IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-5663

UNDER	the Companies Act 1993
IN THE MATTER OF	an application to set aside a statutory demand pursuant to section 290 of the Companies Act 1993
BETWEEN	MCALPINE HUSSMANN LIMITED Applicant
AND	COOKE INDUSTRIES LIMITED *Respondent*

Hearing: 13 March 2012

Counsel: JL Thomas for applicant
E St John for respondent

Judgment: 16 March 2012

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to set aside a statutory demand]

This judgment was delivered by me on 16 March 2012 at 11:30am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Schnauer & Co, PO Box 31 272, Auckland 0741
Stafford Klaassen, PO Box 29 185, Auckland

The application

[1] The applicant applies to set aside a statutory demand dated 1 September 2011 which demands payment "of the sum of $73,188 being a debt owed pursuant to the Construction Contracts Act 2002".

[2] The applicant pleads three principal grounds in support of its application, namely:

(a) That there is a genuine and substantial dispute whether or not the debt is owing and is due;

(b) That it is not insolvent and is well able to pay any further liability if it is ultimately found to be obliged to pay to the respondent arising out of the cancelled Trox order; and

(c) It has defences to any claim the respondent brings for the amount specified in its invoice received on 1 July 2011.

The statutory basis for the application

[3] The application is made in reliance on the Companies Act 1993, s 290(4)(a) and (c). Section 290(4)(a) provides:

> ***290 Court may set aside 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
>
> ...
>
> (c) The demand ought to be set aside on other grounds.

The court's approach to an application to set aside a statutory demand based on the Companies Act 1993, s 290(4)(a)

[4] The approach that the court adopts to an application that relies on the Companies Act 1993, s 290(4)(a) can be shortly stated. The court is required to determine whether there is a substantial dispute whether or not the debt is owing or is due. The applicant must show a fairly arguable basis upon which it is not liable for the amount claimed: *Forge Holdings Ltd v Kearney Finance (NZ) Ltd*[1] and *Queen City Residential Ltd v Patterson Co-Partners Architects*.[2] That formulation was approved in *United Homes (1988) Ltd v Workman*.[3] Once that position is reached the statutory demand should be set aside and the dispute is then disposed of, if necessary, by other proceedings in the ordinary way.

The court's approach to an application to set aside a statutory demand based on the Companies Act 1993, s 290(4)(c)

[5] Before analysing the facts of this case it is appropriate that I refer to the examination of this question by the Court of Appeal in *Commissioner of Inland Revenue v Chester Trustee Services Ltd*:[4]

> That said, I agree with Baragwanath J that the general policy of the Act that insolvent companies should be put into liquidation, if a creditor seeks such an order, should not be departed from lightly. To justify such departure there must be some other factor, be it policy, principle or simply the justice of the particular case, which outweighs the prima facie entitlement of the creditor to an order putting the insolvent company into liquidation. If the focus is on the justice of the particular case the discretion must always be exercised on a principled basis and not on some ad hoc perception of what individual justice might require. All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement is outweighed by some factor or factors making it plainly unjust for liquidation to ensue.

[6] The Court of Appeal has given guidance in those situations where the company relies on an alleged ground of its solvency as a stand-alone ground for setting aside a statutory demand under the Companies Act 1993, s 290(4)(c). In *AMC Constructions Ltd v Frews Contracting Ltd* the Court of Appeal said:[5]

> If there is no dispute as to the company's liability, so that para (a) or (b) [of s 290(4)] cannot be invoked, it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid. If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed. If it is not met, and an application for liquidation is filed, in reliance on the presumption in s 287(a) that the company is unable to pay its debts, then the company will have an opportunity on the liquidation application to rebut the statutory presumption, which applies "unless the contrary is proved". There might be circumstances in which it is appropriate to advance the inquiry as to solvency to the s 290 stage, but that would require some particular circumstance not present in this case.

The opposition

[7] The respondent opposes the application. It relies on three separate matters, namely:

(a) That there is no genuine and substantial dispute whether or not the debt is owing;

(b) The applicant failed to serve a valid payment schedule pursuant to the Construction Contracts Act 2002. The result is that the funds that are the subject of the statutory demand are now a debt due pursuant to the Construction Contracts Act 2002; and

(c) In the alternative, the applicant had no grounds to cancel the contract with the respondent and the respondent was under no duty to mitigate the loss.

