#15

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005- 404- 7165

	BETWEEN	TGC PROPERTIES LIMITED Applicant
	AND	FREEMONT DESIGN AND CONSTRUCTION LIMITED Respondent

Hearing: 04 April 2006

Counsel: Mr S J Tee for the applicant
Mr J A McKay for respondent

Judgment: 10 April 2006 at 12.45pm

JUDGMENT OF ASSOCIATE JUDGE J B DOOGUE

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[1] The Parties entered into a building contract, which provided for the respondent to construct a commercial building on property owned by the applicant at North Shore. The form of the contract that the parties entered into included the general conditions of contract contained in NZS3915:2000. The contract price was $663,000 plus GST. The agreement provided for the works to be commenced 10 January 2005 but with completion being required in approximately May 2005. The project has yet to be completed.

[2] On or about 1 November 2005 the respondent served on the applicant a document in the form of an invoice which claimed payment of an amount of $150,123.86. The document was headed 'this is a payment claim made under the Construction Contracts Act 2002'. It was entitled "Payment Claim No 15".

[3] On or about 8 November 2005 the respondent issued what it claimed was a variation claim arising under the contract which increased the total amount of variations. In the payment claim ('payment claim 15') the costs of variations was stated to be $108,600.99. In the written notice that the respondent gave to the applicant 8 November 2005 ('the variation') the total amount claimed for variations was $135,038.02. This brought the combined amount claimed in Payment Claim 15 and the variation inclusive of GST to $179,865.52.

[4] On 25 October 2005 the applicant faxed to the respondent a document in the form of a payment schedule as that term is used in the Construction Contracts Act 2002 ('the Act'). The payment schedule admitted responsibility to pay am amount of $104,085.82 to the respondent. The difference between the amount claimed, the $179,865.52, and the amount admitted came about because the applicant declined to accept the full amount of the respondent's claims.

[5] The applicant's payment schedule only accepted 61% of the respondent's claim for excavation and site works rather than the 74% the respondent had claimed. As well the applicant declined to pay $7,202.70 for aluminium joinery. Finally the applicant did not accept the construction company's claim for variation in respect of ground remediation works of which the respondent claimed 47% of a total sum of $71,695.80.

[6] The payment schedule made it clear that the applicant did not accept the variations claimed in the variation claim because it said that the work was not outside the scope of the contract works, a variation had not been requested prior to commencement of the work and the work was not accepted as a variation.

[7] The applicant paid the respondent a sum of $104,085.82.

[8] On 5 December 2005 the respondent served a Statutory Demand on the applicant claiming payment of $75,779.70. The amount demanded was the difference between the applicants payment claim 15 ($179,865.52) and TGC's payment schedule ($104,085.82).

[9] The applicant filed and served an application under S 290 of The Companies Act 1993. In that application the applicant sought an order:

> That the Statutory Demand dated the 5 December 2005 and perpetted to be served on the applicant on 2 December 2005 be set aside.

[10] The application was made on the following grounds:

> There is a genuine and substantial dispute that the debt is due for payment, and the applicant remains solvent and able to pay its debts.

[11] The respondent filed a Notice of Opposition dated 25 January 2006 which opposed the making of the Order sought on the grounds:

a) There is not a substantial dispute whether or not the debt is owing or is due;

b) the applicant company is unable to pay its debts.

Principles applicable to applications to set aside statutory demands.

[12] I adopt the following statement of principles which is taken from the judgment of Faire AJ in *Italia Motorsport Ltd v European Motors Ltd* (High Court, Hamilton, 18 October 2004, CIV-2004-419-950):

(4) The approach, which the Court takes to applications on each ground, can be shortly summarised. When considering an application pursuant to s 290(4)(a) of the Companies Act 1993 the Court is required to determine if the applicant can show a fairly arguable basis upon which it is not liable for the amount claimed. *Forge Holdings Ltd v Kearney Finance (NZ) Ltd* (High Court, Christchurch, M 149/95, Tipping J, 20 June 1995) at page 2 and *Queen City Residential Ltd v Patterson Co-Partners Architects (No 2)* (1995) 7 NZCLC 260,936. That formulation was approved by the Court of Appeal in *United Homes (1988) Ltd v Workman* [2001] 3 NZLR 447, 451- 2.

