IN THE COURT OF APPEAL OF NEW ZEALAND

CA454/2014
[2014] NZCA 539

BETWEEN	SOL TRUSTEES LIMITED Appellant
AND	GILES CIVIL LIMITED Respondent

Hearing:	1 October 2014
Court:	French, Venning and Dobson JJ
Counsel:	B P Molloy and R W H Kirwan-Jones for Appellant D M Hughes and E E Cowle for Respondent
Judgment:	10 November 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs for a standard appeal on a band A basis with usual disbursements. Allowance for one counsel only.

REASONS OF THE COURT

(Given by Venning J)

Introduction

[1] SOL Trustees Ltd (SOL) appeals a decision of Associate Judge Sargisson dismissing its application to set aside two statutory demands issued by Giles Civil Ltd (Giles).[1] The primary issue on appeal is whether Associate Judge Sargisson was

[1] *SOL Trustees Ltd v Giles Civil Ltd* [2014] NZHC 1813.

correct to find SOL had failed to provide a valid payment schedule,[2] with the effect that Giles was entitled to serve its statutory demands to recover two outstanding payments as due debts.

Background

[2] SOL and Giles were parties to a construction contract in relation to a 20 lot subdivision at 258–272 Okura River Road, Auckland. SOL was the principal and Giles was the contractor. The contract terms included the terms in New Zealand Standard 3910:2003 *Conditions of Contract for Building and Civil Engineering Construction*.

[3] Airey Consultants Ltd (Airey Consultants) was appointed as engineer under the contract. Airey Consultants had two roles, to act as advisor to and representative of SOL as principal, and, independently of both SOL and Giles, to make decisions under the contract, value work and issue certificates.

[4] The parties also agreed a process for the certification of progress payments. Giles was to send its payment claims to both SOL and Airey Consultants. Airey Consultants would then issue a provisional progress payment schedule certifying the amount due. SOL then had three working days to respond.

[5] Construction commenced on 17 December 2012. The original scheduled completion date under the contract was 17 May 2013. The work was not completed by that date.

[6] Issues arose when Airey Consultants sent a provisional progress payment schedule certifying Giles' payment claim 10 for $565,366 to SOL on 19 October 2013. By email of 22 October to Airey Consultants, SOL's director Mr Hamilton advised the claim was disputed. He also prepared a spreadsheet claiming "Project Overrun Costs", being costs SOL claimed it had incurred because of the delays. On SOL's calculations the total loss attributed to the delayed completion was $1,121,747.

---

2 Construction Contracts Act 2002, s 21.

[7] Although Mr Hamilton initially asked Airey Consultants to keep the spreadsheet confidential, all parties met on 25 October 2013 to discuss the contract. At the meeting Mr Hamilton provided a copy of the spreadsheet to Mr Coombe, a director of Giles. Even though no resolution was reached at the meeting, on 7 November SOL made a part payment of $230,000 to Giles in relation to claim 10.

[8] On 5 November 2013 Giles issued payment claim 11. Airey Consultants provided its certificate for claim 11 for $365,520.32 on 14 November. Mr Hamilton replied by email on 19 November: "Please be advised this claim is disputed and subject to be offset against [liquidated damages] under the contract."

[9] On 22 November Giles requested a formal decision on whether it was entitled to extensions of time for the delays from Airey Consultants. It also requested a decision on whether SOL could prove damage as a consequence of any delays.

[10] Giles issued its next payment claim, claim 12, on 26 November 2013. On 28 November Airey Consultants provided its certificate for payment claim 12 for $92,223.56. Again Mr Hamilton responded with a short email, advising: "Please note for the record that claim 12 for November is also disputed."

[11] On 18 December 2013 Airey Consultants awarded Giles extensions of time for the period up to 29 November 2013. It also concluded SOL's claim for delay could not be claimed as liquidated damages under the contract, meaning that any costs arising from the delay could not be used to offset the certified progress payment claims.

[12] Following the release of that decision, Giles issued payment claim 13 on 20 December. It sought payment of the balance of unpaid sums in claims 10, 11 and 12 as well as the further work claimed in 13. Airey Consultants certified the work claimed in payment claim 13 on 10 January 2014. Mr Hamilton responded in an email of 11 January 2014 in these terms:

> **Subject:** Re: Okura River Road – Progress Claim No. 13
>
> Pieter, Mike,

> You received notice our office is closed until the 20th therefore cannot comply with the 3 day period, as your [sic] are aware the contract is disputed as is also this claim.
> John

[13] Giles then served payment claim 14 on 29 January 2014 for $130,409.50. Mr Hamilton responded on behalf of SOL on the same day with the following email:

> **Subject:** Re: Okura River Road
>
> Please be advised your claim 29th January 2014 is disputed.
>
> Regards,
> John

[14] Giles then issued two separate statutory demands in reliance on payment claims 13 and 14. The first, for $842,539.48 (being the balance due for claims 10, 11, 12 and 13) was issued on 30 January 2014 and the second, for $130,403.50, was issued on 26 February 2014.

