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

CIV 2006-404-4570

UNDER	The Construction Contracts Act 2002
BETWEEN	MULES CONSTRUCTION LIMITED Plaintiff
AND	WEDDING EARTHMOVERS LIMITED Defendant

Hearing: 12 October 2006

Appearances: M L Broad for Plaintiff
R J Viskovich for Defendant

Judgment: 20 December 2006 at 11.00 am 20 December 2006 at 11.00 am

JUDGMENT OF ASSOCIATE JUDGE H SARGISSON

*This judgment was delivered by me on 20 December 2006 at 11.00 am,
pursuant to Rule 540(4) of the High
Court Rules*

Registrar/Deputy Registrar

Date:

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[1] Mules Construction Limited has commenced proceedings against Wedding Earthmovers Ltd and filed a summary judgment application in which it seeks summary judgment against Wedding Earthmovers Limited the unpaid balance on invoices totalling \$432,618.28 together with interest and an order for costs. Mules say that Wedding has no defence to the claim.

[2] Wedding has now paid a substantial part of the amount claimed but it says that there is a genuine dispute about the balance and that the application for summary judgment should, accordingly, be refused and the dispute should go to trial.

[3] The case raises issues under the Construction Contracts Act 2002.

Background

[4] Mules is a construction company. Wedding is an earthmoving and construction company. The two companies entered into a number of separate construction contracts between 10 April 2003 and 4 April 2006, in which Mules agreed to undertake various construction services for sewers, manholes and the like and provided labour, plant and materials for Wedding.

[5] There were eight contracts in all. All were oral contracts and required payment on an hourly basis for labour and on a daily basis for machinery use and on a costs plus margin price basis for materials.

[6] Mules claims that it performed its obligations under the contracts and invoiced Wedding a total of \$432,618.28. Wedding did not pay anything and on 4 May 2006 Mules served payment claims on Wedding for the total amount under s 20 of the Construction Contracts Act 2002. Wedding declined to make the payments claimed.

[7] It is Mules' contention that Wedding was obliged to pay the total amount because it did not exercise its right under s 21 of the Act to provide payment schedules for any amounts it claims are in dispute. Mules says that under s 21 Wedding was obliged to provide a payment schedule or schedules within twenty

working days after service of the payment claims. It says that the last day for Wedding to provide any payment schedules was 1 June 2006.

[8] Wedding contends that it did provide a payment schedule in the form of a letter written by a Mr Askew from Wedding and although Mules claims it received the letter after 1 June 2006, Wedding says the letter was “provided” on or before 1 June 2006 in accordance with the Act.

[9] The letter is dated 29 May 2006. In the letter Mr Askew states:

The bundle of invoices/payment claims hand delivered to Wedding’s Mangere offices on 4 May 2006 have been referred to me for consideration.

As per the discussions between Allan Mules and the writer during May 2006, Wedding have numerous queries regarding several of the accounts. It should be noted that most of the queries discussed below have been raised previously by members of Wedding management with the representatives of Mules Construction Limited.

[10] Mr Askew then goes on to ask Mules to consider his specific comments in relation to four of the contracts which he identifies by project numbers 153, 242, 231 and 125. He says:

Whilst we acknowledge receipt of your tax invoices we confirm that invoices relating to any of the above projects will be subject to counterclaims or counter charges to Mules Construction Limited as a result of remedial work costs to bring all works installed by Mules up to a complying standard that meets Wedding’s expectations.

[11] Mr Askew’s letter makes no such specific mention of the other four contracts.

[12] Mules did not treat the letter as a payment schedule or otherwise regard it as justification for non-payment. It proceeded to file and serve the proceedings together with the application for summary judgment.

[13] Subsequently, Wedding paid Mules several sums to clear the invoices in respect of the four contracts that Mr Askew did not specifically mention in his letter. At the hearing counsel for Wedding said the payment was not a concession as to Wedding’s liability but a “goodwill” gesture made in an attempt to work through matters privately without the need for litigation.

[14] Mules says that in these circumstances Wedding remains liable under the Act for:

- a) The outstanding balance amounting to \$196,222.40 on its claims on projects 153, 242, 231, 125, and
- b) Interest on the amounts invoiced for all eight contracts to the date of payment. It therefore seeks interest for payments it says were made belatedly and for those still to be paid.