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1 *Forge Holdings Ltd v Kearney Finance (NZ) Ltd* HC Christchurch M149/95, 20 June 1995 at 2.
2 *Queen City Residential Limited v Patterson Co-Partners Architects Ltd* [1995] 3 NZLR 307.
3 *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447 (CA) at 451-452.
4 *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR (CA) 395 at [3].
5 *AMC Constructions Ltd v Frews Contracting Ltd* [2008] NZCA 389, (2008) 19 PRNZ 13 at [7].

Background

[8] The applicant obtained a subcontract from Hawkins Constructions Ltd, which was the head contractor on a significant building project at the Auckland Sky City Casino.

[9] The subcontract required the applicant to carry out the HVAC Mechanical Services supply and installation. The subcontract required air conditioning diffusers and componentry made by a company known as Trox in Germany. The respondent is the New Zealand agent for Trox.

[10] As the project progressed it became apparent that any delays in installing the air conditioning would delay overall completion of the project. The head contractor asked the applicant to find out how long it would take to get the Trox components to New Zealand by normal sea freight and how long it would take to get them to New Zealand by air freight. The applicant contacted the respondent and asked for time estimates to get the Trox components to New Zealand. The respondent confirmed an anticipated ex-works German delivery of three weeks for the order. Additional time would be required to get the components transported to New Zealand. On 18 May 2011 the applicant advised the respondent to place the order for the componentry. The order number for this was PD132090. The applicant also asked that the order be air-freighted to New Zealand. It asked for the cost of the difference between sea freight and air freight to be advised. The applicant anticipated that, having received advice from the respondent, the Trox order would arrive in New Zealand on approximately 18 June 2011.

[11] On 20 May 2011 the applicant notified the respondent that an item in the order needed a length adjustment. It asked for the cost difference for air-freighting to be advised. On 26 May 2011 the respondent confirmed that they would proceed with the order. On 3 June 2011 the applicant learned that the respondent had placed the order on hold for a week while it revised the quote. It went on to say that "we expect to be able to issue a firm delivery date by the middle of next week", being 8/9 June 2011.

[12] Further delays occurred. On 8 June 2011 the respondent advised that a further 10 working days was required for technical detailing and drawing and that they would try to confirm the completion date by the beginning of the next week.

[13] On 16 June 2011 the respondent advised the applicant that Trox had released the plans for production and the ex-works Germany delivery date would be 5 July 2011. When the time for air freight was added, that meant that there would be an expected delivery in New Zealand on 17 July 2011.

[14] The applicant advised the head contractor of this amended delivery date. The head contractor immediately instructed the applicant to cancel the Trox order because the head contractor was concerned that the late delivery date would delay the whole project. On 21 June 2011 the applicant cancelled the Trox order.

[15] What follows next is not entirely clear. The case was argued based on the evidence adduced by affidavit by the manager of the applicant. No evidence was advanced by affidavit on behalf of the respondent. Mr St John explained that the reason for this was that the issues that arise on this application could, in the respondent's view, be determined based on the facts set out in the applicant's manager's affidavit.

[16] The original quoted figure appears to be that contained in an email dated 26 May 2011 which records quoted figures based on standard sea freight terms:

> Sky City South $12,800
>
> Sky City North $118,066.

Whether those figures include GST cannot be determined from the documentation.

[17] The applicant's manager has produced the actual invoice rendered by the respondent. It is dated 30 June 2011. The operative provision provides:

> Charges associated with the cancellation of your order no. PD132090, quantity 1, unit price $90,897. Net amount $90,897.

To that a GST component of $13,634.55 is added. The applicant's manager describes his understanding of that invoice as: "The full value of the Trox order less any charge for freight".

[18] The applicant complains that the invoice does not indicate the manner in which the respondent has calculated the amount it is claiming. Further, it complains that the respondent is not claiming a sum for construction carried out but is claiming for cancellation of the contract.

[19] The applicant consulted its lawyers. What followed were two letters from the applicant's solicitors to the respondent company dated 7 July 2011 and 15 July 2011. The applicant sought information from the respondent in those letters. I do not detail the requests in full. Suffice to say, the principal inquiry related to how much of the order had been manufactured by the date of cancellation of the order.

[20] The requests were not responded to in detail. Indeed, no written response was received by the applicant by 29 July 2011. In its solicitor's letter, the applicant had drawn attention to the fact that a response in terms of the Construction Contracts Act 2002 was required by that date, although they desired to resolve the issue beforehand, if possible.

