

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

**CIV-2014-404-001388
[2014] NZHC 3090**

IN THE MATTER OF a statutory demand issued under s 289 of
the Companies Act 1993

BETWEEN LEIGHTON CONTRACTORS PTY
LIMITED
Applicant

AND SHARP CONCRETE CUTTERS &
DRILLERS LIMITED
Respondent

Hearing: 29 September 2014

Appearances: A E Murray for Applicant
E St John for Respondent

Judgment: 5 December 2014

**JUDGMENT OF ASSOCIATE JUDGE OSBORNE
as to statutory demand**

*This judgment was delivered by me at 9.00 am on 5 December 2014
pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Introduction – Sharp’s demand on payment claims

[1] The applicant (Leighton) applies for an order setting aside a statutory demand issued by the respondent (Sharp).

[2] The demand arises out of a construction contract dated 11 September 2012 which is subject to the Construction Contracts Act 2002 (the Act). The estimated completion date was April 2013; the work was in fact completed in July 2013.

[3] Sharp’s demand is stated to represent the balance of payment claims issued under the Act in response to which, it alleges, Leighton failed to provide payment schedules in accordance with the Act. Leighton accepts that each invoice issued by Sharp constituted in terms of s 20 of the Act a valid payment claim. The parties agree as to the dates on which the payment claims were made. With the exception of two claims of 1 July 2013, the timing of the claims and responses are such that the statutory demand either entirely stands or entirely falls, depending upon which party’s argument succeeds.¹ (The invoices are listed in Table 1 at [16] below together with other details relating to them).

[4] It is common ground that, regardless of the Court’s determination on the parties’ arguments, the statutory demand requires adjustment (in relation to the 1 July 2013 claims). It is also common ground that the cash payment schedules issued on the dates referred to in Table 1 at [16] below constituted valid payment schedules under s 21 of the Act.

The issue

[5] The issues in this proceeding are as to the effective date of each payment claim. Leighton asserts that the claims became effective on the 25th day of the month. Sharp asserts that the effective date was 20 working days from service.

¹ See below at [16]–[17].

[6] Counsel agree that to resolve that issue, the Court must answer two questions:

- (a) did the contract provide a payment claim/payment schedule regime in place of the default regime under the Act?
- (b) to the extent that the contract purports to include such a regime, were the terms of the contract invalid as being in conflict with mandatory provisions of the Act?

[7] Two other grounds of opposition were not pursued by Ms Murray for Leighton. First, Leighton abandoned an argument that the statutory demand had not adequately identified the debt. Secondly, Ms Murray did not rely on a ground which had asserted that a statutory demand should not be used to recover a debt. Had that ground been pursued, I would have rejected it. Although older authorities can be found to support such a broad proposition, it is no longer good law in relation to debts which are indisputably owed.

Payment claims and payment schedules – the statutory regime

[8] Section 20 of the Act provides for payment claims and s 21 provides for payment schedules.

[9] Section 22 makes the payer liable to pay the claimed amount in the following circumstances:

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within—
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[10] Section 23(2) of the Act provides that when the payer becomes liable under s 22 of the Act, the payee may recover in any Court as a debt due the unpaid portion of the claimed amount and the actual and reasonable costs of recovery awarded by the Court.

[11] The Court of Appeal has very recently, in *Watts & Hughes Construction Ltd v Complete Siteworks Co Ltd* referred to “the Draconian consequences ... of not serving a Payment Schedule [in time]”.² In doing so, the Court adopted passages from two earlier cases which had identified the “pay first/argue later” philosophy of the Act and emphasised the “absolute and irreversible consequences” which result from not providing a compliant payment schedule.³

The contract

[12] The form of contract adopted by Leighton is entitled “Minor Works and/or Services Contract” and appears to be a standard form of contract adopted by Leighton for what it calls minor works and services.⁴ The contract expressly refers to a number of Acts of Parliament but does not refer to the Construction Contracts Act.

[13] Leighton relies on cl 12 of the contract for the proposition that the contract provides its own procedure in relation to invoices and payments which ousts the default provisions of the Act. Clause 12 provides:

12 Progress Claims and Payments

12.1 ...