[15] Wedding continues to maintain that its liability to make further payment is disputed and that the dispute should not be dealt with by way of summary judgment.

[16] Both sides have filed affidavits in support of their respective positions.

Issues

[17] The issues I am required to decide are:

- a) Is Mr Askew's letter capable of being treated as a payment schedule under s 21?
- b) Was the letter provided to Mules within the prescribed twenty working day period after the payment claim was served?

[18] With one qualification, it is common ground that if the answer to either of these questions is clearly "no", then Wedding has no defence to Mules' claim for summary judgment. The qualification relates to a further argument Wedding advanced at the hearing. The argument is, in effect, that because Wedding had signalled a dispute on or before May 2006, and because it has now paid a substantial part of the amount claimed, the Court should exercise its residual discretion not to enter summary judgment.

[19] For reasons I will come to, the argument lacks substance and is not a bar to summary judgment.

Submissions

[20] I deal first with the question of whether the letter is capable of being treated as a payment schedule.

[21] Section 21 states:

- (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**;
 - (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**.

[22] Mules contends that Wedding's letter is not capable of being treated as a payment schedule as it contains no scheduled amount or identified sum in response to its payment claims in accordance with s 21(2)(c), and no calculations are provided as required by s 21(3)(a).

[23] Counsel for Mules also submitted that there must be substantial compliance with the requirements of the Act if the payer wishes to avoid its consequences. He relied on *Jian Hua Property Ltd v Freemont Design & Construction Ltd* HC AK CIV 2005-404-5526, 16 February 2006, Associate Judge Doogue at [28]. He also submitted in reliance on the same authority, that certainty is required if the mechanisms of the Act are to accomplish the Act's objectives (at [30]).

[24] Counsel emphasised the need to identify what is in issue between the parties in *monetary terms* so that the parties are adequately advised as to the extent of the difference between them (*West City Construction Ltd v Edney* (2005) 17 PRNZ 947 at 953).

[25] In response, counsel for Wedding argued that Mr Askew's letter complies with the requirements of s 21. In particular, he submitted that it is relatively clear that Mr Askew was indicating that Wedding was forwarding a scheduled amount of "nil" until various remedial works could be ascertained and calculated for the alleged defective workmanship. He also submitted that "indicate" in s 21(2)(c) should be given its ordinary and everyday meaning, with the effect that precise calculations are not necessary, especially where the schedule indicates that no payment would be made by the payer.

[26] Both counsel referred to *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 and *Jian Hua Property* for the principle that the Court will not allow technical quibbles to vitiate payment claims or payment schedules that substantially comply with the Act, but Mr Broad argued that the letter contained deficiencies that went beyond technical quibbles. Mr Viskovich argued the contrary.

Discussion

[27] It is clear that the Act does not require a payment schedule to be in any particular form. A schedule may therefore be in letter form, provided it meets the requirements of s 21.

[28] It is important not to allow technical quibbles to vitiate payment schedules that substantially comply with the Act. However, what is provided to the payee must be recognisable as a payment schedule. Failure to meet this basic requirement would frustrate the express purpose of the Act.

[29] Section 3 states:

The purpose of this Act is to reform the law relating to construction contracts and, in particular, -

- (a) To **facilitate regular and timely payments** between the parties to a construction contract; and
- (b) To provide for the speedy resolution of disputes arising under a construction contract; and
- (c) To provide remedies for the recovery of payments under a construction contract.

[Emphasis added]

[30] As noted by Associate Judge Doogue in *Jian Hug Property Ltd*, a reasonable degree of certainty is required if the mechanisms contained in the Act are to accomplish the Act's objectives. If the payer does not issue a document that can be reasonably viewed as a statement addressed to the payee to the effect that the payer does not accept liability for part of the claimed amounts, then the payer will not be protected from the enforcement provisions contained in the Act. A payee should not have to guess at the payer's intentions.

[31] Mr Askew's letter cannot be reasonably viewed as a payment schedule as contemplated by the Act. It is a letter that raises "queries" or issues in relation to four of the projects, pointing to dissatisfaction with the quality of the work because it does not meet Wedding's expectations. While Mr Askew makes clear in the letter that Wedding will dispute liability for the claims and that the invoices will be subject to counterclaims or counter charges for the cost of remedial works, the letter does not specify the extent to which any charges may be set off against the claim. Essentially, what he communicated was that Wedding would not consider the invoices at all pending the resolution of the issues he raised.

