IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-457
[2016] NZHC 211

UNDER	the Judicature Amendment Act 1972 and the Construction Contracts Act 2002
IN THE MATTER OF	an adjudication held pursuant to Part 3 Construction Contracts Act 2002
BETWEEN	MANCHESTER INDUSTRIAL HOLDINGS LIMITED Applicant
AND	ANDREW G HAZELTON First Respondent
	BUSSELL CONSTRUCTION LIMITED Second Respondent

Hearing:	26 January 2016
Counsel:	J R Grace for applicant No appearance for first respondent (abiding the decision) F B Collins for second respondent
Judgment:	18 February 2016

RESERVED JUDGMENT OF DOBSON J

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[1] This proceeding comprises an application for judicial review alleging errors of law by an adjudicator in a determination under the Construction Contracts Act 2002 (CCA). The applicant (MIH) owns a block of residential flats in Eva Street, central Wellington, including a penthouse on the top floor of the building. MIH concluded an oral contract with the respondent (Bussell) to do building work on the property. The work could be characterised as either part of earthquake strengthening work being undertaken by engineers at the property, or otherwise renovations being undertaken contemporaneously with earthquake strengthening work.

[2] The contract was not for a fixed price, but rather Bussell was to charge for the time its workers spent working at the premises, plus charges for the materials used. Invoices were to be presented on a monthly basis.

[3] Bussell undertook physical works between late 2012 and early 2013 and MIH paid the first five claims up to February 2013 for a total of some $103,000. Questions were raised on behalf of MIH and by its architect about the content of Bussell's invoices after the first five payments. Those questions were not resolved and on 1 April 2013 Bussell issued a further payment claim for $27,499.05. MIH questioned the payment claim and its concerns remained unresolved.

[4] On 6 April 2013, MIH terminated its contract with Bussell and engaged an alternative builder to complete the works contemplated by the original contract with Bussell.

[5] On 13 April 2013, Bussell issued another payment claim for a further $16,942.64. The following day, 14 April 2013, MIH emailed Bussell, disputing both of the April payment claims. That email stated that Bussell's work had been defective and asked for particulars of the charges. Further information was sought including details of the areas of work to which the various components of the charges related. There was no timely response. However, some 15 months later on 31 July 2014, Bussell issued a payment claim for $40,648.15 plus GST. It described the claim as relating to work on the Eva Street project for the period from 26 November 2012 to 5 April 2013.

[6] The following day, MIH emailed back to Bussell in the following terms:

> Dear Geoff
>
> Your claim for payment is not accepted
>
> As previously discussed this account is disputed
>
> The matters raised in our correspondence to you last year have not been addressed
>
> The claim under the contracts act is not accepted
>
> The payment schedule is zero

> We believe your claim to be faulty as it was last year and that nothing has changed with you submitting this new "bill"
>
> The onus is still on you to address the issues raised-you have not done this
>
> There are a number of outstanding matters we would raise with you if you want to pursue this
>
> Firstly we have a clearly documented repair schedule of work your company completed that was not to standard or to the plans for the work at Eva St, that had to be rebuilt
>
> The list goes on
>
> Do we want to explore your own performance and the problems we had with your absence from site, the consumption of alcohol during work hours etc etc
>
> We have these clearly documented
>
> Geoff we have not heard from you for over a year
>
> We had thought this matter settled …

[7] Three months later, on 30 October 2014, Bussell served a notice of adjudication of claim under the CCA on MIH. It sought determination of liability on the basis of MIH's failure to pay the payment claim. The matter proceeded to a determination on the papers and on 19 December 2014 the adjudicator, Andrew Hazelton, determined that Bussell had presented valid payment claims but that the response for MIH did not constitute a payment schedule so as to relieve it of the statutory obligation under the CCA to pay the amount of the payment claim. I will return to the reasons for the determination in analysing the criticisms of it advanced in this proceeding.

