#123

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-1825

BETWEEN	LUXTA LIMITED Applicant
AND	PARAGON BUILDERS LIMITED Respondent

Hearing: 7 December 2010

Appearances: P.S.J. Withnall - Counsel for Applicant
J.K. Holt - Counsel for Respondent

Judgment: 17 December 2010 at 10.00 am

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 17 December 2010 at 10.00 am under r 11.5 of the High Court Rules.

Solicitors: Brandons, Solicitors, PO Box 36, Wellington
Kensington Swan, Solicitors, PO Box 10246, Wellington

Introduction

[1] The applicant, Luxta Limited ("Luxta"), applies for an order setting aside a statutory demand dated 2 September 2010 issued by the respondent, Paragon Builders Limited ("Paragon"). The demand is for the sum of $192,338.69 (including GST) and is based on an alleged payment claim debt due under s 23 of the Construction Contracts Act 2002 ("CCA"). The application is opposed.

Background

[2] Luxta and Paragon are parties to a construction contract for the construction of a major townhouse development in Karori, Wellington. Luxta as landowner is named as "Principal" and Paragon is the "Contractor". The contract documents include the General Conditions of Contract NZS 3915:2005, as amended by special conditions (together called "the contract"). The contract provided for an initial total contract price of $8,664,327.00. As work on the development progressed and payments were required, the contract provided for Paragon as builder to submit payment claims, and that Luxta had the right to issue proposed payment schedules in response if it did not agree with the claimed amount. The relevant clauses provide as follows:

> 12.1.1 The Contractor may submit to the Principal claims for payment under the contract. Unless otherwise provided in the Contract Documents such payment claims shall be submitted in respect of work carried out during periods of not less than one Month.
>
> ...
>
> 12.2.1 Within five Working Days after the receipt of the Contractor's claim the Principal may assess the Contractor's payment claim and issue a proposed Progress Payment Schedule to the Contractor scheduling any proposed amendment to the claim which the Principal believes necessary to comply with the terms of the contract. The proposed Progress Payment Schedule shall show the manner in which any such amendment has been calculated, give reasons for the proposed amendment and state the resulting proposed amount payable. If the Contractor does not advise the Principal in accordance with 12.2.3 that it disputes the proposed Progress Payment Schedule, the proposed Progress Payment Schedule shall be the Progress Payment Schedule, and the Contractor shall be entitled to be paid the proposed amount payable.
>
> 12.2.2 If within the period provided for in 12.2.1 the Principal does not issue the proposed Progress Payment Schedule thereunder, or if the Principal does not issue the Progress Payment Schedule as required under 12.2.3 within twelve Working Days of the Principal's receipt of the Contractor's claim under 12.1.1, the Contractor shall be

entitled to be paid the amount of its claim under 12.1.1 and the Contractor's claim under 12.1.1 shall be treated as the Progress Payment Schedule.

[3] Clause 12.2 of the Special Conditions in the contract provides:

Irrespective of what NZS 3916:2005 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.

[4] In relation to final payment claims, the contract provides:

12.4.1 Not later than two Months after the expiry of the Period of Defects Liability or within such further time as the Principal may reasonably allow the Contractor shall submit to the Principal a final account of all the Contractor's payment claims in relation to the contract. The final claim shall state the amount or amounts claimed by the Contractor in respect of all outstanding claims. This account shall be endorsed "final payment claim" and signed by the Contractor....

...

12.5.1 Within ten Working Days after receipt of the Contractor's final payment claim and the issue of the Defects Liability Certificate, the Principal may assess the claim and issue a proposed Final Payment Schedule to the Contractor scheduling all amounts which can reasonably be assessed at that time. The proposed Final Payment Schedule shall show the manner in which any proposed amendment to the Contractor's claim has been calculated, give reasons for the proposed amendment and state the resulting proposed amount payable. Five Working Days after the issue of the proposed Final Payment Schedule the Contractor shall be entitled to be paid the proposed amount payable as progress payment. If the Contractor does not advise the Principal in accordance with 12.5.3 that it disputes the proposed Final Payment Schedule the propose Final Payment Schedule shall be the Final Payment Schedule.

...

