IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV-2012-442-000013
[2012] NZHC 2217

IN THE MATTER OF	Sections 289 and 290 of the Companies Act 1993
BETWEEN	SEATING SYSTEMS LIMITED Applicant
AND	KIDSON CONSTRUCTION LIMITED Respondent

Hearing: 22 August 2012

Appearances: M J Logan for Applicant
G J Praat for Respondent

Judgment: 30 August 2012

RESERVED JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] On 20 December 2011 Kidson Construction Limited issued a demand under s 289 of the Companies Act 1993 against Seating Systems Limited. Kidson says that Seating Systems owes it $39,296.67, the outstanding balance of charges by Kidson to Seating Systems for work undertaken to provide temporary seating at Trafalgar Stadium, Nelson.

[2] Seating Systems denies owing anything to Kidson and maintains that Kidson has been on notice of a dispute about its invoices since July 2011. It says that for this reason the demand should be set aside and further, it should be set aside because it contains a defect and substantial injustice would be caused if it were not set aside.

Background

[3] Seating Systems had a contract with the Nelson City Council to provide temporary seating for rugby matches during the Rugby World Cup 2011. It contracted with Kidson for the latter to build seating, which included such additional features as platforms, stairways, landings, handrails, scrim covering and so forth. On 28 June 2011 Kidson issued six invoices for work and materials.

[4] On 8 July 2011 Seating Systems emailed Kidson raising a number of issues about the invoices. The concerns Seating Systems expressed then, and later, remain unresolved. If that were the complete picture the statutory demand for payment could not survive and indeed would probably not have been issued. Section 290 of the Companies Act provides for the Court to set aside a statutory demand where there is a substantial dispute whether the debt is owing or is due.

[5] However, it is common ground that the contract is a construction contract within the meaning of the Construction Contracts Act 2002. Accordingly the dispute resolution procedure set out in that Act applies. The invoices were payment claims in terms of s 20. Therefore, s 21 applies. It 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 withholding payment on any basis, the payer's reason or reasons for withholding payment.

[6] Section 22 provides that a payer becomes liable to pay the claimed amount on the due date if a payment claim is served and the payer does not provide a payment schedule within the time required by the contract or otherwise within 20 working

days of the payment claim being served. Kidson says no payment schedule has been provided; Seating Systems says the email of 8 July 2011 was a payment schedule.

Issues

[7] The issues in this case are:

(a) Is the defect in the notice under s 289 Companies Act 1993 such that it should be set aside under s 290?

(b) Was the email of 8 July 2011 a payment schedule in terms of s 21 of the Construction Contracts Act?

(c) If it was not a payment schedule, can the notice be set aside under s 290 on the ground that there is a substantial dispute on whether or not the debt is owing or is due?

The statutory demand

[8] Paragraph 1 of the demand reads:

> As at 16 December 2011 [Seating Systems Limited] owes [Kidson Construction Limited] Thirty-four, four hundred and seventy-three dollars and fifty-six cents ($39, 296.67, ("the Debt") being the outstanding balance of invoices for work in providing temporary seating at the Trafalgar Stadium Nelson.

[9] It will be noted that:

(a) The word "thousand" is absent after the initial "thirty-four", and

(b) the words stating the debt do not align with the figures.

[10] Seating Systems does not take issue specifically with the former; it maintains, however, that the latter is a material misstatement of the amount due, there is therefore a defect in the demand, and that substantial injustice would be caused if it were not set aside. It relies on s 290(5) of the Companies Act:

> **290 Court may set aside statutory demand**
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> ...
>
> (5) A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.
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> ...

[11] Subsection (6) provides that a defect includes a material misstatement of the amount due to the creditor.

[12] Accordingly it is necessary to determine first whether there has been a material misstatement of the amount due, and secondly whether a substantial injustice would be caused if the demand were not set aside.