[8] Each party had very different perceptions of the merits of their position, which coloured the arguments they advanced. For MIH, Mr Grace emphasised that:

- it had made a timely complaint in April 2013 to the effect that excessive hours had been charged for;

- the standards of work were deficient;

- inadequately qualified tradesmen had worked in an unsupervised way on the building;

- there had been workers standing around under-utilised; and

- there had been the drinking of alcohol on the site.

[9] When those complaints were raised, MIH requested further detail of the hours worked and the materials charged for, that had not been addressed in any timely fashion. From MIH's perspective, there had been a significant lapse between the challenges raised in April 2013 and the present payment claims being made in July and August 2014, without Bussell making any attempt to deny the criticisms that MIH had advanced. The perceived lack of merit in Bussell's position was compounded by MIH's concern that it would be pointless to pursue a counterclaim for overcharging and defective workmanship because, MIH contends, Bussell is now insolvent.

[10] The on-going solvency of Bussell has been addressed provisionally in related proceedings. Once the adjudicator's determination was issued, Bussell sought to enforce payment by commencing liquidation proceedings against MIH. In April 2015, Associate Judge Smith issued a judgment restraining advertising of those proceedings and staying them pending resolution of the present proceeding.[1] The Associate Judge found that it was unlikely Bussell would be able to refund the figure of some $49,000 payable under the adjudicator's determination if it had to do so.[2]

[11] From Bussell's perspective, it has legitimately invoked procedures under the CCA designed to protect contractors, has complied with the requirements to enforce a payment claim and it is not prevented from doing so because MIH failed to serve it with a payment schedule that would have relieved MIH of the obligation to make prompt payment. Its case is squarely within the "pay now, argue later" policy of the CCA, and neither the lapse in time between the end of its work on the contract and

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1 *Bussell Construction Ltd v Manchester Industrial Holdings Ltd* [2015] NZHC 858.
2 At [62].

the presentation of its payment claims, nor the prospect of its current insolvency (which was not accepted) can operate to qualify its right to payment.

[12] MIH has lodged the amount of the adjudicator's determination in favour of Bussell with an independent stakeholder, pending resolution of this proceeding.

[13] In response to MIH's frustration at not being able to pursue its own claims against Bussell, Mr Collins for Bussell submitted that there were other avenues for MIH to pursue its claim that could have enabled consideration of the substantive claims on both sides at the same time. This could either have occurred by MIH commencing its own adjudication under the CCA and moving for their consolidation, or promptly pursuing an independent claim against Bussell and applying for stay of the effect of an adjudication pending its determination. On Mr Collins' view of the dispute, MIH had done none of these things and instead had simply resisted payment, inconsistently with the "pay now, argue later" policy of the CCA.

[14] That characterisation of the relevant parts of the CCA is now well settled. It reflects the vital importance for contractors of maintaining cash flow if construction businesses are to survive. The CCA has created a procedure that is intended to protect contractors' cash flow, and limits an employer's opportunities for lawfully resisting payment, which depends on adherence to the response required of an employer by the CCA. As Asher J put it in *Marsden Villas Ltd v Wooding Construction Ltd*:[3]

> [17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, and the quick resolution of disputes. The processes that it sets up are designed to side-step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal,

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[3] *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC); endorsed by the Court of Appeal in *SOL Trustees Ltd v Giles Civil Ltd* [2014] NZCA 539, [2015] 2 NZLR 482 at [25].

> rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cashflow.

[15] Accordingly, the part of the dispute that was before the adjudicator was not about the merits of the parties' competing positions. Rather, the issue was whether the steps taken by either or both parties were sufficient to bring themselves within the process in the CCA, which entitles a contractor to demand to be paid forthwith despite the prospect of the payer having a separate claim that would then need to be pursued later. The adjudicator was confined to determining whether the payment claim submitted for Bussell in July 2014 qualified as such under s 20 of the CCA and, if so, whether the response for MIH qualified as a payment schedule for the purposes of s 21 of the CCA so as to relieve it of the obligation to pay the amount demanded in the payment claim.

