#23

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-001858

	BETWEEN	WESTNORTH LABOUR HIRE LIMITED Appellant
	AND	S B PROPERTIES LIMITED Respondent

Hearing: 21 August 2006

Counsel: BP Rooney for Appellant
AJ Hayes for Respondent

Judgment: 19 December 2006

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 19 December 2006 at 3.00 p.m. pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date: .....

Solicitors: Callaghan & Co, P O Box 1434, Auckland for Appellant (N Cartwright)
Hucker & Associates, P O Box 3843, Auckland for Respondent

Introduction

[1] The appellant (Westnorth) appeals against the refusal of Judge PF Barber to grant its application for summary judgment in the Auckland District Court. Westnorth is a labour hire carpentry contractor. It had provided carpenters to the respondent (S B Properties) which was engaged in a factory/warehouse development in Mt Wellington.

[2] Westnorth is seeking to recover $22,687.77 for contract labour provided to the site. It delivered payment claims for that amount under the Construction Contracts Act 2002 (the Act). Under the Act, if a payment claim is served and the recipient does not deliver to the claimant a payment schedule setting out the reasons why payment is not being made within the time allowed in the relevant contract, or otherwise within 20 working days, the claimant is entitled to recover the claimed amount as a debt due.

[3] S B Properties contended it delivered a payment schedule in terms of the Act in response to Westnorth's payment claims. Judge Barber agreed and declined summary judgment. Westnorth contends that the Judge's finding was based on a misinterpretation of the relevant provisions of the Act.

Further background

[4] The contract under which Westnorth agreed to supply carpentry labour for the development was a construction contract within the meaning of the Act. It provided that S B Properties make payments to Westnorth within five days of the delivery of a payment claim. However, the contract was silent as to the time for delivery of payment schedules in response to payment claims.

[5] Between April and September 2005 Westnorth sent eleven fortnightly payment claims to S B Properties. They were all paid "more or less" within the five working days. The payment claims in issue, respectively for $16,562.19 and

$6,266.76 were sent on 12 and 19 September. They were sent by fax and received by S B Properties on the days they were sent.

[6] On 22 September Mr Hugh Mullane, a director of SB Properties, sent a letter to Dale Wadham, the principal of Westnorth. It was sent by email marked "without prejudice". It is a long letter but, as its contents bear on the second of the two issues I am required to consider, it needs to be quoted in full:

> Dear Dale
>
> **Re: Labour & Other Charges – 4 Clemow Drive Mt. Wellington**
>
> We are in receipt of your last two invoices, reference numbers CLE12b in the sum of $14,721.95 plus GST and CLE13b in the sum of $5,238.00. In addition on CLE 13b you have also claimed an out of pocket expense in the sum of $374.01 inclusive of GST.
>
> Further to our chance meeting on site at Clemow Drive this morning I offer the following comments.
>
> 1. Firstly, thank you for turning over to me our two ring binder folders containing information related to the development along with your previous site foreman's (John Connor) site diary. I note your advice that the diary also contains personal entries for John and while the cross pollination of information is not that businesslike, we will copy the diary with the view to returning it.
>
> 2. As you are aware the project budget for labour was slightly less than $80,000 net of GST. I know that you and Greg Robbins the Project Manager engaged by us discussed how the required work could be done within this figure and my understanding is that both you and Greg thought it was achievable but you did not want to be held to that figure.
>
> 3. Sometime around June this year, Greg Robbins made me aware that the project was no longer operating within the agreed budget. After his investigation into the issues, he advised me that the labour cost was likely to be closer to $160,000 plus GST or double the original allowance.
>
> 4. I was not comfortable that I could rely on that information so I phoned you and we spoke at length about what the maximum cost of labour would be to complete the construction. We agreed that it was more likely to be $175,000 plus GST. I proceeded to operate on that basis.
>
> 5. Our arrangement has been that you would invoice my company at the end of each two week period for work done during that time and I would pay you within five days of invoice receipt. Apart from two minor payment delays that have occurred, you agreed with me this morning that I had performed well with respect to payments.

6. John Connor, your site foreman, left the site some weeks ago to work elsewhere for you and you assumed John's supervisory role on our job.

7. The last invoice payment we paid into your bank account on 7th September 2005 was CLE 11b in the sum of $12,893.00 plus GST.

