

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

**CIV 2014-404-000885
[2014] NZHC 1455**

BETWEEN

P3PEOPLE LIMITED
Applicant

AND

QS BUILDING LIMITED
Respondent

Hearing: 26 June 2014

Appearances: D Mitchell for the Applicant
T Bowler for the Respondent

Judgment: 26 June 2014

ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

Background

[1] The applicant (P3People) has applied to set aside the respondent's (QSB) statutory demand. P3People claims they have a substantial dispute with QSB's claim of a debt due; and that they have a significant counterclaim/set off or cross demand in an amount which exceeds QSB's claim.

[2] Ms Jourdain is the sole director and shareholder of P3People which contracted with QSB to construct a "rib raft floor, concrete mid-floor and block work" to the property registered to her company and occupied by she and her husband.

[3] In her affidavit Ms Jourdain describes the work and services contracted to be provided. She deposes in detail concerning her complaints about the adequacy of those services and the failure, she says of the product.

[4] She says P3People has paid \$343,950 (including GST) but disputes any responsibility for the \$32,622.10 identified by QSB's statutory demand. She says the remedial work will cost considerably more than the amount it is claimed P3People owes.

[5] In its notice of opposition QSB says P3People failed to serve payment schedules in response to QSB's payment claims as required under s 22 of the Construction Contracts Act 2002 (the Act); and that P3People is no longer able to dispute the amount claimed because s 23 of the Act prevents that.

[6] In his affidavit on behalf of QSB Mr Stephenson disputes Ms Jourdain's complaints regarding the product and services provided. Mr Stephenson was very particular in his address and denial of each of Ms Jourdain's complaints.

[7] Also, Mr Stephenson annexes a copy of an email sent by Ms Jourdain of QSB dated 28 March 2013 wherein she stated:

I am a qualified project manager and I would never have managed a project like mine the way you guys did it, and with how I feel about it I don't think

you bloody deserve a cent more, however a price was reached though Shaun [Ms Jourdain's husband] and I will honour that.

[8] In his affidavit Mr Stephenson set out a statement with his calculation of the amount outstanding. He then deposed:

In regard to the payment claims no schedule was received from the applicant in the time prescribed by Construction Contracts Act 2002.

[9] In an affidavit in reply Ms Jourdain deposed:

2. I did not receive a notice attached to the... invoices outlining the process for responding to the claims and an explanation of the consequences of not providing a schedule under the Construction Contracts Act.
3. ... I did not receive that invoice... dated 21 December 2012 until sometime during January 2013. The invoice was addressed to my personal post box PO Box 155, Silverdale, 0944 Auckland.

[10] Ms Jourdain says the house was being built for her and her husband (Mr Hamilton) but that she "asked that if any invoices could be issued in the name of my company P3 People Limited". She says she was living on the property when QSB provided its quote in July 2012; that QSB was aware that she and Mr Hamilton were intending to live in the house when it was completed and that until then they lived and rented cabins on the property.

Overview

[11] There is a significant dispute between the parties regarding claims of negligent services and product provided for the foundation of the house to be built as the residence for Ms Jourdain and Mr Hamilton. In those circumstances and but for the Act the Court would have set aside QSB's statutory demand because it would have been inappropriate to proceed any further until the parties' dispute had been thoroughly investigated by Court dispute proceedings processes.

[12] For this reason the submissions of counsel for this hearing have focussed upon whether QSB has adequately observed its Act obligations by its delivery of its payment claims, in order to entitle it to the indemnity provisions provided in the Act.

[13] It is not in dispute that P3People did not serve payment schedules as is required when liability is disputed.

The applicant's case

[14] P3People says QSB was aware the house was being built as the home for Ms Jourdain and Mr Hamilton who were living on the property in rented cabins throughout the works.

[15] The applicant submits the payment claims are invalid because:

- (a) They were served on Ms Jourdain "after the nominated due dates".
- (b) They were served without an outline of the process for responding to that claim as required by s 20(3) of the Act.

The facts according to Ms Jourdain

[16] Ms Jourdain claims QSB has not provided evidence of when and on whom the payment claims of October 2012 and December 2012 were served. Ms Jourdain deposes the December 2012 payment claim was received "in her P O Box sometime in January 2013".

[17] Ms Jourdain acknowledges requesting that QSB's invoices be sent to her company, and that the construction contract was signed by her on behalf of her company. She says that the payment claims were delivered to the post office box used by Ms Jourdain and also P3People, but were not received by her until after the due date of 28 December 2012 as the payment claim provided.

[18] Also Mr Mitchell submits Ms Jourdain is a residential occupier (as is described in the Act) and as such the payment claims to her were not accompanied with an explanation of the process required by s 20(3). Therefore it is submitted that failure prevented Ms Jourdain having all the relevant information to decide how to respond to the payment claims. Counsel submits the payment claim was therefore invalid.

Considerations

[19] Evidence provided by Ms Jourdain included a copy of QSB's construction quotation and contract.

[20] It identified the client as P3 People Limited. It described the contract site address as 641 Horseshoe Bush Road, Dairy Flat.

[21] Under the heading 'payment terms and conditions' the document noted:

...

4. Invoices will also be payment claims under the Construction Contracts Act 2002 and you must pay in full or serve a payment schedule within seven days of delivery of invoice.