12.5.3 If within fifteen Working Days of the Principal issuing a proposed Final Payment Schedule under 12.5.1 the Contractor has advised the Principal in writing of its disagreement with the proposed Final Payment Schedule the following shall apply:

...

(b) At or before the end of this fifteen Working Day period the Principal shall forthwith issue a Final Payment Schedule to the Contractor for the value of the undisputed portion, giving reasons for any amendment to the Contractor's claim and the manner in which any such amendment has been calculated.

12.5.4 If the Contractor fails to submit its final payment claim as provided in 12.4.1 the Principal may issue a proposed Final Payment Schedule based on its own proposed determination of the amount of the final payment due to the Contractor. The Contractor shall be entitled to be paid in accordance with the proposed Final Payment Schedule and the process under 12.5.1 to 12.5.3 shall apply.

[5] The Period of Defects Liability under the contract was stipulated as three months "in respect of the Contract Works" (cl 11.1.1(a) of the Special Conditions of Contract).

[6] Construction of the townhouses commenced in October 2007 and finished almost two years later in September 2009. Over the period of construction, 26 progress payment claims were issued by Paragon, usually at monthly intervals and served on Luxta by email. Payment Claim 26 was issued on 1 December 2009. The parties then referred a number of disputes between them for determination by an expert, Mr Rob Ashcroft.

[7] Nine months after completion, on 29 June 2010, Luxta issued a proposed Final Payment Schedule to Paragon pursuant to cl 12.5.4 of the contract. There is no evidence before me to confirm whether the provisions of cl 12.5.4 had come into operation at the time, other than a statement by Bruce Gordon Kerr ("Mr Kerr") that Luxta considered that the two month period after expiry of the defects liability period for submission of Paragon's final payment claim had expired. Mr Kerr is a contract administrator for Luxta. At the hearing of this matter before me, counsel for Paragon advised that it was not until March 2010 that the expert Mr Ashcroft determined that practical completion of the contract had been achieved in September 2009. It is presumed that the Period of Defects Liability commenced on the date of practical completion or soon after on the date the Certificate of Practical Completion had been issued. There is nothing in the evidence for Paragon, or in its submissions, that would suggest that it directly disputes that Luxta was entitled to issue a proposed Final Payment Schedule.

[8] Later on the same day, 29 June 2010, Paragon served a (purported) Progress Payment Claim on Luxta, for an amount of $215,606.79. This was noted as Payment Claim 27. The relevant claim period was stated as being 30 November 2009 to 30 June 2010, and the stipulated claim date was actually the next day, 30 June 2010. Payment Claim 27 was sent by way of email attachment, in response to an email from Mr Ashcroft the previous day. In Mr Ashcroft's email, he had asked the parties to confirm whether there were currently any claims that they had agreed to refer to him for determination. Besides Mr Ashcroft, the recipients of the email were Mr

Kerr, Mr Huxford and Mr Fawcett, who are all representatives of Luxta. The email read as follows:

> Hi Rob
> We still have a number of disputes to come before you. I have attached the Luxta "final" payment schedule 32 (this should be the proposed final PS as per the contract). We have received this before Paragon issued PC 27. Paragon have not received PS 28, 29, 30 or 31 (PS 26 is incorrectly titled PS29 attached). I have also attached the road bond interest calculations of which you have determined payable and of which Luxta has fragrantly ignored. Luxta have paid the road bond deduction money back only. Also attached are our calculations of interest for the over deducted LD's for your approval. We would ask that you determine these 2 items immediately as they are obviously in dispute by Luxta not acknowledging them on their PS 32. There are more items for your expert determination such as a new raft of contra charges, as well as some already expert and arbitrator determined values for some VO work at the Boundary. (top of the list are VOA56, VOA36, VO47 which have either or both been determined and arbitrated upon by either yourself or Mr. Orchiston) to no avail.
> I have also attached a new VOA86 (incorrect Block A set out). The appearance of PS32 has in fact put this VOA86 into dispute.
> We await your response.
> ...