....

(6) With respect to the Court's power to set aside a statutory demand under s 290(4)(c) the Court of Appeal examined this question in *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395. At 397 Tipping J said:

If the focus is on the justice of the particular case the discretion must always be exercised on a principled basis and not on some ad hoc perception of what individual justice might require. All cases involving s 290(4)(c) must in the end come down to a judgment by the Court as to whether the creditor's prima facie entitlement is outweighed by some factor or factors making it plainly unjust for liquidation to ensue.

(7) The following further observations must be made:

a) Whilst mere assertion will not be enough some sort of material short of proof which backs up the claim that the amount is in dispute is required: *Paramoor Eleven Ltd v Pramb Wong Enterprises Ltd* (High Court, Auckland, M 1460/94, Master Gambrill, 10 April 1995);

b) With respect to s 290(4)(c), the Court has a discretion to set aside a statutory demand on grounds other than those specified in ss (4)(a) and (b);

c) I endorse the comments of Wild J in *Apple Fields Ltd v Trustees Executors and Agency Co of NZ Ltd* 13 PRNZ 387, 395. He said:

The legitimate purpose of a statutory demand is to obtain payment of a debt due.

Assessment

[13] The first issue is whether or not the respondent is able to contend that the applicant is barred from disputing the amount claimed because of the provisions of the Act.

[14] For the applicant Mr Tee in his careful submissions told me that the applicant had given a valid and sufficient payment schedule document to the applicant within

the time required which set out the fact that it disputed that the applicant was indebted to the respondent.

[15] Mr Burt for the respondent said that the claim made was a payment claim in terms of the Act but that the respondent had not served a payment schedule in the time required.

[16] To summarise the sequence of events it as is follows:

- On the 2 November the respondent sent Payment Claim 15 by fax.
- On 8 November 2005 the respondent sent Variation Price Request number 12. This contained the increased amount.
- On 25 November 2005 the applicant faxed the payment schedule which it relies on to the respondent.

[17] In order to resolve the first issue it is necessary to decide whether the applicant acted sufficiently promptly in response to the respondent's claims or whether it is barred from defending the claims as a result of the provisions of the Act.

[18] Section 4 of the Act contains an overview of the provisions of the Act. Included are:

> (a) Default Provisions granting an entitlement to progress payments, and setting out a statutory mechanism for determining the amount of, and the due date for, those payments, in circumstances where the relevant construction contract is silent on any of these matters are set out in s 15-18.
>
> (e) Provisions establishing a procedure that allows a party to a construction contract to recover a progress payment by making a payment claim, and the party is liable for that payment to respond by means of a payment schedule, are set out in s 19-24.

[19] In his submissions Mr Tee accepted that the claims made by the respondent on 2 and 8 November 2005 were payment claims. He also asserted that the response sent by the applicant was a payment schedule within the meaning of s 21 of the Act.

[20] As I understood his argument it was that the time in which the applicant was required to give a payment schedule was the 20 days referred to in s 22 of the Act. s 22 of the Act is as follows:

> **S 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) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[21] Mr Tee said that the payment claim was clearly a payment claim made under the Act. He said that the payment claim was -

> clearly not a progress claim certificate under clause 12 of the General Conditions of Contract.

[22] Mr Tee referred to the payment schedule and said that it had been provided within the required time of 20 working days prescribed by the Act. I should interpolate that that the respondent accepts that the payment schedule was provided within the 20 working day period but submits that it is not the correct period which it says is a period of seven days.

[23] Mr Tee referred to s 12 of the contract in the form NZS 3915:2000. Section 12 was headed 'Payments. 12.1 deals with contractor's claims. 12.2 is headed progress payments certificates'. Provision for other matters such as retentions is made in 12.3.