Did Bussell submit a payment claim?

[16] The requirements for a valid payment claim are set out in s 20 of the CCA in the following terms:

> **20 Payment claims**
>
> (2) A payment claim must—
>
> (a) be in writing; and
>
> (b) contain sufficient details to identify the construction contract to which the payment relates; and
>
> (c) identify the construction work and the relevant period to which the payment relates; and
>
> (d) state a claimed amount and the due date for payment; and
>
> (e) indicate the manner in which the payee calculated the claimed amount; and
>
> (f) state that it is made under this Act.
>
> …

[17] There was no issue that Bussell's payment claim was in writing. It purported to identify the construction contract as "… 3 Eva Street earthquake strengthening for Manchester Holdings Ltd". That was held by the adjudicator to satisfy the requirement in s 20(2)(b) for sufficient details to identify the construction contract to

which the payments related. This was one of the respects in which Mr Grace argued that the adjudicator erred. He argued that more is required if one correctly assessed the context of the requirements in s 20(2) and applied them to the circumstances of the contract in issue.

[18] Mr Grace repeated arguments that had been made by MIH's architect in the papers before the adjudicator, to the effect that Bussell's work did not constitute earthquake strengthening, which rather was undertaken by engineering companies, so that arguably the work was misdescribed in the payment claim.

[19] I agree with the adjudicator that any misdescription (Bussell disputing that there was one) was immaterial in conveying the identity of the construction contract to which the payment claim related. There was only one contract for Bussell's work at 3 Eva Street, and no prospect of confusion on MIH's part as to which contract the claim related. Mr Grace criticised a finding by the adjudicator that MIH "... was fairly put on notice as to what project the payment claim was seeking payment for". Mr Grace argued that this either related to, or influenced, the adjudicator's analysis of the content of a payment claim as required by s 20(2)(c), namely to identify the construction work (arguably distinguishable from "the project") and the relevant period to which the progress payment related. The finding just quoted was followed immediately by:

> The construction work is clearly identified by reference to the covering letter and supporting information filed, as is the period to which the claim relates which is stated to be from 26 November 2012 to 5 April 2013. This therefore satisfies [subs] 2(c).

[20] The adjudicator treated the payment claim as comprising a covering letter specifying that it was a payment claim, which identified the periods to which the claim related, and the amount of the claim. It also described the attachments, which were:

- a summary of the invoices previously presented and the payments received (leaving a net amount payable as the subject of the claim); and

- copies of the seven invoices for different periods detailing hours by each of the Bussell employees plus the materials used on the job.

Some of the invoices were headed "Level 1 earthquake strengthening" and some "Eva Street renovation".

[21] The details conveyed in all of these documents do identify the construction work involved, relative to the oral contract for Bussell to do building work at the Eva Street property. I can see no error in the adjudicator's analysis that the requirement in s 20(2)(c) of the CCA was satisfied.

[22] Mr Grace added a refinement to this criticism of the adjudicator's analysis. He argued that in the context of MIH's April 2013 challenge to the invoices as presented at that time, both parties would know that greater detail of the construction work was required to give MIH fair notice, sufficiently to enable it to consider the components of the payment claim that it would dispute in any payment schedule.

[23] In particular, Bussell's work at the property had been on level one and in the penthouse, and to efficiently analyse and challenge work on the penthouse required the payment claim to distinguish charges for labour and materials in relation to the first floor. Mr Grace relied on Asher J's characterisation of the s 20 requirements in *Marsden Villas*:[4]

> ... do not relate to the substantive content of claims, ... but rather on clarity of form, so the principal knows what the claim is and can respond to it.

[24] Mr Collins' response to this argument was that the breakdown as between components of the job was more than was required by s 20. In any event, he argued that a fair measure of distinction between works on the two floors could be achieved from a detailed analysis of the information provided. Mr Collins conceded that a more detailed breakdown may have been desirable, but was not required under s 20.