[15] SOL applied to set aside the statutory demands on the basis there was a substantial dispute as to whether or not the debts were owing or due in terms of s 290(4)(a) of the Companies Act 1993. That dispute related to SOL's contention that it had provided responses to the payment claims sufficient to constitute valid payment schedules in terms of s 21 of the Construction Contracts Act 2002 (the Act). SOL's position was that the costs to it of the delay exceeded the amount claimed by Giles.

[16] Giles acknowledged that SOL had raised the issue of delay but argued SOL's responses to payment claims 13 and 14 were not payment schedules in terms of s 21 of the Act, so the sums claimed in the payment claims were due debts. SOL was liable to pay the sums demanded.

Associate Judge's decision

[17] After a succinct summary of the principles relating to applications to set aside statutory demands and the purpose of the Act, Associate Judge Sargisson identified the issue before her as whether SOL had issued valid payment schedules on or before

the dates required in response to claims 13 and 14.[3] If SOL had failed to do so then, pursuant to s 23 of the Act, it was liable to pay the sums claimed and there could be no relevant dispute within s 290(4)(a) of the Companies Act to support the application to set aside the statutory demands.

[18] Associate Judge Sargisson concluded that SOL's response to payment claim 10 was not a payment schedule as required by the Act.[4] The spreadsheet did not indicate any scheduled amount. It was not clear that it was intended to indicate a scheduled amount of nil. The Associate Judge also noted that, despite the spreadsheet, SOL had made a subsequent payment of $230,000.

[19] The emails sent in response to payment claims 13 and 14 could not and did not constitute payment schedules either on their own or together with the spreadsheet.[5] SOL had failed to issue valid payment schedules in relation to claims 13 and 14. There was no basis to set aside the statutory demands.

Appellant's submissions

[20] SOL argued that a payment schedule for the purposes of the Act need not be comprised in one document. The cores of the payment schedules in response to payment claims 13 and 14 were SOL's emails of 11 January 2014 (claim 13) and 29 January 2014 (claim 14). However, those emails are to be read with:

(a) the spreadsheet;

(b) SOL's previous emails disputing the account; and

(c) the engineer's decision of 18 December 2013.

[21] Mr Molloy submitted that, taken overall, the combined correspondence provided notice of the nature of the dispute to Giles. He submitted the Court should take a robust, rather than a technical, approach to the issue of payment schedules.

---

3 At [27].
4 At [35]–[38].
5 At [41].

[22] Mr Molloy also submitted that SOL's emails disputing payment claims 11 and 12, which impliedly incorporated the spreadsheet, had been effectively accepted by Giles in its letter to Airey Consultants when it referred the dispute for resolution on 22 November 2013.

Discussion

The purpose of the Act

[23] The starting point must be the purpose of the Act. In *George Developments Ltd v Canam Construction Ltd* this Court said:[6]

> [41] We are satisfied that the necessary analysis must be undertaken with the purpose of the Act in mind. The purpose provision of the Act includes the fact that the Act was "to facilitate regular and timely payments between the parties to a construction contract". The importance of such regular and timely payments is well recognised. Lord Denning MR (quoted in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 (HL) at p 214 per Lord Diplock) said: "There must be a 'cash flow' in the building trade. It is the very life blood of the enterprise."

[24] In *Marsden Villas Ltd v Wooding Construction Ltd* Asher J put it this way:[7]

> [16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain time frame and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.
>
> [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,

---

6 *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA).
7 *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC).

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

[25] We endorse those comments. They are particularly applicable to the issues raised in the present case.

[26] Although the Associate Judge focussed on the spreadsheet in particular as a response to payment claim 10, on appeal the focus has been on claims 13 and 14 and SOL's response, as those claims are the basis for the statutory demands in issue.

What is required for a payment schedule?

[27] Section 21 of the Act sets out the requirements for a payment schedule as follows:

> **21 Payment schedules**
>
> ...
>
> (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.