[13] In *Pioneer Insurance Company Ltd v White Heron Motor Lodge Ltd*,[1] the Court considered a statutory demand where the sum stated differed by 25 per cent from the sum which could be properly demanded. In *Pioneer* the Court viewed the misstatement as sufficiently material that a substantial injustice would be caused. In the present case, the notice has an internal inconsistency of approximately 12 per cent. In my view, each case must be considered on its own facts, and those facts should include any material background facts which may have a bearing on whether the misstatement in the notice was fairly capable, considered against those background facts, to have been misleading.

[14] First, nothing turns on the absence of the word "thousand". The meaning of the verbal statement of the sum is sufficiently clear without that word. Secondly, I am satisfied that by the time the notice was issued the communications between the parties were such that Seating Systems Limited knew that the sum Kidson claimed was $39,296.67, and that against that background the misstatement of the sum claimed in words was not material.

[15] Consequently there is no defect in the notice in terms of s 290(6). However, should that conclusion be incorrect and the internal inconsistency should be regarded as a defect, I am nonetheless satisfied that there would not be a substantial injustice

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1 *Pioneer Insurance Company Ltd v White Heron Motor Lodge Ltd* [2008] NZCA 450.

if the notice is not set aside on this ground. The figure of $34,473.56 came, I was told, from a schedule prepared by Seating Systems and sent to Kidson on 9 December 2011 representing Seating System's reconciliation of invoices payments and adjustments it sought. For an unexplained reason this figure was put into the statutory demand. I think it likely that Seating Systems knew this figure had been created by them and that the amount Kidson claimed was the higher figure of $39,296.67.

[16] I am quite satisfied that despite the internal discrepancy in the sum demanded no substantial injustice would be caused by not setting aside the notice on this ground.

Did Seating Systems respond to Kidson's invoices of 28 June 2011 by issuing a payment schedule?

[17] Section 21 of the Construction Contracts Act sets out three requirements for a payment schedule. It must be in writing, identify the payment claim to which it relates, and indicate a scheduled amount. If the scheduled amount is less than the claimed amount, the payment schedule must also indicate the manner in which the payer calculated the scheduled amount, the payer's reasons for the difference between the two amounts, and if the difference is because the payer is withholding payment on any basis, the reason or reasons for withholding payment.

[18] Mr Logan argues that the email dated 8 July 2011 from Seating Systems to Kidson is a payment schedule. It was sent by Mr Wyatt. In it he refers to Allan, who is Mr A R Hawkins, a director of Seating Systems.

[19] After indicating that some parts of Kidson's invoices had been signed off for payment, the email continued:

> There are some parts of your invoice I need to ask you about because it doesn't marry up with the cashflow in terms of what is owing to you, so please don't take any of this the wrong way, I'm just making sure I have the answers for Allan, who will want an explanation on every cost that is outside of his forecasts and the reasons for it.

General

1. Are you able to look at the rental rate on the swivels, to bring it back in line with the other couplers?
2. Are you able to give us a better plywood rate than the $55.00 per sheet?
3. Overtime rate on the Disabled Platform, can we get a better rate on this?

Mid-Steps

1. For the building of the mid-steps, wouldn't it only have used 8 sheets of plywood, ie, each step being .250mm wide x 1200 long = 9 cuts per sheet of plywood x 8 sheets of plywood = 70 midsteps?

East Stand

1. Wasn't the remainder of the agreed price $9,777.40 + GST, not $13,971.40?
2. The $7000.00 cost to retro fit the bracing, was that agreed with Allan, was it not inclusive in the agreed rate?
3. You have noted 13 hours as the total time to rehash the stair landings at each end, is that how long the welding took to complete that?

South Stand

1. Wasn't the agreement for 2541 seats @ $4.00 per seat = $10,164.00 + GST.
2. The cost to scrim the South Stand, was that not inclusive in the rate?
3. 23 hours repairing broken seats, was there quite a few broken seats in the stand?

West Stand

1. The cost of cutting the bolts off on the permanent nib and the 6 platforms dropped in to minimize any trip hazards, shouldn't the Council be picking up that cost?