8. That payment brought the total net figure paid to you by us at that time for labour to $232,777.00 plus GST.

9. As noted above we have two more invoices which, excluding the materials claim back by you, total a further $19,959.95 plus GST. The materials claim forming part of the last invoice is (according to your invoice) for $332.45 plus GST.

10. All your invoices have always had a weekly time sheet attached. Presumably you are familiar with the charge out rates, the hours charged against those rates in each instance and the work on site.

11. On Tuesday last week I called you on your mobile phone and asked if you could find one of the other tradesmen on site for me because he wasn't answering his phone. You told me you were not on site and that you were having breakfast. I called you at approximately 10.50 a.m. that morning.

12. Later in the day, around about 3:00-3:30 p.m. I went to site to discuss some issues related to the job with you but your man Trevor said you had left and had been gone for a while.

13. Having received and considered your time sheet for Tuesday, 13th September I note you have billed us for an eight hour day i.e. 7:30 a.m. to 3:30 p.m. I do not understand how that could be when I called you at 10:50 a.m. that day and you were "having breakfast". Further, when I visited site at around 3:00 p.m. or so you were not there and Trevor told me you had left quite a while earlier.

14. When I raised this with you this morning you commented it must have been a mistake. When I asked who prepared the time sheets you told me your wife did. My question was and remains, how could your wife prepare time sheets for work being conducted on site when she is not on site and therefore has no direct knowledge of who is on site and what work they are doing.

15. In your last invoice you claimed back the cost of some materials you obtained from Placemakers in Lunn Avenue on 13th September. You paid for the materials with an American Express card. At the same time you returned some weather proofing strip material I had paid for as part of a larger order on 10th September and Placemakers credited the new invoice for the value of the goods you returned. The credit came to $108.00. However, you have billed me for the total amount of the invoice without accounting for the credit obtained for goods paid for by me a few days prior but returned by you.

16. The mezzanines to the units have solid balustrades built at varying heights which do not conform in most instances with the Building Code requirement for Safety From Falling and do not match the drawings

provided. We now have to supply additional materials along with labour to install those materials in order to obtain sign off for Code Compliance. I intend that the cost of this work will be to your care.

Dale, the labour budget has gone from around $80,000 net to $160,000 net to $175,000 net but to date we have paid you $232,777.00 plus GST which is far greater than the figure you and I agreed would see the project through to completion. On top of this we have been billed for a further $19,959.95 net not yet paid which compounds the problem even more as the total labour cost now totals some $252,777.00.

Given my experience on Tuesday, 13th September noted above related to your involvement with our project or otherwise that day, my concern that the time you have billed us for does not necessarily reflect a true account of the time spent working on the job for the benefit of the project along with the fact that you have billed me for the total invoice from Placemakers failing to account for the credit for goods returned (your invoice CLE 13b note regarding Placemakers sending me a refund is erroneous because the invoice you paid clearly states the credit has been applied when you paid the balance by AMEX card) and for which I had already paid, means that I must make the following request of you.

Before I will make any further payments to you related to the two invoices received, the total net value of which is $20,225.96 including the materials claim back, I require you to provide me with a detailed description of work done by each member of your team related to all time sheets already submitted and that information be scheduled on an hour by hour basis. By way of example only, I will require to see precisely what you did related to our project on Tuesday, 13th September between 7:30 a.m. and 3:30 p.m. as claimed in the time sheet accompanying the invoice. This requirement applies to all your staff for the duration of the project from when you first provided labour to the site.

Given you have issued the invoices under the Construction Contracts Act 2002, I must advise that we do not agree with your charges for the reasons noted above and until you provide the breakdown requested and we have had suitable time to consider the information you provide, no further payments will be made to you.

Yours sincerely,
Hugh Mullane
Director
SB Properties Limited

Cc Greg Robbins – Robbins Project Management

Issues

[7] Two issues arise. The first is whether the letter was delivered to Westnorth within the time prescribed by the Act. The second is whether it met the requirements for a payment schedule laid down in the Act.

Relevant statutory provisions

[8] The purpose of the Act is set out in s 3 which reads as follows:

> The purpose of this Act is to reform the law relating to construction contracts and, in particular,—
>
> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies

[9] The machinery laid down in subpart 3 of Part 2 of the Act contains the procedure for facilitating the regular and timely payments referred to in s 3(a). Section 20 of the Act sets out detailed provisions governing the payment claims. As it is accepted that the payment claims complied with the Act, it is unnecessary to quote it.