[22] The quotation was accepted and work began in October 2012.

[23] It is the Court's perception that payment claim irregularities are somewhat an afterthought. No issue concerning those was raised by the application to set aside the statutory demand or in Ms Jourdain's affidavit in support of that application. Rather both documents were devoted entirely to contract work complaints. P3People said it disputed the sum claimed and intended to issue a set off and/or counterclaim.

[24] The first time any questions were raised with respect to the form and delivery of the payment claims appeared in the reply affidavit. It might be argued the Court should not accept that evidence because it was not raised upon evidence given by Mr Stephenson in QSB's affidavit in support of the notice of opposition.

[25] On the other hand it is clear from the construction quotation that the parties' contract would be subject to the Act. The Court agrees with Mr Bowler's submission that the usual legal principles governing applications to set aside a statutory demand are displaced by the fact that the parties have entered into a construction contract and payment claims are governed by the Act.

[26] The purpose of the Act is to facilitate regular and timely payments between parties to a construction contract. As appears by the decision of the Court of Appeal in *George Developments Limited v Canam Construction Limited*¹ a purposive interpretation must be adopted and technical quibbles should not be allowed to vitiate a payment claim that substantially complies with the requirements of the Act.

[27] Whilst Ms Jourdain thinks she picked up the payment claim from her post office box in January 2013, she appears somewhat vague with her recollection. It is her case of course that the payment claim came to her notice after the date by which payment was due. Mr Mitchell submits therefore the document must fail as a payment claim.

[28] The payment claim provided for payment within seven days. The parties' contract required payment within seven days of the delivery of the invoice. It is to be inferred from the applicant's evidence that delivery was effected by mail to the post office box Ms Jourdain had directed delivery to.

[29] Mr Mitchell refers the Court to the authority of *Lindsay Builders Ltd v Bird*². This Court agrees with Mr Bowler's qualification of the effectiveness of that authority. In that case Lang J observed that a plaintiff's argument in support of a claim would have difficulties succeeding if the payor could not make payment in time when the due date for payment preceded the date of service of the payment claim.

[30] However in that case the plaintiff did not appear when the matter was called. Whilst making the comment the learned Judge acknowledged that he had not heard argument on the point. The comments therefore are obiter. The default provisions in the Act provide 20 working days from the date of service of the payment claim to respond by way of a payment schedule, or to pay.

¹ [2006] 1 NZLR 977.

² HC Christchurch, CIV 2010-409-2724, 13 July 2011.

[31] In this case the payment claim referred to a due date of seven days from the date of the payment claim. The parties' contract required payment within seven days of delivery of an invoice.

[32] Had Ms Jourdain filed a payment schedule within seven days of her receiving, through her post office box, the payment claim, then QSB would unlikely have cause for complaint about its timing.

[33] If Ms Jourdain had filed a work payment schedule within 20 working days of receipt, her chances of arguing good cause for failing to meet payment of the payment claim would be in much better shape than no payment schedule at all being delivered, as occurred in this case.

[34] The second arm of the argument for P3People rests on a claim that Ms Jourdain and Mr Hamilton are residential occupiers and therefore s 20(3) of the Act required also the delivery of an explanation of the consequences of not responding to a payment claim and not providing payment. No such explanation was provided with the delivery of QSB's payment claim.

[35] Mr Bowler submitted that an applicant cannot on the one hand enjoy the benefits of limited liability and perhaps also taxation benefits by entering into the contract using a corporate entity as the contracting party and then, on the other hand, seek to obtain the benefits of being an individual who is a residential occupier. The Court agrees.

[36] Section 2 of the Act provides that a residential occupier is:

An individual who is occupying, or intends to occupy, the premises that are the subject of a construction contract wholly or mainly as a dwelling house.

[37] P3People is not an individual.

[38] It may or may not have been obvious that Ms Jourdain and her husband were the intended occupants of the property. Whatever that arrangement was it concerned Ms Jourdain and her company – it did not affect the contract between the company and QSB.

[39] The Court considers it is of no assistance to P3People. The purpose of s 20(3) was intended to make it clear that contractors needed to provide sufficient information to private, not corporate owners of a residential property.

[40] Also and not to be overlooked is Ms Jourdain's acknowledgement in her email of 28 March 2013 that she was a qualified project manager.

Conclusions

[41] The respondent's payment claims were served upon the applicant and no payment schedules were served by the applicant in response.

[42] Section 23 of the Act precludes the raising of counterclaims or set off based on claims of faulty workmanship.

[43] QSB has sufficiently satisfied its statutory obligations to effect delivery, in sufficient form, of a payment claim. Due to the failure of P3People to respond appropriately they are unable to raise claims of defective work in opposition to obligations to meet payment.

[44] The application to set aside the statutory demand is dismissed.

[45] QSB wishes to make a claim for reasonable actual costs as s 23(2) of the Act permits. As Mr Bowler suggests the Court directs any submissions for costs greater than 2B scale, are to be filed and served by 4:00pm 27 June 2014, i.e. tomorrow. Mr Mitchell submits 2B costs are sufficient. If he has any further submissions then those are to be filed and served by 4:00pm 30 June 2014.

Associate Judge Christiansen