12.2 Progress claims shall be submitted in a form acceptable to Leighton on or before the time for submission of claims for payment stated in the Annexure or, if no time is stated, on the last business day of each month (relevant time). If the Contractor submits a progress claim earlier than the relevant time, the Contractor agrees that the progress claim shall not be taken to have been submitted until the relevant time and that the early submission of the progress claim shall not require Leighton to make a determination or payment in respect of

² *Watts & Hughes Construction Ltd v Complete Siteworks Co Ltd* [2014] NZCA 564 at [33].

³ *Salem Ltd v Top End Homes Ltd* CA 169/05, 12 December 2005 at [22] and *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC) at [111].

⁴ It is described by Leighton as “Document No. D-PR-4102 Rev 14”.

the progress claim any earlier than would have been the case if the Contractor had submitted the progress claim at the relevant time.

- 12.3 Progress payments shall be made within the period for payment stated in the Annexure for Leighton's determination of the value of the matters referred to in clause 12.1 less the amount paid in previous progress payments.

Leighton may, at its discretion, provide a statement to the Contractor of its determination of the amount payable in respect of a progress claim submitted by the Contractor at any time prior to the time for payment of the claim. The statement may take any form.

- 12.4 At Leighton's discretion, payment shall be made by electronic funds transfer or by cheque. The date of the payment shall be regarded as the date on which the funds are cleared by Leighton for payment, the funds being available to the Contractor within 2 business days thereafter.

- 12.5 The Contractor shall not submit a claim for payment to Leighton unless:

- (a) Its employees and subcontractors have been paid all amounts due and payable to them;
- (b) It has paid all workers compensation insurance premiums due and payable by the Contractor in connection with the Works and/or Services;
- (c) It has paid all payroll tax due and payable in respect of wages paid or payable to employees engaged in connection with the Works and/or Services; and
- (d) It has complied with all statutory obligations in connection with the Works and/or Services.

- 12.6 Leighton may, at any time and as a condition precedent to payment, require the Contractor to provide it with evidence to Leighton's satisfaction of the Contractor's compliance with clause 12.5.

[14] The "Annexure" referred to in cl 12 provides:

Payment Terms

(clause 12)

- (a) **Time for submission of claims for payment:**

(Cross the applicable box and complete (i) if applicable)

- (i) 25th day of month
- (ii) alternative Fridays

(b) **Period for Payment:** 30 days

[If (a)(i) applies the period for payment shall be the Friday following the number of days stated in (b) from the last day of the month in which claims are submitted.

If (a)(ii) applies the period for payment shall be the Friday following the number of days stated in (b) from the time for submission of claims (in this case, the period for payment to be stated in (b) should be 14 days).

Claims not submitted in time shall default to the next claim period.]

Sharp's invoices and Leighton's payment schedules

[15] The invoices which are the subject of Sharp's statutory demand cover the period 1 April 2013 to 16 July 2013.

[16] Table 1 which follows sets out:

- (a) the date of invoice;
- (b) the effective date of invoice if the 20th working day from service (Sharp's case) is adopted;
- (c) the effective date of invoice if the 25th day of the month (Leighton's case) is adopted;
- (d) the due date for a payment schedule if Sharp's case is accepted;
- (e) the due date for a payment schedule if Leighton's case is accepted;
and
- (f) the date on which Leighton issued a payment schedule.

Table 1

	Date of Invoice	Effective date if 20th working days from service	Effective date if 25th working day of month	Date Sharp alleges PS due	Date Leighton alleges PS due	Payment Schedule issued
April Invoices	01/04/2013	30/04/2013	25/04/2013	20/05/2013	31/05/2013	31/05/2013
	01/04/2013	30/04/2013	25/04/2013	20/05/2013	31/05/2013	31/05/2013
	02/04/2013	01/05/2013	25/04/2014	20/05/2013	31/05/2013	31/05/2013
	14/04/2013	13/05/2013	25/04/2013	20/05/2013	31/05/2013	31/05/2013
	16/04/2013	15/05/2013	25/04/2013	20/05/2013	31/05/2013	31/05/2013
June Invoices	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	31/05/2013	01/07/2013	25/06/2013	20/06/2013	02/08/2013	24/07/2013
	01/06/2013	01/07/2013	25/06/2013	20/07/2013	02/08/2013	24/07/2013
	05/06/2013	03/07/2013	25/06/2013	20/07/2013	02/08/2013	24/07/2013
	07/06/2013	05/07/2013	25/06/2013	20/07/2013	02/08/2013	24/07/2013
	11/06/2013	09/07/2013	25/06/2013	20/07/2013	02/08/2013	24/07/2013
July Invoices	01/07/2013	29/07/2013	25/07/2013	20/08/2013	30/08/2013	24/07/2013
	01/07/2013	29/07/2013	25/07/2013	20/08/2013	30/08/2013	24/07/2013
	16/07/2013	13/08/2013	25/07/2013	20/08/2013	30/08/2013	26/08/2013