[21] On 28 July 2011 the applicant sent a response which, on its face, purports to be a payment schedule in terms of the Construction Contracts Act 2002, s 21. That document records the date of issue of the invoice, noted that the due date for issue for a payment schedule was not stated on the payment claim, or any terms of trade. It noted that the claimed amount was $90,897 plus GST. It then set out in table form the following:

Item	Claimed	Approved	Reasons and basis of calculation
Claimed by Cooke			
Charges associated with cancellation of McAlpine order No PD132090	90,897.00	17,709.90	Allowed at 15% of confirmed order value of $118,066 (without prejudice to an overall settlement between Cooke/McAlpine/Hawkins being agreed)
Less amounts due to McAlpine			
Allowance for consequential costs associated with delay, re-sequencing of construction, liquidated damages, etc as charged by Hawkins	0.00	TBA	Refer Hawkins letter 9 June 2011 (emailed by McAlpine 15 June 2011)
Total Claimed Amount	$90,897.00		
Total Scheduled Amount		$17,709.00	

[22] The letter went on to explain why the due date for service was 29 July 2011. No issue is taken with that date or with the fact that the sum of $20,365.35 was direct credited to the respondent's bank account on 29 July 2011.

[23] The letter then, having set out the history of the matter, concluded with the following paragraph:

> Despite the fact that your payment claim does not contain any substantiation for the basis of the charged cost, we have in light of our earlier undertaking assessed it without prejudice to any obligation that we may have (and subject to agreeing an overall settlement with Hawkins), and have shown a cancellation fee equal to what we regard as being fair and reasonable.
>
> To avoid doubt our position is:
>
> 1. If that allowance is not acceptable as full and final payment, then no amount is payable, and the amount is nil; and
>
> 2. That we are entitled to recover from Cooke all costs incurred by McAlpine associated with delay, re-sequencing of construction, liquidated damages, and other costs that may be charged by Hawkins under our subcontract. We refer to Hawkins letter dated 9 June 2011 (copied to Cooke on 15 June 2011). Although we will contest any such charges, we will look to Cooke for recovery of any actual costs arising out of Cooke's mishandling of the Trox order.

[24] On 5 August 2011 the respondent's counsel wrote to the applicant's solicitors. In that letter counsel referred to the applicant's email and, in particular, the 28 July 2011 letter and wrote:

> I have advised my client that this schedule is inadequate and does not comply with the Act. Your client was required to schedule that amount

> which it says is owing. A conditional offer made "without prejudice" is not a valid payment schedule.
>
> Accordingly, having failed to provide a payment schedule the full amount is now a debt due pursuant to the Act. If payment is not made immediately legal proceedings will be issued without further notice.

[25] The letter went on to comment upon the merit issue concerning cancellation and asserted that there had been a wrongful repudiation by the applicant of the contract obligations. Further correspondence ensued. The respondent maintained its position that no payment schedule had been provided by the applicant with the result that the sum claimed was due.

[26] What followed then was the issue of the statutory demand that is the subject of this proceeding. The figure claimed in the statutory demand appears to be the net amount claimed before GST of $90,897 less the calculation of the schedule amount due in the 28 July 2011 document of $17,709, leading to a claim of $73,188. Counsel did not explain how the additional sum and GST component should be treated. That arises from the fact that the actual payment made by the applicant was $20,365.35 and not the scheduled amount of $17,709.

[27] Because the amount would appear to be slightly less when the impact of GST is taken into account and because counsel did not raise it in submissions, I proceed on the basis that there is no current argument about the actual quantification of the figure contained in the statutory demand.

The grounds in support and in opposition discussed

[28] I deal first with the solvency issue. There is nothing in the material placed before me that justifies the setting aside of the statutory demand on a stand-alone basis based on the applicant's solvency. The applicant's solvency is, however, relevant should the court consider the exercise of the court's additional powers under the Companies Act 1993, s 291. Indeed, Mr St John acknowledged that this would not be an appropriate case to call for an immediate liquidation of the company.

[29] I deal next with the two major issues that arise in this case. The first issue is whether or not the tax invoice of 30 June 2011 is a payment claim in respect of a construction contract and which complies with the Construction Contracts Act 2002, s 20. The second major issue is whether the formal response in the letter of 28 July 2011 is a payment schedule that complies with the Construction Contracts Act 2002, s 21.

The payment claim

[30] Ms Thomas submitted that the payment claim issued by the respondent was not a valid payment claim.