[9] On 30 June 2010, Paragon wrote to Luxta, requesting that its proposed Final Payment Schedule be withdrawn:

> ... we disagree with the schedule and we request that you withdraw it and await our Final Claim which will be tabled in due course (& in accordance with the expert's latest determination).
>
> However we will respond to the items highlighted as these will be presented to the expert for a further determination.
>
> ...
>
> As noted above we wish to refer numerous items to the expert as there has been no attempt by Luxta to negotiate or discuss any of our claims. Luxta suddenly issue a Final Payment Schedule in contradiction of the expert's determination and expect Paragon to accept the 'Final Schedule' amounts.
>
> The only way Paragon can move forward and to finalise this contract is to refer all of the above items as well as several more items that will be raised in our Final Claim submission to the expert as we have no faith in the ability of the Luxta management team.

[10] Paragon did not reissue or issue any further payment claims after 30 June 2010. According to Mr Kerr, it appears that a Final Payment Schedule was issued on 20 July 2010.

[11] Paragon argues that, based on cl 12.2 of the contract, Luxta was required to serve a payment schedule by 8 July 2010, in response to Payment Claim 27 which it

did not do. The due date for payment of this claim was therefore 21 July 2010. On 2 September 2010, Paragon served the present statutory demand on Luxta for $192,338.69. The reduction in the amount sought, from the $215,606.79 claimed in Payment Claim 27, can be explained by certain payments that were made by Luxta prior to the issue of the demand.

Counsel's Arguments and My Decision

[12] Paragon argues that it is entitled to payment of the amount claimed pursuant to ss 22 and 23 of the CCA. Section 22 provides that the payer under a construction contract becomes liable to pay the full claimed amount on the due date for payment if the payer fails to provide a payment schedule in response to a payment claim within the prescribed timeframe. Where the payer fails to pay the claim by the due date for payment, s 23 provides that the payee is entitled to recover the claimed amount as a debt due in any court. In essence, the effect of the CCA is that, where the payer fails to take advantage of the payment schedule process to challenge a payee's claim, the payer must "pay now and argue later": see *Greys Avenue Investments Ltd v Harbour Construction Ltd* HC Auckland CIV-2009-404-2026, 12 June 2009 at [37]. The debt created by s 23 is enforceable by way of the statutory demand procedure: see, for example, *Gill Construction Co Limited v Butler* [2010] 2 NZLR 229.

[13] Luxta does not dispute that these principles are applicable in this case. It argues however that Payment Claim 27 under the circumstances here was not a proper payment claim and also was not validly served, and in addition, that it has a counterclaim, set-off or cross-demand. The application is based on paras (b) and (c) of s 290(4) of the Companies Act, which provide that the Court may set aside a statutory demand if 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.

[14] I will address these two grounds in turn.

Payment Claim and Service

[15] Luxta submits that issuing a statutory demand amounts to an abuse of process, because Payment Claim 27 was not appropriate here or validly served. It seems that Luxta's argument is not only that service of the claim was not properly effected, but also that in any event there was no basis on which Payment Claim 27 could have been issued. In essence, Luxta's contention is that Payment Claim 27 either was not in fact a payment claim, or that it was not served "in circumstances that could be treated as the service of a payment claim". Paragon, on the other hand, submits that Payment Claim 27 was validly served and that there is no basis to suggest that the issue of the demand amounts to an oppressive use and abuse of process.

[16] As I have already noted, Payment Claim 27 was sent as an attachment by way of email to Mr Kerr, Mr Huxford and Mr Fawcett, who are all representatives of Luxta, in response to an email by Mr Ashcroft. Luxta submits that a discernible and typical pattern of submission of payment claims had developed over the period of construction under the contract, whereby payment claims were generally made at monthly intervals, usually at the end of the month, and were sent by email. Luxta submits that for all previous payment claims a covering email was included, specifying that Paragon was forwarding a payment claim and attachments. It suggests that on these occasions this left no ambiguity or room for confusion that the documents sent were in fact payment claims. In contrast to previous payment claims, however, it is suggested that Payment Claim 27 was not properly served and did not follow the established pattern, because it was directed to Mr Ashcroft and was not properly forwarded to Luxta. On this, Luxta maintains that it was incumbent on Paragon to make it understood that what it was submitting was a payment claim, and that it failed to do so here because the accompanying email did not in any way refer to the payment claim.