[24] Mr Burt, for the respondent referred to in particular clause 12.2.1 which provide as follows:

> 12.2.1 Within seven working days after the receipt of the Contractor's claim the Principal may assess the Contractor's claim and may notify the Contractor in writing of any proposed amendment to the claim which the Principal believes necessary to comply with the terms of the contract. Any such notice shall give reasons for the proposed amendment.
>
> 12.2.2 If within the period provided for in 12.2.1 the Principal does not give any notice thereunder, the Contractor shall be entitled to be paid the amount of its claim under 12.1.1 and the provisional progress payment certificate shall be the progress payment certificate.

[25] Mr Burt said that the payer (that is the applicant) had not provided a payment schedule to the payee within the time required by s 22 of the Act:

[26] On the face of it this seemed to be a compelling submission. Mr Tee however said that the procedures set down by the NZS 3915:2000 were not followed in this case. He instanced the fact that a different claim form from that provided in the 11th Schedule to the NZS contract form was used. So while Mr Tee accepted that the general procedure established by the Act applied, when it came to a matter of fixing the date for compliance, the contract did not apply and the provisions of the Act did apply with the result that the applicant had 20 working days to give a notice to the contractor-

> ...in writing of any proposed amendment to the claim which the Principal believes necessary to comply with the terms of the contract. Any such notice shall give reasons for the proposed amendment.

[27] In my view the respondent's submission is correct. The respondent seeks to recover under the contract. It has given a Notice, which the applicant accepts is a valid claim for payment. The applicant of course contests that the payment claim was wrongly calculated into amounts to which the respondent was not entitled. But the important point is that the applicant accepts that it needed to give some sort of notice in the form of a payment schedule disputing the respondents claim. The respondent therefore accepts that there was a contract which gave rise to the debt and it accepts that the procedure for recovering that debt is that which is set down in the Act. At the same time though it attempts to disavow the application of the contract so far as it sets a more restrictive time for giving a payment schedule.

[28] In my view, the contract is the source of the respondent's right to claim. I accept that the Act determines the procedures for enforcement of payment. I am also

of the view that the procedures in the Act must defer in the matter of time limits to the contract where necessary. As I have noted already, s 22 b) ii) of the Act says the time period for giving a payment schedule is 20 working days

> ..if the contract does not provide for the matter.

[29] The question is whether or not the contract fixed a period of time governing the issue of when a payment schedule is to be given. I accept that clause 12.2.1 does not, in its terms, refer to a payment schedule, but the type of document that it specifies is one that fulfils exactly the same function as a payment schedule under the Act. That being so, this is not a case where the parties contract does not "provide for the matter" within the meaning of s 22. If that interpretation of the matter is correct, it is implicit in s 22 that the parties will be bound by the time limit that they themselves agreed on.

[30] Mr Tee was unable to refer me to any substantial ground on which I should conclude that the time limit should be the twenty days that the Act speaks of, rather than the seven days mentioned in the contract. He said that the parties' time limit only applied where the contractor issued a form of invoice that complied exactly with the form annexed to their contract. He was not able to tell me why it was a matter of contractual necessity that that be so. Certainly, the contract does not provide that the time limit in clause 12 should have no application in a case where the enforcement provisions of the Act were to be invoked. If it had done so the applicant might be able to mount a convincing case that the consequence was that the parties must be taken not to have agreed on a provision that "provides for the matter" of a time limit, to use the language of s 22.

[31] In my view the time provision contained in the Act must defer to the specific provisions contained within the contract. Because that is my conclusion, it follows that the applicant had seven working days within which to respond to the Contractor's claim and because it did not respond within the time limited within the contract for that purpose the consequences set out in s 23 of the Act ensue.

[32] I do not need to go on to consider the other interesting arguments raised by Mr Tee concerning the arguments about insolvency of the company. The sole

question is whether or not there is a 'genuine and substantial dispute that the debt is due for payment'. In my opinion there is not such a dispute. The applicant must fail in its attempt to set aside the statutory demand and its application is dismissed.

[33] I direct that the applicant is to pay costs to the respondent on a 2B basis.

J P Doogue
Associate Judge