[31] She acknowledged that technical quibbles about compliance with the Construction Contracts Act 2002, s 20 will not invalidate a payment claim that substantially complies with the requirements of the Act.[6]

[32] What is required, however, she submitted, is compliance in substance with the requirements of the Act.[7]

[33] She submitted that the payment claimed does not meet the mandatory requirements of s 20 because the invoice does not:

(a) Identify the construction work and the relevant period to which the progress payment relates as required by s 20(2)(c);

(b) Indicate the claimed amount as defined by the Construction Contracts Act 2002, s 19 and as required by s 20(2)(d); and

(c) Indicate the manner in which the payee calculated the claimed amount as required by s 20(2)(e).

[34] She submitted that the amount claimed has not been substantiated as to what construction work it related to and how the claimed amount was calculated. She noted the applicant's claim that the order was only three days into a 13-day

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[6] *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA) at [42].
[7] *Loveridge Ltd v Watts & Hughes Construction Ltd* HC Tauranga CIV-2011-470-275, 29 September 2011 at [17].

manufacturing schedule when cancellation was notified. She submitted, therefore, that the payment claim lacked the specificity necessary for the applicant to know what construction work was the subject of the claim.

[35] Mr St John submitted that the requirements of s 20(2)(a) and (f) are expressed as mandatory requirements and must be contrasted with the balance of the requirements of s 20, namely (2)(b), (2)(c), (2)(d) and (2)(e), which are less prescriptive and do not uniformly impose immutable obligations.[8]

[36] Mr St John also submitted that the applicant's complaints about the payment claim are all within the lesser requirements of s 20(2).

[37] He further submitted that it is not necessary to identify the time period because this was a contract for a single supply. There was no question of progress payments. There could only be one period.

[38] Because this was a single-supply contract there could be no issue about:

(a) The date for payment; and

(b) The calculation of the amount due.

Both arise from the contract itself.

[39] Finally, Mr St John submitted that the applicant's complaints about the payment claim are truly within the 'technical quibble' category and should be dismissed on that basis.[9]

Discussion

[40] The legislative purpose and the procedure that lies at the heart of the Construction Contracts Act 2002 have been summarised in a number of judgments and I will not repeat them again.[10]

[41] As has been said in a number of cases, a contractor wishing to take advantage of the summary procedure prescribed by the Act must comply with the requirements imposed by the Act. In particular, there must be a compliance with the requirements specified in s 20 which deals with payment claims. Counsel have already drawn attention to the position that in some instances there is a need to comply with the letter of legislative requirements, for example, that prescribed by s 20(2)(a) and (2)(f). In other areas, particularly those requirements specified by ss 20(2)(b), (c), (d) and (e), it may be sufficient if there is a substantial compliance.[11]

[42] Subpart 3 of the Construction Contracts Act 2002 sets out the procedure for making and responding to payment claims. Section 19 is the interpretation section.

> "Claimed amount" is there defined as "an amount of progress payment specified in a payment claim that the payee claims to be due for construction work carried out".
>
> "Scheduled amount" is defined as "an amount of progress payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim".

[43] The requirements for a valid payment claim are specified in s 20(2):

> (2) A payment claim must—
>
> (a) be in writing; and
>
> (b) contain sufficient details to identify the construction contract to which the progress payment relates; and
>
> (c) identify the construction work and the relevant period to which the progress payment relates; and
>
> (d) indicate 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.

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[8] *Welsh v Gunac South Auckland Ltd* HC Auckland CIV-2006-404-7877, 11 February 2008 at [18].
[9] *George Developments Ltd v Canam Construction Ltd*, above n 6, at [42].
[10] *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC) at [14]–[17].
[11] *George Developments Ltd v Canam Construction Ltd*, above n 6, at [41]–[43].

[44] The first matter raised by the applicant is whether there has been compliance with s 20(2)(c). The tax invoice identifies the construction work by reference to the order number. There can be no doubt about that. The construction work here was the air-conditioning diffusers and the componentry. It was fully set out in the order form. The reference to the order form removes any doubt as to what work was required. As to the second issue raised, the relevant period, this was a single-supply contract. There is no question of progress payments or payments on a periodic basis. A single supply was required and was called for by the contract. The description in the invoice therefore, in my view, fits within what is required for s 20(2)(c).

