IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-000459
CIV-2014-404-000299
[2014] NZHC 1813

BETWEEN	SOL TRUSTEES LIMITED Plaintiff
AND	GILES CIVIL LIMITED Defendant

Hearing: 5 May 2014

Appearances: B P Molloy and R W H Kirwan-Jones for the Applicant
D M Hughes and E E Cowle for the Respondent

Judgment: 4 August 2014

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 4 August 2014 at 4.50 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors / Counsel:

Kensington Swan, Auckland
Haigh Lyon, Auckland
B P Molloy, Auckland

Case officer: Katrina Tauhinu

Introduction

[1] Sol Trustees Limited applies for orders under s 290 of the Companies Act 1993 to set aside two statutory demands. Giles Civil Limited served Sol Trustees with the first demand on 31 January 2014, claiming Sol Trustees owes it $842,539.48 on its Payment Claim 13, and with the second demand on 26 February 2014, claiming $130,409.50 on its Payment Claim 14, each case for work undertaken pursuant to a construction contract.

[2] Under the Construction Contracts Act 2002 (the Act), if a payment claim is served on a party to a construction contract and payment of the lesser of the claimed amount or the amount scheduled in a payment schedule is not made within the time allowed in the contract or otherwise within 20 working days, the claimant is entitled to recover the amount of the claim as a debt due.[1]

[3] Sol Trustees has not paid the amounts demanded of it. It contends it is entitled to an order setting aside the statutory demands on the basis that it has responded to the payment claims by providing responses that are sufficient to constitute valid payment schedules within the time allowed pursuant to the contract, and in respect of which there is a real dispute within the contemplation of s 290(4) of the Companies Act.

[4] The applications are opposed and the parties have requested that they be heard together.

Issues for determination

[5] There are two overarching issues that arise for determination in deciding whether or not there should be an order to set aside the statutory demands:

(a) Is there a substantial dispute as to whether or not the debt is owing or due? This turns on whether Sol delivered valid payment schedules in response to Payment Claims 13 and 14 – which also turns on whether

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1 Construction Contracts Act 2002, s 23.

it is able to treat those responses and its prior response to Payment Claim 10 as a cumulative response; and if so

(b) Whether, for the purpose of such a response, it is able to rely on a set-off or counterclaim based on its claimed entitlement to liquidation damages under the contract for costs of delay.

[6] There is a remaining issue that arises from Sol's submission that Payment Claims 13 and 14 are substantially the same and the second statutory demand is therefore an abuse of process. This point may be disposed of at the outset. There is nothing in the Act barring a party to a construction contract that prevents a contractor from resubmitting prior progress claims by repeating them in subsequent claims, or that prevents the principal from reiterating the same response in each subsequent payment schedule. Because the effect of resubmission reactivates the claim, the principal cannot simply sit on its hands if it wishes to avoid the statutory consequences of not responding to a payment claim.

[7] The amounts claimed in Payment Claims 13 and 14 are different and therefore the issue of a second statutory demand is not an abuse of process, as it relates to an unpaid payment claim.

Background

[8] Sol engaged Giles to undertake construction work on a 21 lot subdivision at Okura. Their contract, entered into in December 2012, is a construction contract for the purpose of the Construction Contracts Act 2002. The general conditions of the contract are the New Zealand Standard Conditions of Contract for Building and Civil Engineering Construction 3910:2003.

[9] The parties became embroiled in a dispute during the course of construction of the subdivision works over Giles' alleged failure to complete the works by 17 May 2013 in breach of its contractual obligations. The dispute came to a head at the time Giles delivered its Payment Claim 10 for $565,366, on 19 October 2013. On 22 October 2013 Sol's only director, Mr Hamilton, emailed Mr Lee, the Engineer

appointed to the contract, disputing the amount claimed. A spreadsheet entitled "Project Overrun Costs", prepared with the assistance of an independent quantity surveyor engaged by Sol, was attached to the email. It listed what Sol contends were the anticipated costs had the project been completed on time, and the actual costs of the project including costs said to arise from the delay such as additional resource consent costs. Sol calculated the total loss attributed to the late finish to be $1,121,747, and accordingly that the costs to it of late completion were greater than the amount claimed by Giles in Payment Claim 10.

