

#95

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

CIV-2009-485-1957

BETWEEN

LUXTA LIMITED
Applicant

AND

CAPITAL CONSTRUCTION LIMITED
Respondent

Hearing: 8 February 2010

Appearances: P. Withnall - Counsel for Applicant
H. Brown - Counsel for Respondent

Judgment: 10 February 2010

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

*This judgment was delivered by Associate Judge Gendall on 10 February 2010 at
3.30 pm pursuant to r 11.5 of the High Court Rules.*

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Introduction

[1] This is an application to set aside a statutory demand issued by the respondent, Capital Construction Limited (“Capital Construction”), originally seeking the sum of \$568,711.67. The statutory demand is based on a debt alleged to be due from the applicant, Luxta Limited (“Luxta”), for services provided under a construction contract.

[2] In its application, Luxta contends that the demand should be set aside on the basis that the issue of the demand amounts to an abuse of process and savours of oppressive conduct.

Background Facts

[3] Capital Construction and Luxta are parties to a construction contract (“the contract”) for the construction of a townhouse development in Karori, Wellington. Capital Construction is the contractor and Luxta is the principal.

[4] The parties’ contract is in the standard form NZS 3915:2005 and is amended by certain special conditions. In particular, general condition 12.2 of NZS3915.205 dealing with Progress Payment Schedules was substituted to provide for Luxta’s payment obligations in the following way:

“Irrespective of what NZS 3915:2005 provides, the Principal has seven working days from the receipt of the Contractor’s claim to issue the Progress Payment Schedule and eight working days from the issue of the Progress Payment Schedule to pay the scheduled amount.”

[5] On 25 June 2009, Capital Construction served a purportedly final payment claim on Luxta. Luxta advised Capital Construction that the payment claim did not comply with clause 12.4.1 of the contract, which specified that the final payment claim was to be issued no later than two months after the expiry of the defects liability period. Capital Construction then withdrew that payment claim.

[6] On 31 July 2009, Capital Construction submitted an alternative payment claim entitled “payment claim 19” for \$544,946.04. According to Capital Construction, the claim was discovered to contain clerical errors, and was therefore withdrawn and re-issued on 3 August 2009 for the amount of \$568,711.67 (“the payment claim”). The due date for payment was 24 August 2009.

[7] Luxta, however, did not serve a payment schedule within seven working days of service of the payment claim, and also failed to make payment of the claimed amount by 24 August 2009. It appears that, given that Capital Construction had issued three payment claims 19, there was a dispute as to the timing of Luxta's obligation to pay for the amount specified in the payment claim.

[8] Capital Construction referred the matter to an expert for determination under the alternative dispute resolution clause, together with a number of other disputes that had arisen between the parties. The hearing took place on 15 September 2009.

[9] Two days later, on 17 September 2009, Capital Construction served the statutory demand in question on Luxta under s 289 of the Companies Act 1993. Luxta then filed an application to have the statutory demand set aside on 1 October 2009, and Capital Construction filed a notice of opposition on 12 October 2009.

[10] On 13 November 2009, Luxta made a payment to Capital Construction of \$126,781.85. This reduced the amount currently claimed to be outstanding to Capital Construction to \$441,929.82.

Counsel's Arguments and My Decision

[11] Luxta brings this application pursuant to s 290 of the Companies Act 1993, which sets out the basis on which a statutory demand may be set aside:

"290 Court may set aside statutory demand

- (1) The Court may, on the application of the company, set aside a statutory demand.
- ...
- (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
 - (a) There is a substantial dispute whether or not the debt is owing or is due; or
 - (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
 - (c) The demand ought to be set aside on other grounds.

[12] The only ground effectively relied upon by Luxta in bringing this application is that the statutory demand amounts to an abuse of process: s 290(1)(c). It submits

that, in invoking the expert determination process under the contract, Capital Construction must have accepted that there was a “dispute or difference” in relation to the payment claim, as provided for by section 13 of the contract. Luxta contends that, given the respondent’s decision to invoke the dispute resolution procedures, it should have recognised that this was not an appropriate occasion for the use of a statutory demand.

[13] Counsel for Luxta refers to the Court of Appeal’s decision in *Link Electrosystems Limited v GPC Electronics (NZ) Limited* [2007] NZCA 501, (2007) 18 PRNZ 946 at [16], where the Court held that the statutory demand procedure is not to be used oppressively as a debt collection device. He argues that Capital Construction abused the coercive power of the statutory demand procedure by issuing a demand only two days after the dispute resolution hearing, and before the expert had issued a determination. It is submitted that the purpose of issuing the statutory demand was to pre-empt the outcome of the expert determination process, or to pre-empt the time it would take for that process to run its course.