[45] Understandably, with respect to s 20(2)(d), this was not developed to any great extent by Ms Thomas. Counsel were agreed on what the due date was, namely, 29 July 2011. The amount claimed is clearly set out in the invoice.

[46] Section 20(2)(e) requires closer examination. The amount claimed in the tax invoice is less than the contract sum, excluding the cost of travel. Why it is less and what portion of the contract rate has been excluded by the invoice and how it was calculated was not set out. The requirement is to indicate the manner in which the payee calculated the claimed amount. My initial view was that the description in the invoice was certainly a borderline position in relation to compliance. However, this was a single-supply contract with one contract sum. When one considers the particular circumstances of this case, having regard to the background that I have outlined, it is not at all difficult to see that the substantial contract sum is claimed. One would have thought, therefore, that the applicant's answer should have been to take issue with the payment claim in the payment schedule. Indeed, as the facts disclose, that was what was attempted. I therefore am satisfied that, when I take into account the full circumstances of this case, bearing in mind that it is a single-supply contract that called for a contract sum, what has been supplied in this case has sufficiently complied with s 20(2)(e).

[47] The conclusions set out above answer the first of the two major issues involved in this case and therefore require a consideration of the second, namely, whether the applicant's response by virtue of an attempted s 21 payment schedule in fact was a valid payment schedule.

Is there a valid payment schedule?

[48] Mr St John first referred to the scheduled amount as it is defined in s 19. He submitted that the payment schedule did not specify a payment in response to a payment claim but, in fact, provided for the payment of a sum in full and final settlement of the contract. It then went on to say that if the amount is not accepted then the amount is nil.

[49] Mr St John next drew attention to the consequences that flow where no payment schedule is provided pursuant to s 23 and to the fact that there is no provision for counterclaims, set-offs or cross-demands, except in the defined circumstances set out in the Construction Contracts Act 2002, s 79.

[50] Mr St John acknowledged that if the payment schedule had stopped simply with the calculated sum due for payment and had not added the conditions upon which payment was made, then the schedule would have complied.

[51] Mr St John referred to *Metalcraft Industries Ltd v Christie*.[12] The court there had to analyse a payment schedule which was written in the following terms:

> ... In any event our client disputes liability for payment, and advises that she is unable to specify if any payment is to be made to your client until she receives invoices for the remedial work undertaken by her replacement contractors. This, and our earlier correspondence, is to be regarded as our client's reasons for withholding payment. The cost of the remedial work is expected to exceed your client's invoice.
>
> ... Any summary judgment proceeding on the basis of your claim that the sum is a debt due, or otherwise, will be defended and costs will be sought.

[52] Harrison J at [18] analysed that letter as follows:

> In my judgment the letter, even when read in conjunction with earlier correspondence, does not approach satisfaction of the statutory requirements. It cannot be construed as indicating a scheduled amount of nil. To the contrary, Pegg Ayton specifically stated that Ms Christie was not then in a position 'to specify if any payment is to be made'. It was not an unequivocal denial of liability for all of the payment claim but was instead notice that

[12] *Metalcraft Industries Ltd v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007.

Ms Christie would review her position at a later date. The strict provisions of Part 2 were enacted to pre-empt this very mischief.

[53] Mr St John next referred to the summary of the effects and consequences of payments and judgments under the Construction Contracts Act 2002 contained in the judgment of Mallon J.[13]

> **Statutory provisions**
>
> *The CCA regime*
>
> [7] An adjudicator has the power to determine whether or not a party is liable to make a payment under a construction contract (s 48 CCA). The adjudication is binding on the parties and is of full force and effect even where any other proceeding relating to the dispute has been commenced (s 60 CCA). The amount of the adjudication is recoverable as a "debt due ... in any court" (s 59(2)(a) CCA) or an application can be made for the adjudication to be entered as a judgment in accordance with the procedures for that in the CCA (s 59(2)(c) CCA). There are only limited grounds on which the entry of judgment can be resisted and they do not include that a party disagrees with the adjudicator's view as to liability (s 74(2) CCA)
>
> [8] However, an adjudication does not necessarily finally resolve matters as between the payer and the payee. A party remains able to submit the dispute to a court (or other dispute resolution procedure) (s 26(1) CCA). The result is that a party can successfully obtain an enforceable adjudication under the CCA but separately have a judgment entered against them for the same amount. This can only occur if the court proceeding is determined after the adjudication, because an adjudicator must terminate its proceedings if the court (or other dispute resolution) proceeding is determined first (s 26(3)). Providing the dispute is referred promptly to an adjudicator, this is unlikely to occur very often because the CCA procedure is subject to strict timeframes and few formalities.
>
> [9] A determination under the CCA therefore provides a mechanism by which payment of disputed amounts can be promptly required and enforced, even though the payer is able to separately contest that the payment was owing under the contract between the payer and the payee. If the payer's position is upheld in separate proceedings then the payee will be required to pay back the money that he or she received from the payee as a result of the CCA process. For this reason the CCA has been described as a "pay now, argue later" regime and as giving rise to a "temporary" debt (eg. *Laywood v Holmes Construction* [2009] 2 NZLR 243 at [52]). Nevertheless, because it is a debt that may be enforced, it has been held that a statutory demand can be issued in respect of it: *Volcanic Investments Limited v Dempsey & Wood Civil Contractors Limited* (2005) 18 PRNZ 97.