[25] Mr Grace's argument is supported by the good sense in applying the CCA in a way that enables disputes arising out of construction contracts to be defined and

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4 *Marsden Villas Ltd v Wooding Construction Ltd*, above n 3, at [70].

determined as efficiently as possible. On the facts in this case, if MIH wished to retain a quantity surveyor to review the reasonableness of the hours charged, when its concern related only to the work on the penthouse, the quantity surveyor would have to undertake a materially larger assessment involving the reasonableness of hours worked for the whole job, if its two components were not separately identifiable from the details presented on behalf of Bussell in its payment claim. The concerns MIH raised in 2013 arguably gave fair warning of its concerns and the additional information required.

[26] However, such individual concerns are not reflected in the requirements stipulated in s 20(2). It is not appropriate to add to the statutory requirements by imposing another layer of detail going beyond what the section requires. Accordingly, I can find no error in the adjudicator upholding the status of Bussell's payment claim.

Did MIH submit a payment schedule?

[27] MIH relied on the 1 August 2014 email communication quoted at [6] above as constituting a payment schedule that relieved it of the obligation under the CCA to make timely payment of Bussell's payment claim.

[28] The requirements for a payment schedule are set out in s 21(2) and (3) of the CCA in the following terms:

> **21 Payment schedules**
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> ...
>
> (2) A payment schedule must—
>
> (a) be in writing; and
>
> (b) identify the payment claim to which it relates; and
>
> (c) state 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.

[29] Decisions on the adequacy of documents in these contexts have often acknowledged that "technical quibbles" should not be allowed to disqualify documents that otherwise substantially conform with the requirements of s 20(2) and s 21(2) and (3).[5] The substantive purpose is to adequately inform the claimant of the nature and extent to which its payment claim is disputed, to enable a decision on whether to dispute the payment schedule and, if so, on what grounds.

[30] The adjudicator determined that MIH's 1 August 2014 email did not sufficiently indicate the manner in which MIH had calculated the scheduled amount (which was simply stipulated as zero), and that MIH's response therefore did not qualify as a payment schedule. The adjudicator excluded a 14 April 2013 email that set out the basis for MIH's challenge to the payment claim made at that time.[6]

[31] The adjudicator appears to have excluded the content of MIH's 14 April 2013 email in part by ruling that a payment schedule should be comprised in a single document. He cited a decision of Associate Judge Christiansen in support of that requirement.[7] In that decision, the Associate Judge observed:

> [60] Section 21 contemplates that a payment schedule should be comprised in "a" (ie a single document). Even if that is not the case and a payment schedule could comprise more than one document then there must be a sufficiently identified relationship and cross-referencing of those composite parts to leave a contractor in no doubt about what is being addressed and the fact that those matters are appropriately being addressed in response to the payment claim.

[32] The requirement for a payment schedule to be comprised in a single document was one of the errors of law Mr Grace raised in criticising the determination that MIH had not presented a valid payment schedule. I am not persuaded that Associate Judge Christiansen's judgment did clearly require a

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5 See *SOL Trustees Ltd v Giles Civil Ltd*, above n 3, at [39].

6 The content of the 14 April 2013 email is described in [5] above.

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

payment schedule to be comprised in a single document. His reasoning expressed a qualification to the proposition, and to the extent that his judgment is to be taken as requiring a single document, then with respect it is wrong. It would be patently unfair if (as is demonstrated on the facts here) a claimant could present a valid payment claim that comprised numerous documents, but the payer's response in a payment schedule had to be assembled in a single document. Numerous decisions consider the adequacy of a payment schedule when comprised in a number of documents, and there would be no justification for imposing such a restriction as to form.[8]

[33] However, the prospect of including other information in multiple documents does not necessarily mean the additional content qualified it as a payment schedule.