[32] This approach is not what s 21 contemplates. It leaves the payee with an unacceptable level of uncertainty as to the payer's intentions. It is also contrary to the purpose of the Act as explained by Asher J in *Marsden Villas Limited v Wooding Construction Limited* HC AK CIV 2006-404-002136, 25 May 2006 (at [17]):

The processes that it (the Act) 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 ... to delay payments.

[33] The letter also does not sufficiently satisfy the specific requirements of s 21(2)(c). It does not adequately particularise a scheduled amount, and consequently fails to provide the prescribed related information.

[34] The key to s 21 is the provision of sufficient information to make clear the manner in which the scheduled amount has been calculated: see *Jian Hua Property Ltd* at paragraph [27]. Section 19 defines "a scheduled amount" as the amount of a

progress payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim. One can glean from the overall tone of Wedding's letter that Mules could not expect payment on the invoices, but the Act clearly requires more than this.

[35] In *West City Construct Ltd v Edney* 17 PRNZ 947, 953, Venning J said:

The purpose of the payment claim and payment schedule provisions of the Act is to enable a contractor to make a claim for work done in an identified sum and, in the event the employer disputes the claim, the employer has the ability to challenge the claim by formally referring to it but importantly in doing so is required to specify *how much the payer says is actually payable*. The legislation is designed to ensure the parties identify the difference between them, and to identify what is in issue between the parties in monetary terms so that the parties are adequately advised as to the extent of the difference (emphasis added).

[36] On Venning J's interpretation of the relevant provisions, the payer must state explicitly the amount it says is payable, in monetary terms and the reasons why it is less than the amount claimed. Adopting his approach, it is difficult to see how Mr Askew's letter is sufficiently explicit about what is disputed. The letter does not expressly state that Wedding will not be making any payment at all, let alone identify, in monetary terms, the difference between the parties and the reasons for the difference. The difference is not stated in monetary terms, and the reasons that are given are so general as to leave the payee guessing at the payer's intentions. Although the letter outlines various issues and notifies of future disputes, that cannot sensibly be regarded as sufficient to constitute a payment schedule of the kind contemplated by the Act.

[37] For the above reasons, I am satisfied that Mr Askew's letter is not capable of being treated as a payment schedule. The answer to the first question is therefore "no".

Was the "payment schedule" provided in time

[38] In view of the above finding, it is not necessary to consider the question whether the letter was provided within the prescribed twenty working days.

Residual Discretion

[39] I come next to the final ground that Wedding relied on; namely that the Court should exercise its residual discretion not to order summary judgment.

[40] Counsel for Wedding argued that it has already all but \$196,222.40. He submitted that Mules was aware prior to serving its payment claims that Wedding disputed the alleged monies owing under the relevant projects, and the bases for those disputes. Counsel submitted that because there are issues as to loss incurred by Wedding for defective work, the Court should exercise its discretion to not award summary judgment.

[41] I reject the submission. The Act is clear that if a payment claim is made, a payment schedule must be provided if the payer recipient wishes to withhold payment of a disputed invoiced sum. If a payment schedule is not provided, the payer may still dispute liability for payment but the contractor must make the payment pending the outcome of the dispute.

Result

[42] I am satisfied that Mules has shown that Wedding has no defence to Mules' claim for summary judgment on the balance of the invoices that remains unpaid. Accordingly, I give summary judgment for Mules in the sum of \$196,222.40.

[43] I reserve the matter of interest. Counsel for Mules is to file and serve by 30 November 2006, a memorandum setting out Mules' calculations as to interest. Counsel for Wedding has a further seven days to respond by memorandum. If there is any dispute as to the calculation, I will hear from both counsel and will convene a telephone conference or a further hearing.

Costs

[44] Mules is entitled to costs on a 2B basis together with disbursements to be fixed by the Registrar.

[45] Any issue as to further costs on memoranda relating to interest is reserved.

Dated at Auckland on _____ at _____ am/pm.

Associate Judge Sargisson