[13] *Gill Construction Co Ltd v Butler* [2010] 2 NZLR 229 (HC) at [7]–[9].

[54] Mr St John next referred to a passage from the judgment of Asher J in *Marsden Villas v Wooding Construction Ltd* where his Honour said after describing the circumstances in which a claim is made:[14]

> If a principal does not agree with the way in which a progress payment is calculated in a progress claim, it may protest to this in a responding payment schedule. That is the appropriate remedy. There is no reason for the Court to interpret s 17 as setting up a gateway through which a valid claim must pass. I bear in mind the substantive compliance approach, referred to earlier in this judgment.

[55] Ms Thomas submitted that the payment schedule in fact met the requirements of s 21 because it did indicate the basis for withholding payment and, further, it did indicate how that sum was calculated.

The payment schedule analysed

[56] I have referred to the definition of "scheduled amount" contained in s 19 and therefore do not repeat it.

[57] Section 21 of the Construction Contracts Act 2002 provides:

> **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

[14] *Marsden Villas Ltd v Wooding Construction Ltd*, above n 10, at [40].

> withholding payment on any basis, the payer's reason or reasons for withholding payment.

[58] I agree and accept Mr St John's submission that had the payment schedule simply stopped at the point where it referred to the total scheduled amount of $17,709 there could be no complaint with its content. When I consider the authorities that I have set out in the summary of Mr John's submissions, I accept his submission that the schedule is not in compliance with s 21 where a tag is placed on the scheduled amount. To do so simply runs contrary to the scheme of the Act, which is set out in the authorities referred to in my summary of Mr St John's submissions.

[59] The conclusion I have reached is that the payment schedule does not comply with s 21 and the consequences of serving a valid payment schedule do not apply. The result is the unpaid portion of the invoice, which I take for the purposes of this application is the amount actually specified in the statutory demand, is due in terms of the Construction Contracts Act 2002. In saying that I do not intend to depart in any way from the consequence of such a finding as is appropriately summarised by Mallon J in *Gill Construction Co Ltd v Butler*.[15]

[60] The flavour of the correspondence between the applicant, respondent and, latterly, their legal advisers indicated a desire on the applicant's part to find a satisfactory resolution to the position which flowed from the cancellation of the order. It is disappointing that no attempt has been made to find a solution to that, as I anticipate that the conclusion I reach in this case will probably lead to further proceedings between these parties. Having said that, that is often a consequence of the interim solutions that are provided for in the Construction Contracts Act 2002.

Conclusions

[61] I conclude, therefore, that the application to set aside the statutory demand fails and accordingly is dismissed.

[15] *Gill Construction Co Ltd v Butler*, above n 13.

[62] For reasons earlier referred to in this judgment, I consider that the appropriate order in consequence of that finding and in reliance on the Companies Act 1993, s 291, is that I should order that the applicant pay the debt specified in the statutory demand within 15 working days of the date of this judgment and that if the applicant defaults in such payment, the respondent may make application to put the applicant into liquidation. I order accordingly.

Costs

[63] This application occupied a full half-day defended hearing. At counsel's request I reserve costs. Because there may be an issue relating to actual solicitor/client costs I order that the party seeking costs shall file and serve a memorandum together with an affidavit if costs, other than costs according to the High Court Rules are sought. Counsel opposing shall file and serve, 14 days after receipt of the memorandum and affidavit from the party seeking costs, any memorandum in opposition and any affidavit in opposition. A reply memorandum shall be filed and served seven days thereafter.

JA Faire
Associate Judge