[34] Decisions have consistently acknowledged that the requirement is to "indicate" reasons for withholding payment rather than to state, specify or set out reasons. That suggests a degree of flexibility or that some lack of precision or particularity is permissible.[9] I agree with the adjudicator that the 1 August 2014 email does not have sufficient detail to indicate the reasons for MIH's refusal to pay the amount of the payment claim. It provides no indication of any calculations relied on for MIH to quantify the counterclaims, or how those counterclaims related to the extent specified in the payment claim. The information conveyed could not allow Bussell to decide which components of the dispute raised by MIH it would accept, and which it would contest.

[35] Mr Grace argued that once interpreted in light of the matters raised by MIH in its 14 April 2013 email, then the combined effect was sufficient to indicate the manner in which MIH calculated the scheduled amount at zero, and the reasons for the difference between zero and the amount claimed by Bussell. Mr Grace argued that Bussell could not be confused as to the correspondence from the previous year referred to in the 1 August 2014 email. MIH's challenges in April 2013 had gone

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8 For example, in *SOL Trustees Ltd v Giles Civil Ltd*, above n 3, the Court of Appeal considered a payment schedule that was comprised in more than one document.

9 See *Foggo v R J Merrifield Ltd* HC Christchurch CIV-2009-409-000605, 21 September 2009 at [37] and *Westnorth Labour Hire Ltd v S B Properties Ltd* HC Auckland CIV-2006-404-001858, 19 December 2006 at [29] (adopting Australian authority).

unanswered, and the matter had thereafter not been addressed again until the July 2014 payment claim was presented.

[36] Mr Collins argued that there was no sufficient cross-reference in the 1 August 2014 email to the matters that had been raised in April 2013, so that the matters raised in 2013 could not be taken into account in assessing whether MIH had sufficiently indicated the matters required in a payment schedule by s 21(3). Mr Collins conceded that his argument would have less force if MIH had annexed a copy of the 2013 email to the 1 August 2014 email and made specific cross-reference. However, even in those circumstances, he argued that insufficient information was conveyed to indicate the requisite matters.

[37] In *Westnorth Labour Hire Ltd v S B Properties Ltd*, Rodney Hansen J upheld the adequacy of an employer's response to a payment claim that did not specify the scheduled amount or the reasons for the difference between the scheduled amount and the claimed amount.[10] In that case, Rodney Hansen J reasoned:

> [28] … 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.

The employer's letter in that case ran to some two and a half pages, indicating considerable detail of concerns on numerous matters and requesting further information to enable a counterclaim to be prepared in more precise terms.

[38] As the Court of Appeal did in *SOL Trustees Ltd*, I consider that Rodney Hansen J's analysis is distinguishable because of the thoroughness of the response in that case that was relied on as a payment schedule. Without provision of a copy of the April 2013 email when MIH purported to send its payment schedule on 1 August 2014, it is difficult to treat the content of those unspecified earlier communications as part of a payment schedule. Further, even if their content is

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[10] *Westnorth Labour Hire Ltd v S B Properties Ltd*, above n 9.

included, there is no information as to the extent of overcharging MIH would claim, or the cost of remedial work it had to pay for with a subsequent contractor to correct work inadequately or incorrectly done by Bussell. Presumably, either or both of those matters would have to be outlined for MIH to indicate the matters required by s 21(3).

Conclusion

[39] To the extent that the adjudicator ruled that a payment schedule had to be contained in a single document, then that constituted an error of law.[11] However, when communications from MIH are considered on a broader basis, there is still inadequate to constitute a payment schedule.

[40] Accordingly, the application for judicial review is dismissed. Bussell is entitled to costs on a 2B basis, together with disbursements, if any, to be settled by the Registrar.

Dobson J

Solicitors:
Surridge & Co, Porirua for applicant
Gibson Sheat, Wellington for second respondent

[11] The adjudicator's reliance on the point was somewhat unclear, and was not determinative in the finding that MIH had failed to present a payment schedule.