those that clean such transport vehicles in the course of their construction, erection, alteration or repair would also come within the ambit of the Act. In *Staveley Industries Plc v Odebrecht Oil & Gas Services Limited* (unreported, United Kingdom High Court, Queens Bench Division, Judge Richard Harvey QC, 28 February 2001) it was held that construction contracts as defined by the Housing Grounds Construction and Regeneration Act 1996 did not extend to ship building.

[35] Contrary to the submissions of Mr Carpenter that s 6(1)(e) and s 6(1)(g) are stand alone provisions, I take the view that although they do not expressly state that

the buildings or structures must be attached to land the absence of those relevant words is impliedly clarified by the preceding subparagraphs of the section, all of which do contain this requirement, and which by their express words exclude reference to a vessel.

[36] In my judgment a boat or vessel is not a "structure" in terms of s 6(1)(g). Consequently the work carried out by the respondent does not fall within the definition of "construction work" and the Act does not apply.

Other matters

[37] In my opening remarks I indicated that if the Construction Contracts Act did not apply to the contract between the parties then there was sufficient evidence before the Court to indicate there was a substantial dispute about whether or not the debt was owing or is due. That position was not challenged in submissions before me. I comment that in applications to set aside statutory demands the Court expects some information to support a claim that the company upon which a demand has been served has no ability to pay its debts. The liquidation process is after all an inquiry into the solvency of the debtor company and not merely a process for use to collect debts.

[38] In this case there is some information (but not very much) from which to draw an inference that MPS is unable to pay its debts. There is no information at all to support that conclusion concerning GHI.

Judgment

[39] The statutory demands are set aside.

[40] Costs are payable by the respondent to the applicants on a Category 2B basis together with disbursements as fixed by the Registrar. If counsel cannot agree upon the quantum of costs then I will make a decision upon memoranda received by

the Court within 21 days of this date.

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Associate Judge Christiansen