[17] The entries in Table 1 in relation to the two invoices of 1 July 2013 indicate that Leighton has no ground to contest the fact that those invoices represent debts due and owing – Leighton’s payment schedules in relation to them in time whichever party’s case as to the effective date of claim is accepted.

Leighton’s position

[18] For Leighton, Ms Murray submitted generally that there is a substantial dispute as to whether the sums invoiced by Sharp became, by operation of the Act, debts due and owing.

[19] For that general proposition, Ms Murray submitted that the contract provided a payment claim/payment schedule regime, which excluded the default regime under the Act.

Sharp's position

[20] For Sharp, Mr St John submitted that Leighton cannot dispute the fact that the sums invoiced by Sharp are due and owing because:

- (a) the contract did not provide a payment claim/payment schedule regime, with the result that the default regime under the Act applied; and
- (b) to any extent (which is denied) that the contract purported to include a regime, that regime was invalid as being in conflict with mandatory provisions of the Act.

The test to be applied in relation to setting aside a statutory demand

[21] Leighton does not have to satisfy the Court of the correctness of its arguments. The applicable test under s 290(4)(a) Companies Act 1993 is that the Court must be satisfied that there is a substantial dispute whether or not the debt is owing or is due. In the way the test is frequently put, Leighton as applicant must show that there is arguably a genuine substantial dispute as to the existence of the debt.

Issue 1 – did the contract provide a Payment Claim/Payment Schedule regime in place of the default regime under the Act?

[22] Clause 12 of the contract⁵ is headed “Progress Claims and Payments”. With repeated reference to “progress claims” it provides a mechanism by which any progress claims must be submitted. Through cl 12 incorporating the Annexure to the contract,⁶ the time for submission of any progress claim under cl 12 is the 25th day

⁵ Above at [13].

⁶ Set out above at [14].

of the month. (That period is to be contrasted with “20 working days after the payment claim is served” under the default regime provided in s 22(b)(ii) of the Act).

[23] For Leighton, Ms Murray relies upon the following provisions of the Act:

14 Parties free to agree on progress payment provisions in construction contract

The parties to a construction contract are free to agree between themselves on a mechanism for determining—

- (a) the number of progress payments under the contract:
- (b) the interval between those payments:
- (c) the amount of each of those payments:
- (d) the date when each of those payments becomes due.

20 Payment claims

- (1) A payee may serve a payment claim on the payer for each progress payment,—
 - (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
 - (b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).

21 Payment schedules

- (1) A payer may respond to a payment claim by providing a payment schedule to the payee.
- (2) A payment schedule must—
 - (a) be in writing; and
 - (b) identify the payment claim to which it relates; and
 - (c) indicate a scheduled amount.
- (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
 - (a) the manner in which the payer calculated the scheduled amount; and
 - (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and

- (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within—
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[24] Ms Murray submits that at least arguably the parties exercised their freedom to determine details in relation to progress payments (under s 14 of the Act). In particular, she says that the combination of cl 12.3 and the Payment Terms in the Annexure represent a contractual provision for the date when each payment would become due.

[25] Ms Murray submits that Sharp was permitted, in terms of s 20, to serve a payment claim for each progress payment at the end of the period specified in the contract. By the combined effect of cl 12.2 and the Payment Terms under the annexure, that meant the 25th day of the month. Clause 12.2 of the contract, by its terms, means that any progress claim (for a progress payment) submitted earlier than the 25th day of the month is taken to have been submitted on that day.

[26] Ms Murray submits that it is arguable that the default regime for progress claims under the Act was replaced in this case by the contractual provisions.

