IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-275

BETWEEN	LOVERIDGE LIMITED Plaintiff
AND	WATTS & HUGHES CONSTRUCTION LTD Defendant

Hearing: 15 August 2011

Appearances: Mr P J Crombie for plaintiff
Mr N Smith for defendant

Judgment: 29 September 2011 at 4:00 PM

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

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

Registrar/Deputy Registrar

Date……

Counsel:
Cooney Lees Morgan, P O Box 143, Tauranga - by email: lspeed@clmlaw.co.nz /

Abernethy Broach Law, Mount Maunganui
(Counsel: Nathan Smith, Barrister – by email: Nathan@nathansmith.co.nz)

Background

[1] Loveridge Limited was engaged by Watts & Hughes Construction Ltd as a sub-contractor to carry out construction work relating to a youth justice facility at Rotorua. Watts & Hughes was the head-contractor for the project.

[2] The terms of the contract are as set out in the pre-letting interview sub-contract document.

[3] As work under the sub-contract progressed, Loveridge submitted monthly payment claims.

[4] Payment claims 1–11 dated between April 2009 and February 2010 were all accepted by Watts & Hughes, who responded with payment schedules and payment was made in full (less 10% by way of retentions for total amounts up to $200,000 and 5% thereafter as provided in the contract).

[5] Watts & Hughes did not pay the amounts due under the last three payment claims. They are payment claims 12 (dated 30 June 2010), 13 (dated 31 August 2010) and "Final" (dated 9 September 2010). The total sum which the plaintiff claims is $161,711.73 (allowing for retentions).

[6] The plaintiff has issued summary judgment proceedings to recover this sum. The main issue that arises for the Court's consideration is whether the payment claims which the plaintiff served purportedly pursuant to the Construction Contracts Act complied with the Act. More specifically, the question that the case will turn on at summary judgment stage is whether the notices of claim contained a due date for payment as the Act requires. A number of other issues were also raised from the bar. I do not consider that they need to be considered in the light of the conclusion that I have reached on this issue.

Amended statement of claim

[7] At the outset of the hearing Ms Speed sought leave to file an amended statement of claim which would have altered the basis upon which summary judgment was to be sought. I reserved that question.

[8] In the light of the way in which the hearing progressed and the leadup to and preparation of documents for the summary judgment hearing, I do not consider that leave ought to be granted. The application came far too late in my view. The amended statement of claim has remained on the file in the meantime although it has not been formally received for registration by the Registrar. Given that the result of the hearing before me is that the summary judgment application is to be dismissed, the claim will now proceed as a standard civil proceeding and there is no bar to a party filing and serving an amended statement of claim without leave up until the point where the proceedings are set down for hearing. The Registrar may therefore be able to accept this document for registration if it is otherwise in order for that to occur.

The lack of a payment date in payment claims 12 and 13

[9] Payment claim 12 was for the amount of $162,719. In the space where the payment claim form required insertion of the information "Claim date and Period covered", the claimant inserted "30/6/2010 feb–june". The document did not state a date on which payment was said to be due.

[10] The defendant in due course served a claim schedule dated 30 June 2010, which in its penultimate line, read "Scheduled Amount Due: (+ GST) $95,000".

[11] I consider that the defendant is correct in the submission that the payment schedule must specify a due date for payment. It would be surprising if a statutory mechanism which was designed to put the payer on notice that a claim was being made under the Act could be ignored, particularly as the Act has strict time guidelines which are conducive to one of its objects which is to improve promptness of payment, or as it is said in s 3(a), " to facilitate regular and timely payments between the parties …".

[12] Further, the mandatory language of the statute which is conveyed by the use of the word "must" does not permit a payee to assert that substantial or approximate compliance with the obligation will suffice.

[13] It would seem that the requirement to insert into the notice of claim the date when the amount claimed became due must be for the purpose of enabling the payer, who must respond to the notice of claim, to decide whether it agrees that payment is due or whether it will dispute that issue, possibly amongst other matters, by serving a payment schedule.

Section 18 of Act

[14] Mention was made of s 18 of the Act during the course of argument as being a possible solution to the difficulty that the plaintiff found itself in because of the non-provision of a date on which payment was due.

[15] My conclusion, briefly, is that the purpose of s 18 is to make provision for when the debt which has been established by use of the mechanisms in the Act has to be paid. While the terminology is perhaps confusingly similar to that used in s 20 I consider that the part of the Act in which s 18 appears is concerned with something different from the part of the Act in which s 20 appears. The purpose of the part of the Act in which s 18 appears as to enact "Default provisions for progress payments in the absence of the express terms". The provisions of that part only apply where the parties to a construction contract failed to agree on the mechanism to regulate when progress payments became due. This part of the Act is therefore concerned with the content of the parties contract. The payment claim regime in the CCA does not create debts which are owed by one party to another that would otherwise not be owed, rather, it is concerned with procedures for assisting in the recovery of debts in circumstance where payment ought not to be delayed.

[16] The payment claim regime in Subpart Three of Part Two of the Act provides for an enforcement process and as part of that objective provides details as to the procedures by which a party seeking to enforce a debt and the party who has resisted payment on the grounds that there is a defence to the claim, must follow. One of its purposes is to require payment notices which define with reasonable precision what

is required of the debtor to be served on the debtor. This informs the debtor what is required. So the requirement of s 20 which mandates the insertion of a date when payment is due in a notice is different from the provisions of s 18 which deal with the content of the parties' contract.