[10] On 25 October 2013 the parties held a meeting to discuss the issue. At the meeting Mr Hamilton provided a copy of the spreadsheet to Giles' representatives and advised that Sol will not be paying Payment Claim 10 or any further payment claims. Notwithstanding this, Sol made a payment of $230,000 to Giles as part payment of Payment Claim 10 on 7 November.

[11] On 5 November Giles issued Payment Claim 11 for $365,520.32. Sol responded on 19 November via email stating only that "this claim is disputed and subject to be offset against [liquidated damages] under the contract". On 28 November Giles issued Payment Claim 12 for $92,223.56. The next day Sol responded with a one line email advising "for the record that claim 12 ... is also disputed".

[12] Pursuant to cl 13.2.1 of the contract any contractual disputes must be referred to the Engineer for review. On 22 November Giles wrote to the Engineer requesting a decision on the extent to which Giles was entitled to an extension of time and the extent to which Sol could prove loss caused by the alleged delay.

[13] The Engineer released his decision on 18 December 2013, awarding Giles extensions of time for the period up to 29 November 2013. The Engineer found that Sol was seeking general damages as a compensatory remedy, and therefore could not rely on the liquidated damages provision in cl 10.5.3 in the contract to offset Payment Claim 10. Sol did not accept the Engineer's position. It had serious concerns about "arbitrary extensions of time" and the costs it claimed to have suffered for delay. It sought to refer the matter to mediation, to which Giles agreed.

[14] While the parties were preparing to go to mediation, Giles continued to serve payment claims. Payment Claim 13 was served on 20 December 2013 for $842,539.48, to which Sol responded on 11 January 2014 via email in terse terms as follows:

> 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 you are aware the contract is disputed as is also this claim.
> John.

[15] Giles served Payment Claim 14 on 29 January 2014 for $130,409.50. Sol responded on the same day with the following email and similar brevity:

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

[16] On 15 January 2014 Giles accepted Sol's offer to go to mediation in relation to Payment Claim 13. Subsequently, in late January Giles resiled from this position and it served its statutory demands.

[17] It is Giles' position that it was entitled to serve its statutory demands and was reasonable in withdrawing its agreement to mediate as, it contends, Sol did not pay the amounts demanded and had failed to provide proper payment schedules to both payment claims, which Sol disputes. Sol contends that Giles was well and truly aware that the subject matter of these claims was much in dispute, as they essentially covered costs claimed in Payment Claim 10 that were already responded to and addressed in the spreadsheet; and also because Payment Claims 11 and 12 were responded to and disputed. Additionally, it was aware that the costs of delay, as set out in the spreadsheet, exceeded the amount of the claims.

[18] Relevantly, Giles does not dispute these contentions, except insofar as it disagrees that there were valid payment schedules to Payment Claims 13 and 14 and

does not agree there is any room for reliance on the spreadsheet. It says that Sol's responses to payment claims 13 and 14 are based essentially on Sol's assertion that it has an entitlement to damages which the contract disallows as a set-off.

Relevant Legal Principles for Setting Aside a Statutory Demand

[19] Giles' application is made in reliance on s 290(4) of the Companies Act, which states:

> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that—
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> (a) There is a substantial dispute whether or not the debt is owing or is due; or
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> (b) The company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
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> (c) The demand ought to be set aside on other grounds.

[20] The onus is on the applicant to demonstrate grounds for a dispute.

[21] The Court's approach to an application for an order to set aside a statutory demand based on s 290(4) is well understood. The applicant must show a fairly arguable basis on which it is not liable for the amount claimed. Once that position is demonstrated, the statutory demand should be set aside and the dispute resolved, if necessary, by other proceedings in the normal way.

[22] When a matter is to be determined pursuant to s 290(4)(b), the Court's approach is as set out in *Covington Railways Ltd v Uni-Accommodation Ltd* where the Court said:[2]

> Where a company which is the subject of a liquidation application is indisputably in debt to the applicant creditor, it may nonetheless be able to show that it has a claim against the applicant which reduces the net balance owing to the creditor or even off-sets it altogether. Where there are liquidated sums due each way, that is simply an arithmetical exercise. It is more difficult if, on the applicant's side, there is an indisputable liquidated sum, but the other party's claim is for an unliquidated sum with liability and/or quantum in dispute. Then, in order to impeach the statutory demand and overcome the presumption in s287(a) that the company is unable to pay its debts when it has failed to comply with the demand, it must be able to do more than merely assert that there is an available set-off. It must be able to point to

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2 *Covington Railways Ltd v Uni-Accommodation Ltd* [2011] 1 NZLR 272 (CA) at [11].