[17] Luxta also argues that Paragon's intention appeared to be to submit Payment Claim 27 at the end of the month on 30 June 2010, and that this was the actual date

of Payment Claim 27. The Payment Claim stated that it was for the period up to 30 June. Luxta argues that the email on 29 June merely foreshadowed that the *subsequent* submission of Payment Claim 27 was one of the disputes to be referred to Mr Ashcroft for determination. Luxta's argument seems to be that, because a Final Payment Schedule precludes any further payment claims, Paragon sought to notify Mr Ashcroft of the impending dispute that would no doubt arise once it had issued Payment Claim 27. Luxta here refers to the email from Paragon on 30 June 2010, in which Paragon advised that it wished to refer the matter of the proposed Final Payment Schedule to the expert for determination and requested that the Schedule be withdrawn. Importantly, Paragon also indicated that it would make a "Final Claim", which would be tabled "in due course".

[18] In response, Paragon contends that Payment Claim 27 was clearly served in the contractually prescribed manner, although it does acknowledge that cl 15.1.2(a) of the Special Conditions of Contract did provide for service of payment claims by way of facsimile. All of the 27 payment claims had been served by email, and I did not understand Luxta to take any issue with this aspect of service earlier. In any case, it is clear that a particular method of service prescribed by the parties may displace service options which are otherwise specified in the CCA: *Hawkins Construction Ltd v Ecosse Afrique Enterprises Ltd* HC Wellington CIV-2008-485-2327, 25 February 2009.

[19] Paragon further submits that, even if it had not satisfied the prescribed manner of service, there was still sufficient evidence that Payment Claim 27 was brought to Luxta's attention. Here, reference is made to *Herbert Construction Company Limited v Toogood* HC Napier CIV-2010-441-283, 20 August 2010, where I rejected the defendant's argument that service of a payment claim was invalid, noting that the defendant did not contend that he had never received the payment claims in question. Further authority for this proposition can be found in *West City Construction v Edney* (2005) 17 PRNZ 947.

[20] In the present case, Luxta does not suggest that it did not receive Payment Claim 27. The thrust of its submission does not appear to me to be directed at mere procedural defects in service. Instead, it submits that sending the document titled

"Payment Claim 27" on 29 June 2010 was never in fact intended to be service of a payment claim. It also argues that, had it understood that Paragon was intending to submit a Payment Claim, in its response to Mr Ashcroft on 29 June 2010, it "most definitely" would have responded with a Progress Payment Schedule within the time required. Paragon's position with respect to this argument seems to be that, if Luxta was in any doubt regarding the circumstances of service of Payment Claim 27, it could have obtained clarification using the framework of the CCA, namely by issuing a payment schedule. However, in my view the fact that Paragon could have "obtained clarification" in this way does not mean that the email of 29 June 2010 amounted to the valid submission of a payment claim within the terms of the parties' contract and ss 20 to 23 of the CCA.

[21] As I see the position, there are two factors here that lead to the result that Paragon's statutory demand should be set aside. First, I agree with Luxta's submission that there is a reasonable argument here that the circumstances surrounding the alleged service of Payment Claim 27 indicate that Paragon did not in fact intend to submit a payment claim, with all the consequences that would flow from such an act. Paragon's email, although sent to Luxta, was addressed to Mr Ashcroft, and made reference to a number of issues that would still need to be resolved between the parties, including, presumably, the matters referred to in the document headed "Payment Claim 27". The email could be understood as an attempt by Paragon to foreshadow the issues over which there still remained a dispute, rather than the submission of a payment claim. This impression is only confirmed by Paragon's email on 30 June 2010 to Luxta, in which Paragon announced that its "Final Claim" would be tabled in due course, but warned that the matters in dispute would need to be determined by the expert.

[22] Secondly, even if Payment Claim 27 amounted to effective submission of a payment claim, it is unclear whether there was any basis for Paragon to issue the claim in the first place. By June 2010, construction under the contract had ceased for some nine months, and it is quite possible that the two month period after expiry of the defects liability period for the submission by Paragon of a final payment claim had expired. If that was the case, then Luxta's proposed Final Payment Schedule

would have set in motion the process set out in cl 12.5.4, which would have precluded the issue of any further payment claims by Paragon.