[28] Scheduled amount is itself defined in the Act:[8]

---

[8] Section 19.

> **scheduled amount** means 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.

[29] The issue in the present case is whether SOL has satisfied ss 21(2)(c) and 21(3).

[30] To support his submission that it is permissible to read SOL's emails of 11 and 29 January together with the previous spreadsheet (and the engineer's decision) as comprising the payment schedule, Mr Molloy relied on two decisions of the High Court: *NCB 2000 Ltd v Hurlstone Earth Moving Ltd* and *Westnorth Labour Hire Ltd v S B Properties Ltd*.[9]

[31] In *NCB 2000* Wylie J held that a letter of 12 November 2010, when read with an earlier payment schedule and a comprehensive letter of 1 November 2010, satisfied the requirements for a payment schedule. Mr Molloy relied in particular on the Judge's concluding comments:[10]

> In my view, it would be unrealistic, unduly mechanistic and technical to exclude reference to this earlier documentation, and require that the letter of 12 November 2010 be read in isolation.

Mr Molloy submitted that similarly, the short email responses to claims 13 and 14 should not be read in isolation and could be read with the earlier spreadsheet and previous emails.

[32] In *NCB 2000* it was argued that the letter of 12 November was not a valid payment schedule as it failed to identify the payment claim to which it related and did not indicate the reasons for the difference between the scheduled amount and the amount claimed. However, the Judge concluded that, while the letter did not set out in detail the reasons for the difference between the scheduled amount and the amount claimed, when read with the earlier correspondence it was sufficient:[11]

---

9 *NCB 2000 Ltd v Hurlstone Earth Moving Ltd* HC Auckland CIV-2010-404-8096, 23 June 2011; and *Westnorth Labour Hire Ltd v S B Properties Ltd* HC Auckland CIV-2006-404-1858, 19 December 2006.

10 At [50].

11 At [44].

> It indicated a scheduled amount. It described itself as a payments schedule. It indicated the amounts that NCB accepted it was liable for, the amounts which NCB said had been paid either directly or indirectly, and the amount which NCB said it had overpaid.

[33] Importantly, the Judge recorded the detail of the letter of 12 November in the following terms:[12]

> The letter referred to the property at 88 Lady Ruby Drive and to the Construction Contracts Act. Under the heading "Payment Schedule" Mr Black set out plumbing and drainage works, and scheduled earthworks charged. He approved eight of the claimed variations and then itemised the payments NCB said had been made either directly or indirectly. He asserted that there had been an overpayment by NCB to Hurlstone of $26,950.99.

[34] The case of *NCB 2000* is quite different to the present case. In that case the principal responded to the items in the payment claim in the letter of 12 November. The letter engaged with the contractor's claim, as contemplated by the Act. By contrast, in neither of the emails sent in January in response to claims 13 and 14 was there any attempt by SOL to engage with or address Giles' claims other than to generally assert they were disputed. SOL made no attempt to indicate a scheduled amount.

[35] In *NCB 2000* Wylie J relied on the earlier decision of Rodney Hansen J in *Westnorth*, an appeal from the District Court. Again the facts of that case are important. A director of the principal company had sent a letter on 22 September in response to payment claims issued on 12 and 19 September. The letter identified the payment claims by invoice number and quantum. It then went on to detail, in over two and a half pages and some 16 paragraphs, the principal's response to the claim. The letter did not, however, quantify the balance due.

[36] Rodney Hansen J agreed with the District Court Judge's finding that, although the letter did not indicate a scheduled amount, it could be read as indicating the scheduled amount was nil. The Judge was satisfied the letter provided an adequate explanation why that was so. The letter identified doubts as to the accuracy of the contractor's time sheets and hence the sums charged. It identified a charge for materials that had been returned and provided other instances of faulty workmanship

---

[12] At [11].

that would entitle a reduction. Further information was sought. In Rodney Hansen J's judgment the letter conveyed the essence of the reasons for withholding payment.

[37] Again the facts of *Westnorth* are quite different to those in the present case. The principal engaged with the payment claim and responded to it in detail. In the present case all that SOL did was assert the claim was disputed. That is not sufficient.

[38] In *George Developments Ltd v Canam Construction Ltd* this Court accepted that an unduly technical approach ought not to be taken to the Act's requirements for payment claims.[13] However, that was in the context of its consideration of *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd*.[14] In *Hawkins*, the points taken were that the incorrect contract number was referred to and the name of the statute was abbreviated. Not surprisingly, Windeyer J rejected those objections as lacking merit.