> evidence before the Court showing that it has a real basis for the claimed set-off and that accordingly, the applicant's claim to be a creditor is, to the extent of the set-off, seriously in doubt. In the words of Buckley LJ in *Bryanston Finance Ltd v De Vries (No.2)* [1976] Ch 63, 78, it must show that there are "clear and persuasive grounds" for the set-off claim. Where this can be done, the party who has issued the statutory demand against the company will be shown to be using the statutory demand and liquidation procedures improperly because there is a "genuine and substantial dispute" about the net amount of the company's indebtedness (*Taxi Trucks Ltd v Nicholson* [1989] 2 NZLR 297, 299). The dispute should then be resolved in the ordinary way – except as to any undisputed balance – rather than upon the hearing of a liquidation application.

The purpose of the Construction Contracts Act 2002

[23] All disputes between parties to a construction contract must be approached with the purpose of the Act in mind.[3] The purpose of the Act is set out in s 3. The Act reforms the law relating to construction contracts for the purpose of facilitating regular and timely payments between parties to a construction contract, and provides remedies for the recovery of payments that are due.

[24] Justice Asher in *Marsden Villas Ltd v Wooding Construction Ltd* pertinently stated:[4]

> The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, and the quick resolution of disputes. The processes that it 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 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 cashflow.

[25] The Court of Appeal in *George Developments Ltd v Canam Construction Ltd* similarly stated that the intention of the Act is to protect cash flow, and it is to be interpreted so as to achieve the object of speeding up payments.[5]

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3 Subsequent references to "the Act" in this judgment are references to the Construction Contracts Act 2002. When reference is made to the Companies Act 1993, the name of that Act is stated in full.

4 *Marsden Villas Ltd v Wooding Construction Ltd,* above n 9, at [17].

5 *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA) at [55].

[26] With these principles in mind I turn to the issues that require determination. Sol has the onus. I begin with its contention that it has provided valid payment schedules to Payment Claims 13 and 14.

Did Sol issue valid payment schedules in response to Payment Claims 13 and 14?

[27] It is not in dispute that unless Sol delivered valid payment schedules on or before certain dates, then Payment Claims 13 and 14 became debts owing and due on those dates with the result that s 23 will apply and there will be no relevant dispute within the contemplation of s 290(4) of the Companies Act available to Sol for the purpose of its application to set aside the statutory demands. The relevant date for Payment Claim 13 is 28 January and for Payment Claim it is 25 February 2014.

[28] Sol's argument can be summarised as follows:

(a) Payment Claims 13 and 14 are essentially Payment Claims 10 to 12 reissued, and that Payment Claim 14 is a repeat of Payment Claim 13.

(b) Both Payment Claims 13 and 14 are the subject of a valid payment schedule because:

(i) The email responses of 11 and 29 January were within the time allowed under the contract for payment schedules.

(ii) Though of minimal content, the emails met the requirements for a payment schedule in s 21 if read together with the payment schedule for Payment Claim 10. The same applies to the email response to Payment Claim 14. Counsel relies on *Herbert Construction Company Ltd v Alexander*, where Associate Judge Gendall stated that the Act requires a response to *every* payment claim,[6] and, as counsel submits, each claim was responded to.

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6 *Herbert Construction Company Ltd v Alexander* HC Napier CIV-2010-441-500, 21 October 2011 at [49].

(c) The payment schedule for Payment Claim 10 was a valid payment schedule. When Giles received Sol's advice disputing Payment Claims 13 and 14, Giles could only conclude that it was because the basis for disputing Payment Claim 10 remained live. On this basis the emails Sol sent in response to Payment Claim 13 and 14 must be read in conjunction with the payment schedule for Payment Claim 10.

[29] As Sol has the onus of demonstrating that it has provided a valid payment schedule to Payment Claims 13 and 14, in order to succeed on its own argument that it provided such schedules, it must show not only that it did deliver a response to Payment Claim 10, but that the response to Payment Claim 10 constituted a valid payment schedule.