[20] Mr Logan submits that the first two requirements for a payment schedule are met – the email is obviously in writing, and Mr Logan maintains that it identifies the payment claims to which it relates. This is because the paragraph headings "Mid-Steps", East Stand", "South Stand", and "West Stand" and the reference to the disabled platform under item 3 of the general heading, are referable to five of the six invoices which relate to those five areas of the work. He also notes that the six invoices concerned were the only outstanding invoices to Kidson so the payment schedule could not relate to any other invoices.

[21] Mr Logan says that a letter can constitute a payment schedule,[2] and the same should apply to an email. Mr Logan noted that in *N C B 2000 Ltd v Hurlstone Earth*

2 *N C B 2000 Ltd v Hurlstone Earth Moving Ltd* HC Auckland CIV-2010-404-008096, 23 June 2011, Wylie J.

Moving Ltd Wylie J adopted the observations of Rodney Hansen J in *Westnorth Labour Hire Ltd v S B Properties Ltd*,[3] where the Court had adopted the approach of the New South Wales Supreme Court in *Multiplex Constructions Pty Ltd v Luikens*:[4]

> ... The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

[22] Mr Logan goes on to analyse the email in relation to each of the invoices and submits it sets out the facts disputed in relation to each. On this basis he submits that the requirements for a payment schedule in s 21 have been met.

[23] Mr Praat argues that the email referred only to four of the six invoices, and failed to indicate a scheduled amount as required. He refers me to the judgment in *Marsden Villas Ltd v Wooding Construction Ltd*,[5] in which the Judge summarised the procedure and then said:

> [17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of that procedure, and the quick resolution of disputes. The processes that it sets up are designed to sidestep 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, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cash flow.

[24] Counsel also referred to *Metalcraft Industries Ltd v Christie*:[6]

> [15] ... the whole thrust of the payment claims provision in Part 2 is to enhance a contractor's entitlement to make and enforce progress claims unless they are properly disputed in a timely manner: *West City Construction Ltd v Edney*, HC Auckland CIV-2005-404-001066 1 July 2005, Venning J: at [44]. The specific purpose of the payment schedule is to give the

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3 *Westnorth Labour Hire Ltd v S B Properties Ltd* HC Auckland CIV-2006-404-001858, 19 December 2006.

4 *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [78].

5 *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC).

6 *Metalcraft Industries Ltd v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007, Harrison J.

> contractor full and unequivocal notice of all areas of difference or dispute to enable it to properly assess its future options.

[25] Relying on these authorities Mr Praat submits that the email does not give Kidson any indication of a scheduled amount, and that the email cannot be reasonably interpreted as putting Kidson on notice that Seating Systems was prepared to make a payment of a particular figure.

Discussion of this issue

[26] First, I am satisfied that the email identifies the payment claims to which it relates. It followed the invoices within a matter of days, and uses the same subheadings as the invoices use. It refers quite clearly to five components of the work. It is established that some want of precision and particularity is permissible. I see little if any basis on which Kidson could have had any doubt about which invoices were being referred to under the specific subheadings in the email.

[27] The third requirement of s 21(2) is that the payment schedule must indicate a scheduled amount. The scheduled amount is the amount that the payer proposes to pay in response to a payment claim.[7]

[28] Section 21(3) sets out three requirements for a payment schedule if the scheduled amount is below the amount claimed. The courts have consistently recognised that the purpose of a payment schedule is to give the contractor full and unequivocal notice of all areas of difference or dispute in order to enable it to properly assess its future options.[8] The scheduled amount is the portion of the payment schedule which dictates the future. The three requirements for a payment schedule set out in s 21(3) (which include the way in which the scheduled amount was calculated and the reasons for it) are directed at creating a clear position which may lead to the payee accepting the payment in full settlement (because it accepts the calculation and the reasons for it) or to the payee determining that the issues must be referred to a dispute resolution process. This part of a payment schedule is therefore of considerable importance. Nonetheless if the essence of the reasons for

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[7] Construction Contracts Act 2002, s 19.