[23] I accept Paragon's submission that it would be contrary to the strict payment regime of the CCA to set aside a demand that is based on a valid payment claim, whether on the basis that there is a substantial dispute as to the debt or on the abuse of process ground. However, where the question is whether what was issued was in fact a payment claim, a different approach is warranted. This is particularly so in circumstances where, based on Luxta's proposed Final Payment Schedule, Paragon was clearly aware that Payment Claim 27 would not have been accepted without response, and had already advised the expert that the matters in dispute would need to be referred to him for resolution.

[24] It may be that, overall, Luxta's arguments could have been more properly raised under s 290(4)(a), on the basis that there is a substantial dispute as to the debt. For present purposes, however, it is immaterial that Luxta's application was brought pursuant to the "other grounds" provision in para (c), as it would clearly also be an abuse of process to give effect to a statutory demand in respect of which there is a substantial dispute. I consider that Luxta has shown a fairly arguable basis upon which it is not liable for the amount claimed, on the grounds that there is a substantial dispute whether Payment Claim 27 was ever effectively or validly submitted: *United Homes (1988) Limited v Workman* [2001] 3 NZLR 447 at 451-2.

Counterclaim, set-off, or cross-demand

[25] For these reasons, it is unnecessary to consider Luxta's alternative argument that it has a set-off for $43,008.75 in the form of an award from the expert, Mr Ashcroft dated 17 June 2010 ("the award") for liquidated damages against Paragon. However, I propose to set out the parties' argument on this aspect for the sake of completeness.

[26] Luxta argues that the award is final and binding in terms of cl 13.2.7 of the contract. Paragon accepts that Luxta's set-off falls within the exception contained in s 79 (a) or (b) of the CCA, which allows the Court to give effect to any set-off in any

proceedings for the recovery of a debt under s 23 if the set-off is for a liquidated amount, and judgment has been entered for that amount or there is not in fact any dispute in relation to the claim for that amount.

[27] However, Paragon submits that the set-off does not reduce the amount claimed to below the prescribed amount of $1,000, and that a demand must not be set aside by reason only of an overstatement of the amount claimed, unless the Court considers that substantial injustice would be caused if it were not set aside. Reference is made here to s 290(5) and (6) of the Companies Act 1993 and *Magsons Hardware Limited v Doric Interiors & Construction Limited* HC Auckland CIV-2008-404-6861, 10 August 2009 at [13]. Paragon submits that no substantial injustice would be caused if the demand remains valid in respect of $149,329.94, being the balance of the amount claimed in the demand after deduction of Luxta's set-off.

[28] Paragon's principal submission with respect to Luxta's set-off, however, is that the Court should in any event exercise its discretion not to give effect to the set-off, on the basis that to do so in the circumstances would "recreate the same problem of delayed payment that the CCA seeks to avoid". Paragon argues that it is relevant in this regard that the expert determined that Luxta had wrongfully deducted the sum of $100,000.00 in liquidated damages in earlier payment schedules; that Luxta had the opportunity to use the framework of the CCA to claim its set-off in a payment schedule, but failed to do so; and that Luxta should not be able to "sit on its hands", by failing to issue a payment schedule in the knowledge that any right to set-off it may have will nevertheless be preserved in subsequent proceedings.

[29] I have already stated that I do not need to determine this part of Luxta's application. Nevertheless, I note here that, had I been required to decide the issue, I would have been inclined to give effect to the set-off in accordance with s 79(b) CCA by reducing the amount sought in the demand. Paragon's argument that the Court should exercise its discretion not to give effect to the set-off, on the basis that this would not accord with the purpose of the CCA, seems misguided to me, given that it appears to be accepted that there is no longer a dispute in respect of the liquidated amount.

Conclusion

[30] For the reasons I have outlined above, Luxta's application to have the statutory demand set aside is successful.

[31] An order is now made setting aside the statutory demand dated 2 September 2010 issued by Paragon against Luxta.

[32] As to costs, I see no reason why they should not follow the event in the usual way. Costs are awarded to Luxta on this application on a 2B basis together with disbursements as fixed by the Registrar.

'Associate Judge D.I. Gendall'