[39] We agree that technical quibbles should not be allowed to vitiate either a payment claim or a payment schedule that otherwise substantially complies with the requirements of the Act. The issue in this case is whether the documents SOL relies on can be said to have substantially complied with the requirements of the Act.

[40] It is clearly insufficient to simply assert the amount claimed is disputed, which is as far as SOL's email responses to payment claims 13 and 14 went.

[41] SOL's attempt to incorporate the earlier spreadsheet as part of its payment schedule does not assist it. The spreadsheet cannot, either on its own or taken with the other emails referred to, satisfy the requirements of a payment schedule. At best it is SOL's calculation of a potential counterclaim or set-off for delay.

[42] We note that s 79 of the Act prescribes the circumstances in which a counterclaim or set-off can be raised in response to debt recovery proceedings:

---

13 *George Developments Ltd v Canam Construction Ltd*, above n 6, at [43].

14 *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2001] NSWSC 815 at [8].

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> 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.

[43] Although we have not had the benefit of full argument on the point, it would appear to be inconsistent if a counterclaim or set-off that is excluded by s 79 could be relied on as a response to a payment claim issued earlier. We note that in *Metalcraft Industries Ltd v Christie* Harrison J held that in light of s 79 a principal's denial of liability for a payment claim on the basis that a right of set-off existed would be insufficient.[15]

[44] For those reasons we do not consider that a counterclaim or set-off of the nature SOL seeks to raise in this case can provide the basis for a payment schedule in response to a payment claim under the Act. To allow a counterclaim or set-off to be used in that way would be contrary to the purposes of the Act to facilitate regular and timely payment by identifying the amount payable to the contractor for work done.

[45] In any event, SOL would not be able to rely on the spreadsheet in the present case because since the spreadsheet was tabled at the meeting on 25 October 2013 there have been two significant events:

(a) first, the payment of the $230,000 by SOL; and

(b) second, the engineer's decision of 18 December 2013.

[46] In relation to the first, Mr Hamilton said that at the meeting on 25 October:

> ... Due to these losses [as set out in the spreadsheet], I informed the attendants at the meeting that I would not be paying any further payment

---

15 *Metalcraft Industries Ltd v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007 at [28].

> claims. I note I also provided this schedule to Mike Lee [Airey Consultants] in an attachment to an email dated 21 October 2013.

[47] Mr Coombe's evidence is slightly different:

> ... We discussed the spreadsheet and it was acknowledged by JH [John Hamilton] that the items were significantly overstated to such extent that the claim would be reduced to a worst case scenario of $200,000. JH agreed to release $230,000 (incl GST) which was subsequently paid, and I understood that GCL [Giles] would be paid more once JH returned from a trip in Africa.

[48] Mr Hamilton has sworn an affidavit in reply in which he takes issue with the suggestion that more would be paid and says:

> [SOL] only paid the $230,000 in order to ensure progress on the subdivision and it refused to pay any further amount to reflect its assessment of losses.

[49] It is unclear from the evidence whether the $230,000 was agreed to be paid at the meeting or later. It is unnecessary to resolve the conflict because it was not paid until 7 November, well after the payment schedule had been tabled. If, on SOL's argument, the spreadsheet was to be regarded as part of the payment schedule that provided for a sum said to be owing, at the least it required adjustment by $230,000.

[50] Further, as noted, the claim for the delay was based on a calculation that the project was required to be completed by 17 May 2013. The issue of delay was subsequently referred to the engineer for determination. In the decision delivered on 18 December, Airey Consultants allowed a number of extensions of time that cumulatively took the completion date of the contract to 29 November 2013. Even if SOL was otherwise able to rely on the claim for delay, at the least it was required to take the extended completion date into account and adjust its claim accordingly. The spreadsheet tabled at the October meeting was no longer relevant after delivery of the engineer's decision in December.

[51] Mr Molloy suggested that as SOL had sought to have the matter referred to mediation, the engineer's decision had no effect. He referred to and relied upon cl 13.2.4 of the contract:

> ... Upon making a formal decision the Engineer shall forthwith send copies of it to both the Principal and the Contractor. The Engineer's formal

> decision shall, subject to 13.3 and 13.4 or any Adjudication proceedings, be final and binding.

Clauses 13.3 and 13.4 are references to mediation and arbitration.