[8] *West City Construction Ltd v Edney*; *Metalcraft Industries Ltd v Christie* at [24] - [25] above.

withholding payment is made known sufficiently to enable the payee to make a decision on whether or not to pursue a claim and to understand the nature of the case it will have to meet if the matter proceeds to adjudication, that is sufficient.[9]

[29] An examination of the email relied upon by Seating Systems shows that:

(a) In relation to the disabled platform, it asks whether Seating Systems can be given a better rate for overtime.

(b) In relation to the mid steps, it asks whether only eight sheets of plywood would have been used instead of the number charged for, and gives a calculation.

(c) In relation to the east stand, it raises a question in relation to the remainder of the agreed price, whether the cost of retrofitting bracing was included in the agreed rate (or was otherwise agreed) and whether welding took the 13 hours stated.

(d) In relation to the south stand, the email asks a question relating to the original agreement which is difficult to relate back to the invoice, whether the cost of scrim was included in the rate (presumably the rate was agreed in the contract) and whether there were quite a few broken seats in the stand.

(e) Finally in relation to the west stand, it asks whether a certain cost should have been referred to the council instead.

[30] I have carefully considered Mr Logan's submissions but even allowing as much latitude as can reasonably be given, I am not satisfied that the email constituted a scheduled amount as required by s 21, defined in s 19, and particularised as in s 21(3). In essence the document asked a number of questions. Whilst it can fairly be concluded that in respect of certain of the points a dispute is raised about liability to pay certain items, that falls well short of giving Kidson full and unequivocal notice of all areas of difference to enable it to properly assess its

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9 *N C B 2000 Ltd v Hurlstone Earth Moving Ltd*; *Westnorth Labour Hire Ltd v S B Properties Ltd*; *Multiplex Constructions Pty Ltd v Luikens* at [21] above.

future options. Read as a whole the document is seeking answers, and indeed the opening paragraph states: "I'm just making sure I have the answers for Allan, who will want an explanation on every cost that is outside of his forecasts and the reasons for it." I do not think it can be fairly construed as a document which complies with the requirements of a scheduled amount in s 21.

[31] It follows that the payment claims made by Kidson in its six invoices were not responded to by a payment schedule. Consequently the provisions of s 22 apply. This provides:

> **22 Liability for paying claimed amount –**
> A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if –
> (a) a payee serves a payment claim on a payer; and
> (b) the payer does not provide a payment schedule to the payee within –
> (i) the time required by the relevant construction contract; or
> (ii) the contract does not provide for the matter, 20 working days after the payment claim is served.

Can the notice be set aside under s 290 on the ground that there is a substantial dispute whether or not the debt is owing or is due?

[32] Section 23 of the Construction Contracts Act provides, relevantly:

> **23 Consequences of not paying claimed amount where no payment schedule provided**
> (1) The consequences specified in subsection (2) apply if the payer –
> (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
> (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
> (2) The consequences are that the payee –
> (a) may recover from the payer, as a debt due to the payee, in any court, -
> (i) the unpaid portion of the claimed amount; and
> (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
>
> ...

[33] Section 79 of the Construction Contracts Act provides:

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
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> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if –
>
> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[34] Service of a statutory demand is a proceeding for the recovery of a debt under s 23: *Laywood v Holmes Construction Wellington Ltd.*[10] Accordingly on this application to set aside a statutory demand the Court must not give effect to any counterclaim, set-off or cross-demand raised by any party to the proceedings. Mr Logan submits that Seating Systems does not say that it has a counterclaim, set-off or cross-demand; rather it says it has a defence as the amounts charged by Kidson are wrong. Therefore Mr Logan says s 79 does not apply. Section 79 is clear in its terms. References to a counterclaim, set-off or cross-demand mirror the terminology in s 290(4)(b) of the Companies Act, the second of the grounds for setting aside a statutory demand. They do not repeat the first ground, a substantial dispute whether or not the debt is owing or is due. It was open to the legislature to so provide; it did not. Section 79 does not apply.

[35] The point does not, however, assist Seating Systems, because the effect of s 22 is that it has become liable to pay the amount claimed, and the effect of s 23 is that Kidson may recover the unpaid portion of the amount claimed as a debt due to Kidson in any court. Issuing a statutory demand is an act of recovery of the debt, under this Act. The time for raising a dispute in relation to Kidson's payment claims was within 20 working days after the claims were served (s 22) and in the absence of that having occurred, as here, the consequences are clearly set out in s 23. The situation is well summarised in *Luxta Ltd v Paragon Builders Ltd*:[11]

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10 *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35.