[30] Counsel for Sol submits that there was a response to Payment Claim 10 in the form of a spreadsheet that it brought to Giles' attention by email to the engineer on 22 October, and by delivery to Mr Hamilton at the meeting on 25 October. Counsel submits that this overall response was sufficient for the purposes of s 21 because the spreadsheet:

(a) Is in writing, and obviously provided in response to Payment Claim 10.

(b) Clearly applies to the subdivision contract, and clearly describes and therefore "identifies" the construction work undertaken not only over the term of the project but in the relevant period to which Payment Claim 10 relates.

(c) It clearly identifies the additional costs arising as a result of delay.

(d) Meets the additional requirements of s 21 because it contains sufficient information to indicate that the entire amount of the claim was in dispute. It does this by:

(i) Showing the overall costs of the subdivision to Sol, taking into account the costs of Giles' delay, compared with what the costs would have been had the delay not occurred.

(ii) Identifying that the increase in costs amounted to $1,121,747; this was sufficient to indicate that the monetary amount in dispute exceeded the full amount claimed in Payment Claim 10, and therefore that Sol intended to withhold payment entirely.

[31] Counsel adds, that as the costs of delay also exceed the amount claimed in Payment Claims 13 and 14, Giles had to know that Sol's position remained unchanged. It must have been clear to it that the response (in this case the emails) was to be read in conjunction with the spreadsheet. From the moment Giles was provided with the spreadsheet, it must have been clear to it that what the spreadsheet was identifying was an ongoing dispute which would apply not only to Payment Claim 10 but to all future payment claims.

[32] Counsel for Sol submits that support for this approach is found in *NCB 2000 Ltd v Hurlstone Earth Moving Ltd*, where the Court stated:[7]

> It would have been preferable if the letter dated 12 November 2010 had referred to the earlier correspondence, but in the particular circumstances of this case, I am not persuaded that this was required to render the letter a complying payment schedule ... NCB had provided comprehensive responses to [two earlier] payment claims ... 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 be read in isolation.

[33] Justice Wylie based his finding on the fact that the letter in question met the majority of s 21 requirements. It was in writing, identified the property and the Act, indicated a scheduled amount, and it described itself as a payment schedule. Additionally it detailed the way the amount was calculated, and indicated reasons.

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[7] *NCB 2000 Ltd v Hurlstone Earth Moving Ltd* HC Auckland CIV-2010-404-8096, 23 June 2011 at [50].

[34] Justice Venning in *West City Construction Ltd v Edney* described the purpose of a payment schedule in the following way:[8]

> [44] 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.
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> [45] It is not sufficient to refer in some general way to a formula of the nature referred to by the respondent in this case. That is not the intent of the legislation.

[35] The essential message of a payment schedule must be the precise nature of the monetary dispute between the parties, which is otherwise known as the scheduled amount. In *Westnorth Labour Hire Ltd v S B Properties Ltd* Hansen J opined that the most important aspect of a document purporting to be a payment schedule is that it conveys this essential message:[9]

> Although the letter does not adopt the terminology of the Act, is not stated to be a payment schedule and does not specify that the scheduled amount is nil, the essential message is clear and unequivocal.

[36] I am not satisfied Sol has given such a message, and therefore that it has discharged the onus placed on it of showing that it provided a valid payment schedule to Payment Claim 10, and by dint of that, a valid payment schedule for Payment Claims 13 and 14. On the evidence currently before me it has fallen short.

[37] My primary reason for this is that the spreadsheet does not indicate a scheduled amount that it would pay, whether nil or otherwise, contrary to the requirements of s 21 and Venning J's test cited above. Moreover, it is clear that it did not intend the spreadsheet to indicate a scheduled amount of nil, as counsel claims, as demonstrated by its subsequent payment of $230,000 to Giles (a substantial part of the amount claimed in Payment Claim 10).

[38] It may well be the case that the spreadsheet does comply in most respects, but this critical deficiency with s 21 compliance cannot be overcome. The spreadsheet

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8 *West City Construction Ltd v Edney* HC Auckland CIV-2005-404-1066, 24 August 2005.