[52] Mr Molloy submitted that cl 13.2.4 had the effect that, once a mediation or arbitration process was commenced, the engineer's decision was of no effect. We do not accept that submission. The clause does no more than confirm that, if the decision is set aside or varied during the course of the mediation, arbitration or adjudication process, the engineer's decision is replaced by that ruling. However, until it is set aside or varied as a result of the dispute resolution process, the decision stands. The position is not dissimilar to a judgment subject to appeal. The judgment is binding pending any stay or ultimate reversal on appeal. So is the engineer's decision.

[53] Further, even if the parties were currently involved in a mediation or arbitration, it would not affect SOL's obligation to issue a payment schedule or, if it failed to do so, to pay the claims. Clause 13.5.2 of the contract provides:

> No Payment Schedule nor payment due or payable shall be withheld on account of dispute proceedings. Where any item is in dispute, the Engineer shall certify such amount as is properly payable according to his or her view as to the terms of the contract and his or her valuation in accordance with 12.1.3 and include such amount in a certificate in the form of a provisional Progress Payment Schedule and the process under 12.2.1 to 12.2.7 shall apply. No payment due under Section 12 shall be withheld by reason of the existence of any dispute.

[54] That clause is consistent with the purpose of the Act discussed above. It confirms that, notwithstanding the claim arising out of delay, following the certification by the engineer of progress payments 13 and 14 SOL was required to respond with a full payment schedule and, in the absence of doing so, was not able to rely on the dispute (which in any event had by that stage been ruled on by the engineer).

[55] For the above reasons we conclude that the emails from Mr Hamilton on behalf of SOL dated 11 January and 29 January cannot be construed as payment schedules either on their own or read with the spreadsheet and earlier denials.

[56] The suggestion that in some way the engineer's decision is to be read as part of the payment schedule is, with respect, misconceived. Further, while as Mr Molloy noted, Giles' letter requesting a decision from the engineer referred to a dispute, the request for a decision was limited to Giles' request for an extension and a determination of whether SOL could prove damage as a consequence of any culpable delay.

[57] Nor are we able to accept Mr Molloy's recast argument, raised for the first time in reply, that his firm's letter of 29 January was in some way a payment schedule. In the course of that letter to Giles' solicitors Mr Molloy said:

> As mentioned in our telephone discussion with you of even date we are not yet in a position to fully particularise our client's concerns with the engineer's report. However broadly speaking, our client's initial concern is that the engineer erred in deciding that our client was not able to offset payments pursuant to the contract. Specifically, we are of the view that even though there are not express provisions in the contract allowing for an offset, the machinery provided by the Construction Contracts Act 2002 is sufficient to allow our client to offset payment through its provision of the payment schedules to the engineer Mike Lee.
>
> Our client has had its Quantity Surveyor update its schedule of claimed losses and a copy of that updated schedule is also attached.

[58] Mr Molloy suggested the letter could be read as a payment schedule applying to both claims 13 and 14. However the letter cannot be read or interpreted that way for several reasons. First, the letter does not identify either payment claim. It is focused on SOL's challenge to the engineer's decision, and does not address the payment claims. Next, it was in any event too late to be a response to claim 13. Under cl 12 of the contract the parties agreed SOL was to provide a payment schedule within three working days of receipt of the engineer's certified progress payment claim. The engineer certified progress payment claim 13 on 13 January 2014. The solicitor's letter of 29 January was out of time in relation to claim 13. It could not have applied to claim 14, which was only issued on 29 January.

[59] Next, the letter effectively concedes that SOL was not able to fully particularise its position. Finally, the recast spreadsheet referred to in the letter was different to the previous spreadsheet that Mr Molloy had previously argued applied and identified the amount in issue. Both cannot be correct.

[60] There is one subsidiary issue. Mr Molloy noted that, having initially agreed to go to mediation on the issue of the engineer's decision, Giles withdrew from the mediation process. Mr Hughes' response was that Giles' agreement to go to mediation was conditional upon SOL properly identifying particulars of its claim, which never occurred.

[61] We do not need to resolve that issue for the purposes of this appeal. The parties were not bound by any outcome at the mediation unless both agreed to a settlement at the mediation. Arbitration remains open to the parties, but any arbitration will proceed on the basis that SOL must pay the amounts demanded in the meantime. That is the effect of the Act and is confirmed by cl 13.5.2 of the contract.

Result

[62] For the above reasons the appeal is dismissed.

Costs

[63] The appellant is to pay the respondent costs for a standard appeal on a band A basis with usual disbursements. Allowance for one counsel only.

Solicitors:
Haigh Lyon, Auckland for Appellant
Kensington Swan, Auckland for Respondent