[14] Luxta contends that the circumstances of the present case are very similar to those in *Edge Computers Limited v Colonial Enterprises Limited* (1996) 9 PRNZ 621 at 625, where the Court of Appeal was satisfied that an application for winding up while the real issues between the parties were awaiting resolution in the District Court was an abuse of process. In essence, Luxta asserts that Capital Construction is not entitled to reject the dispute resolution process “mid-stream” and replace it with “the draconian (and irreconcilable) alternative of a statutory demand”, as this would amount to a misuse of procedure.

[15] It appears to be common ground between the parties that Luxta is not in a position to raise any dispute or counter-claim as to the debt for the purposes of setting aside the statutory demand. It is not disputed that the payment claim was a valid payment claim under s 20(2) of the Construction Contracts Act 2002 (“CCA”). Moreover, s. 22 provides that a payer becomes liable to pay a payment claim if it does not provide a payment schedule to the payee within the stipulated time. Where no payment schedule is provided, failure to pay the claimed amount allows the payee to recover the unpaid portion of the claimed amount as a debt due. In *Salem Limited v Top End Homes Ltd* (2005) 18 PRNZ 122 at [11], the Court of Appeal observed that:

“The fundamental position under the Act is that, if a progress claim is made and the employer does not respond within the period stipulated in the construction contract or, by default, within the time specified in the Act, the amount of the claim becomes payable forthwith.”

[16] Moreover, s 79 of the CCA provides that, in any proceedings for the recovery of a debt under s 23, the court must not give effect to any counterclaim, set-off, or cross-demand unless it is for a liquidated amount, and judgment has been entered for that amount or there is no dispute between the parties in relation to the claimed amount. It is well established that s 79 is applicable to statutory demands under the Companies Act 1993: *Laywood v Holmes Construction Wellington Limited* [2009] NZCA 35.

[17] Capital Construction submits that the claimed amount became a debt due pursuant to s 23 of the CCA when Luxta failed to provide a progress payment schedule under special condition 12.2 of the contract in response to Capital Construction's payment claim. It contends that no valid grounds exist to set aside the demand, and that the two payment claims that were both withdrawn are not relevant to the issue of whether there is a debt due and owing to it.

[18] Capital Construction argues that it is not precluded from recovering the amount owed to it by issuing a statutory demand simply because the dispute is before an expert. It refers to the "pay now, argue later" regime of the CCA, relying on a comment by Mallon J in *Gill Construction Company Limited v Butler* HC Wellington CIV-2009-406-203, 2 November 2009 at [9] that "the CCA has been described as a 'pay now, argue later' regime and as giving rise to a 'temporary' debt". In her judgment, Mallon J. then continued to note that, because it is a debt that may be enforced, a statutory demand can be issued in respect of it. On this see also the comments of Wylie J. in *Greys Avenue Investments Ltd v Harbour Construction Ltd* High Court, Auckland CIV-2009-404-2026, 12 June 2009 at paras. [36] and [37].

[19] In light of the authorities relied upon by Capital Construction, in my view Luxta's application to set aside the demand on the basis of abuse of process or oppressive conduct must fail. Unlike *Edge Computers Limited v Colonial Enterprises Limited*, which was not a case involving a construction contract under the CCA, the debt in the present case is enforceable despite commencement of the alternative dispute resolution process. The regime under the CCA establishes an obligation to pay for a payment claim, unless the principal (in this case Luxta) issues a payment schedule within the required timeframe, regardless of whether the claim is disputed. It follows that issuing a statutory demand to enforce the payee's right to recover the claimed amount cannot amount to an abuse of process, even if an alternative dispute resolution process has been instituted in the meantime. And here,

first, Capital Construction and Luxta are both experienced commercial parties quite familiar with the strict payment requirements of the CCA and secondly Capital Construction has been denied the cash flow benefits so important to contractors under the CCA on this payment claim 19 for nearly 6 months now.

[20] As I see it, Capital Construction is entitled here to recover the unpaid portion of the amount claimed in the statutory demand, being \$441,929.82. Luxta failed to respond to the payment claim within the timeframe required by the contract, and the debt thus became due and owing on 24 August 2009. And s. 290(5) Companies Act 1993 clearly provides that an overstatement of a debt in a statutory demand in circumstances such as the present does not invalidate the demand – *Brookers Company and Securities Law* CA290.03(4) – the part payment here does not affect the demand.

Result

[21] For the reasons outlined above, the present application fails.

[22] As to costs, Capital Construction has succeeded here in opposing Luxta's application and is entitled to costs which are awarded on a 2B basis, together with disbursements as fixed by the Registrar.

[23] Luxta has sought an extension of time for compliance with the statutory demand pursuant to s. 290(3) Companies Act 1993. This is appropriate here and an order is made that Luxta is to have a period of 10 working days from the date of this judgment to comply with the statutory demand and pay the unpaid portion of the amount claimed being \$441,929.82.

'Associate Judge D.I. Gendall'