Substantial compliance with the provisions of s 20

[17] I accept that the approach that the Court takes to claims under the Act is to avoid unduly technical interpretation of its provisions. Where non-compliance is alleged, the Court will generally approach that matter by asking whether there has been compliance in substance. But in a case where there has been no compliance at all concerning one of the elements which a valid payment claim is required to include, the claimant's position cannot be salvaged by invoking the principle that the Court is to look to matters of substance. The requirement that the notice of claim must indicate "the due date for payment" could hardly be more obvious and there can be little argument that the wording of the legislation is mandatory.

[18] Unless a payment claim which complies with the Act has been served, there is no requirement to serve a payment schedule. The failure to serve any, or any valid, payment schedule cannot provide the payee with an entitlement that it would not have had but for the provisions of the Act.

[19] Ms Speed suggested that an unduly technical approach to the application of the Act is not justified. She referred me to authorities including *Canam Construction Ltd v George Developments Ltd.*[1] I was also referred to *Westnorth Labour Hire Ltd v S B Properties Ltd*,[2] a decision of Rodney Hansen J, and also the case of *Foggo v R J Merrifield Ltd*[3] a decision of French J.

[20] In *Westnorth*, the Court was dealing with an appeal from a summary judgment entered in the District Court. The Judge summarised the position in the following terms:

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1 *Canam Construction Ltd v George Developments Ltd* HC Auckland CIV-2004-404-3565, 10 November 2004.

2 *Westnorth Labour Hire Ltd v S B Properties Ltd* HC Auckland CIV-2006-404-1858, 19 December 2006.

3 *Foggo v R J Merrifield Ltd* HC Christchurch CIV-2009-409-0605, 21 September 2009.

> [28] Again I agree with the Judge. Although the letter does not adopt the terminology of the Act, is not stated to be a payment schedule and does not specify that the scheduled amount is nil, the essential message is clear and unequivocal. Mr Mullane explains why he now doubts the accuracy of Westnorth timesheets and hence the sums he has been charged. He identifies a charge for materials that have been returned and instances of faulty workmanship which would entitle S B Properties to counterclaim. He says he will not pay the two invoices until Westnorth provides him with full particulars of what the contracted labour has done.

[21] I have read the comments of Rodney Hansen J as being to the effect that provided the substance of the information required is stated in the notice, divergence between the actual terminology used in the Act and that actually adopted by the party sending the notice will not mean that there has been non-compliance with the requirements of the Act.

[22] My view is that, in broad agreement with that approach, if a reasonable reading of the document as a whole would convey the required information, differences in terminology will not be important.

[23] The consequences of the service of an unanswered payment claim are set out in s 24. They entitle the claimant to obtain judgment. They are dependent upon the steps specified in the Act having been taken. Those steps include the requirement that the payee has served a payment claim. That term is defined in s 5 of the Act in these terms:

> **payment claim** is the claim referred to in section 20.

The Court is directed that it "must not" enter judgment in favour of the payee "unless it is satisfied that the circumstances referred to in subsection (1) exist". That is to say, unless the Court is satisfied that a payment claim has been served, amongst other things.

[24] At this point in the statutory process under the Act, the function of specifying the date that enables the parties served to decide whether or not they agree that all or part of the amount claimed is in fact owing. The payer, for example, may consider that while the claimant has certainly done some work that will in due course entitle it to payment, the point when payment for all or part of that work has not yet been

reached. Further, an accurate notice will provide information to the payee about when its obligations under the Act accrue, including the payment, will be required.

[25] Unfortunately the payment claim here does not satisfy even that test because there has been a complete omission.

Replacement payment claims

[26] I do not accept that the claimant can cure a defect in an initial payment claim by serving subsequent amended or substituted payment claims. By using the terminology that it did in enacting ss 20 and 21, the legislature has made it clear that there will be only one payment claim relating to each progress payment[4] and one payment schedule responding to it. I also consider that unnecessary confusion would result unless that clear position is adhered to. The Act after all is designed to assist those who are engaged in the construction industry who are not lawyers. Simplicity and not undue complexity is required when approaching interpretation of the Act.

[27] That said, I do not consider that there is necessarily any problem in a claim being made in a later period for work done in an earlier period. Otherwise the Act would not have provided in section 20 (1) (c) that each payment claim is to identify the relevant period to which the progress payment relates. The Act does not include a limitation period for claiming for work carried out in a particular period.

[28] However the supplementary payment claims in this case purport to be second or subsequent notifications of a requirement to pay for work which has already been the subject of a payment claim.

[29] It is necessary to bear in mind, of course, that this conclusion only means that a claimant in respect of a non-complying claim is not entitled to the statutory advantages that flow to claims that are able to be recognised under the Act. At common law claim for the amount in question is not lost.

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4 Construction Contracts Act 2002, Section 20 (1).

Conclusion

[30] That is sufficient to dispose of both progress payments 12 and 13. The payee has not served payment claims which comply with the definitions set out in ss 5 and 20 of the Act. Service of such a claim is an essential prerequisite to enforcement under the Act and without it the plaintiff cannot obtain summary judgment. The application for summary judgment is dismissed.

[31] Costs will be reserved. The registrar is to schedule this proceeding for a further case management conference. The parties are encouraged in the meantime to confer on suitable timetable directions from this point forward. Those directions should include the preparation of a joint memorandum stating the issues that will need to be resolved in the litigation from this point forward. Reference should be specifically made to what, if any, future applicability the provisions of the Construction Contracts Act will have to the parties' dispute. The parties should also consider the issue of trial duration which will involve consideration of witness numbers (both expert and non-expert) and also alternative dispute resolution and whether a judicial settlement conference is required.

[32] In case there is any additional matter which requires the further attention of the Court which I have not covered in my judgment, I grant leave to either party to file and serve an application for further directions within 21 days of the date of judgment.

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J.P. Doogue
Associate Judge