[27] Mr St John, for Sharp, submits that the 20 working day (default) requirement of payment under s 22 of the Act applies in this case because there are no relevant contractual provisions to replace it. Mr St John submits that the contract refers only to progress claims and not to payment claims. He notes the express reference to payments but not to payment schedules. He submits that the contract does not restrict the date by which payment claims can be made and the date on which they become effective.

Discussion

[28] The contract expressly makes provision in cl 12.3 for progress payments, requiring that they be made within the period for payment stated in the Annexure (“30 days”). The annexure also provides that the claims for payment are to be submitted on the “25th day of month”. That is a mechanism for determining (in terms of s 14(b) of the Act) the interval between payments.

[29] When it comes to service of a payment claim, (which s 20(1) of the Act expressly provides a payee may serve for each progress payment) Leighton’s reliance is upon cl 12.2 which speaks in terms of “progress claims”.

[30] The effect of Mr St John’s submission is to suggest that the Court should conclude that when the parties provided for progress claims in relation to progress payment entitlements, the parties were not speaking of the same concept as that of “payment claims” under s 20 of the Act.

[31] I find it at least arguable that what the parties set out in the contract was a regime whereby payment claims were submitted for each progress payment. Although in cl 12.2 the parties referred to “progress claims” rather than “payment claims”, they equally referred (in cl 12.5) to “a claim for payment”. An indication that those involved in the industry are likely to have contemplated that progress claims would fall within the concept of “payment claims” under the Act can be found in the text by Geoff Bayley and Tomás Kennedy-Grant, *A guide to the Construction Contracts Act* at where the authors note that the term “payment claim” is defined in s 5 of the Act simply as “the claim referred to in s 20”. They go on to observe in relation to progress claims:⁷

Within the construction industry interim claims for payment have generally been described as “progress claims” while the last claim has been described as the “final claim”. The description “payment claim” introduced by the Act will cover both types of claim.

[32] I do not find that it is clear beyond argument that the particular wording used in the contract in relation to payments on progress claims (whether “progress

⁷ Geoff Bayley and Tomás Kennedy-Grant *A guide to the Construction Contracts Act* (2nd ed, Rawlinsons Media Ltd, 2009) at 64.

payments” or “a claim for payment”) was intended to be something other than the “payment claim” provided for in s 20 of the Act.

[33] Mr St John also submitted that there is a legal difficulty in treating the progress claims as payment claims under the Act. Mr St John submits that the effect of cl 12.2 of the contract is to deem a claim to have been served on a date after the date on which it was in fact served. Mr St John submitted that to allow the parties to “deem” alternative dates would undermine the purpose of the Act as if deeming provisions were valid there would be no reason why a clause could not equally deem a payment claim to have not been made, say until the end of the contract.

[34] I do not find that argument compelling. The key issue is whether the contractual arrangement for progress payments represents a mechanism for determining the matters which s 14 of the Act gives the parties freedom to determine. It is arguable in this case that what cl 12.2 provides is an interval between payments, being the calendar month interval which follows from the stipulation of the 25th day of each month as the date for submission of claims. In turn, the parties have agreed that claims submitted at that interval are then due for payment 30 days after the 25th day of the month. The interval between claims and payments and the due date of payments under cl 12.2 of the contract fits comfortably with the Act’s first purpose, namely to facilitate regular and timely payments between the parties to a construction contract.⁸ Recognising as valid or arguably valid the cl 12 provision for regular and timely payments in this case does not undermine the purpose of the Act. But a provision which deemed claims to have been made or payments due at the end of a contract might well do so. The employer in Mr St John’s counterfactual would be stipulating for a contract without intervals between payments or, put another way, would not be providing for progress payments at all.

Overall conclusion

[35] I find it arguable that the contract validly provided a payment claim/payment schedule regime which excluded the default regime under the Act.

⁸ Construction Contracts Act 2002, s 3(a).

Outcome

[36] Given my finding, Leighton's application must succeed.

[37] Costs and disbursements must follow the event. A 2B award is appropriate.

Orders

[38] I order:

- (a) The statutory demand issued by the respondent on 27 May 2014 is set aside; and
- (b) The respondent is to pay the applicant's costs on a 2B basis together with disbursements to be fixed by the Registrar.

Solicitors:
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Franklin Law, Auckland.
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