9 *Westnorth Labour Hire Ltd v S B Properties Ltd* HC Auckland CIV-2006-404-1858, 19 December 2006 at [28].

fails to adequately advise the parties of the monetary extent of the dispute, namely the difference between the amount claimed by Giles and the amount Sol says is actually payable. Sol's reason for withholding payment was not made sufficiently known to Giles to enable it 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 adjudication.[10] The spreadsheet therefore failed to convey a clear and unequivocal message regarding the scheduled amount and the monetary issue between the parties.

[39] Sol's failure to specify a scheduled amount that disputed Payment Claim 10 in particular meant that from the moment Giles received the spreadsheet it was unable to assess its own or Sol's position in relation to Payment Claim 10. It is not enough to say that Giles assessed its position by seeking legal advice and referring the dispute to the engineer.

[40] The legislative purpose of a payment schedule is to inform the contractor of what it will and will not be paid in respect of a payment claim, enabling it to assess its position immediately upon receiving the payment schedule. For the schedule to serve its legislative purpose it would have to have identified a scheduled amount of $230,000. As it was, Giles had no way of knowing that, and moreover, if counsel for Sol's submission is right, Giles would have to have deduced that it would either receive nothing or $230,000. If partial payment was intended by Sol, it should have identified this. If it intended to pay nothing on the basis of a claim to entitlement to damages, it should have identified that. In terms of the legislative intent, Giles, as contractor, was entitled to some predictability as to its position, and hence a clear statement from Sol about the scheduled amount. It did not receive that. The spreadsheet was not a valid payment schedule.

[41] Given that I have found that the spreadsheet was not a valid payment schedule, it follows that the emails sent in response to Payment Claims 13 and 14 also cannot and do not constitute payment schedules, neither together with the spreadsheet, nor separately. The emails only provide Giles with knowledge that the payment claims were disputed. There is no cross-reference to the spreadsheet, and there is no scheduled amount indicated. They do not inform Giles of the monetary

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

extent of the dispute, nor is there a clear and unequivocal message as to what is disputed and on what basis.

[42] I find therefore that Sol has not provided valid payment schedules for Payment Claims 13 and 14. As a result, the statutory demands cannot be set aside on the basis of a substantial dispute within the contemplation of s 290 of the Companies Act.

[43] There is no need to consider Giles' argument that the terms of the contract prevent Sol from relying on a claim for damages for delay as the basis for its purported payment schedule. As there is no valid payment schedule, it is unnecessary to discuss whether particulars deductions purportedly contained in the schedule are permitted deductions.

Conclusion

[44] For the above reasons both applications to set aside the statutory demands are declined.

[45] The time for compliance for both statutory demands is extended to 15 working days from the date of judgment. Failing compliance, pursuant to s 290(3) of the Companies Act, Giles may proceed with an action for liquidation. In so ordering, I do not wish to be seen as expressing any view on the merits of such an application. I simply observe that the Court, in exercising discretion to set aside a statutory demand under s 290, decides whether it is just to allow the statutory demand to stand so that non-compliance will give rise to a presumption of inability to pay debts. [11] In that context, the Court however does not exercise discretion whether a liquidation order should be made.[12]

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11 *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 18 PRNZ 97 (HC) at [13], [19] and [20].

12 At [13].

[46] As the Court of Appeal in *Laywood v Holmes Construction* observed obiter different considerations arise in a proceeding for an application to set aside a statutory demand on the one hand and an adjudication of an order to wind up a company on the other, but expressed no opinion on the point.[13] Additionally, as noted in *239 Queen Street Developments Ltd v Watts & Hughes Construction Ltd*[14] by Associate Judge Bell in citing the observation in *Laywood*, claims of a set-off that could be raised on liquidation should be heeded and not be brushed aside by an immediate order for liquidation.[15] Upon production of further evidence as to its claims for damages for delay, it is conceivable that Sol may be able to defend itself in liquidation proceedings if they are filed. This judgment does not purport to deal with that question.

[47] Costs follow the event. Giles is entitled to costs on a 2B basis plus disbursements as fixed by the Registrar.

Associate Judge Sargisson

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13 *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 (CA) at [61] and [65].
14 *239 Queen Street Developments Ltd v Watts & Hughes Construction Ltd* [2012] NZHC 1791.
15 At [24].