11 *Luxta Ltd v Paragon Builders Ltd* HC Wellington CIV-2010-485-1825, 17 December 2010, Associate Judge Gendall.

> [12] ... 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.

[36] In *McAlpine Hussmann Ltd v Cooke Industries Ltd*,[12] the Court was faced with the situation in this case: a payment claim to which the payer had not responded with a payment schedule. Nonetheless it asserted a genuine dispute, and sought an order setting aside a statutory demand for payment of the sum in the payment claim. The Court applied *Gill Construction Co Ltd v Butler*[13] and declined to set aside the demand. I follow the same course.

Solvency

[37] Seating Systems has paid the sum claimed into its solicitor's trust account, for payment to Kidson should it be required to do so. Mr Logan argues that Seating Systems is therefore solvent, and the s 289 process for enforcing payment of a debt should not be invoked.

[38] Whilst solvency is relevant at the time an application is made to liquidate a company, that is not the position on an application to set aside a statutory demand, unless the Court is considering at the same time making a further order under s 291 putting the company into liquidation.[14] That is not under consideration here, at this point.

Outcome

[39] The application to set aside the statutory demand is declined. The time for payment is extended to 15 working days of the date of this judgment.

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[12] *McAlpine Hussmann Ltd v Cooke Industries Ltd* HC Auckland CIV-2011-404-5663, 16 March 2012, Associate Judge Faire.

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

[14] *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389.

Costs

[40] Section 23(2) of the Construction Contracts Act provides that in addition to recovering from the payer, as a debt due, the unpaid portion of the amount claimed, the payee may also recover the actual and reasonable costs of recovery awarded against the payer by that Court. Mr Pratt submitted that this is a statutory foundation for this Court to award to Kidson the actual and reasonable costs it has incurred on this proceeding. Mr Logan submitted that costs should follow the event, but on a scale 2B basis. Counsel accepted that this subsection does not appear to have been applied to date.

[41] I do not read s 23(2)(a)(ii) as requiring the Court to order that the payer pay the actual and reasonable costs of recovery. Nonetheless it is in my view a decisive incentive to a payer to recognise the force of the system provided by the Construction Contracts Act for timely identification of disputes, a prompt resolution process (Part 3 of the Act) and immediate payment of sums not disputed in the way the Act requires (the "pay now and argue later" system). In this case I have found that Seating Systems did not follow the required procedure for identifying a dispute, Kidson therefore had the benefit of the debt being immediately payable, but Seating Systems set the money aside rather than paying Kidson. In this circumstance Kidson was entitled to take enforcement procedures and took them. It was then faced with this application with attendant cost. The correct procedure, having failed to provide a payment schedule complying with s 21, was to pay and seek repayment later if, on completion of a dispute resolution mechanism, it was found that the payment made was excessive.

[42] Prima facie, therefore, there appears to be a basis upon which the actual and reasonable costs of Kidson in this proceeding might be awarded under s 23(2)(a)(ii). When Mr Praat sought costs on this basis at the hearing, my initial reaction was to ask Mr Logan to then respond. I detected that he may not have felt fully ready to deal with this point, which was not foreshadowed in Mr Praat's written submissions. Having considered the matter further, and set out in this judgment a summary of the basis upon which there may be grounds for making such a payment, I think it appropriate to give Seating Systems a further opportunity to make submissions on

whether an order should be made. As well, the costs claimed by Kidson should be identified. Accordingly I direct:

(a) Kidson is to file and serve a memorandum setting out the costs claimed, within five working days. That memorandum may also cover the grounds for a claim to costs if they are not sufficiently summarised above.

(b) Seating Systems is to file a memorandum in opposition within 10 working days.

(c) The memoranda will then be referred to me and dealt with on the papers.

J G Matthews
Associate Judge

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