[10] Section 21 sets out the requirements for payment schedules. It provides as follows:

> (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.

[11] Section 22 deals with the consequences of failure to provide a payment schedule within the prescribed time. It provides:

> 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.

Time of delivery

Submissions

[12] The short point at issue under s 22 is whether, for the purpose of para (b)(i), the contract makes provision for the time within which the payment schedule is to be delivered. In the District Court and before me Mr Rooney contended that it did. He argued that s 22 should be interpreted to require that where the contract stipulates a date for payment, any payment schedule must be delivered on or before the date of payment or the consequences in s 23 will follow. He submitted that the reference to "the time required" in para (b)(i) should be read as "the time required to pay the claimed amount".

[13] Mr Rooney said an interpretation which allowed a claim to be disputed beyond the contractually agreed time for payment would be contrary to the scheme and purpose of the Act. He relied on the following eight provisions as indicating a contrary intention:

> [i] By s 3 of the Act its purposes include "to facilitate regular and timely payments" and "to provide for the speedy resolution of disputes". The delay which would result from delivery of a payment schedule after the contractually agreed date for payment would be inconsistent with this purpose.

[ii] Section 4, which provides an overview of the Act, refers to ss 19-24 as providing a single procedure for payment claims and objections to payments. Any delay in the provision of a payment schedule would also be inconsistent with this provision which Mr Rooney contended assumed a "seamless" process.

[iii] Section 14 leaves the parties free to determine when payments become due and, if they do not, s 18 provides for payment twenty days after delivery of the claim. Mr Rooney said it would be illogical to extend the agreed time for payment merely because the parties had not agreed a time for providing payment schedules.

[iv] Section 19 defines the "scheduled amount" which, by s 21, must be included in a payment schedule as:

> ... an amount of progress payments specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim.

Mr Rooney argued that the use of the future tense indicates that a payment schedule should be provided before payment arises.

[v] Section 23(1) provides that the payee may recover the claimed amount as a debt due 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.

Mr Rooney argued that the use of the conjunctive "and" indicates that the due date for payment in s 23(1)(b) is the same date as "the time allowed by s 22(b)" in s 23(1)(a).

[vi] Section 24 is to similar effect when the payment schedule refers to a scheduled amount and the payer fails to pay. Mr Rooney said this

indicates an expectation that the payment schedule will be provided before payment becomes due.

[vii] Section 72 sets out the circumstances in which a contractor is entitled to give notice of an intention to suspend work. The first such ground is in subs (1)(a)(i) which provides:

> A claimed amount is not paid in full by the due date for its payment and no payment schedule has been provided.

It was argued that in cases where the contract provides a time for payment but not for provision of a payment schedule, there will be an "hiatus" between the due date for payment and the time when a contractor becomes entitled to give notice of an intention to suspend work.

[viii] A similar hiatus would arise in relation to the right to assert a counterclaim, setoff or cross-demand. Section 79 provides that the Court must not give effect to any counterclaim, setoff or cross-demand other than a setoff of a liquidated amount in any proceedings for the recovery of a debt under ss 23 or 24.

[14] All provisions are said to point to an intention that the time for delivery of a payment schedule should end on the date stipulated for payment. On that basis Mr Rooney said the payment schedule in relation to the 12 September payment claim should have been delivered no later than 19 September. As it was sent three days after the 19th, even if it was a payment schedule, it was not delivered in time and the appellant should have been granted summary judgment for the amount of the 12 September claim, $16,562.19.

[15] Mr Hayes' response was direct and to the point. Section 22 is unambiguous. It provides for the payment schedule to be provided within the time provided by the contract, and if the contract makes no provision for its provision, within twenty working days after the payment claim is served.

Discussion

[16] I agree with Mr Hayes and the Judge in the District Court. The time referred to in s 22(b)(i) can only be read as referring to the time required by the construction contract for provision of a payment schedule. The words of subpara (i) must be read with the opening words of para (b). They refer to the provision of the payment schedule. There is no reference to the time for payment. The appellant's interpretation relies on adding words to the section which could have been there if the legislature had intended the outcome contended by Mr Rooney.

[17] The legislation leaves it open to the parties to agree the time of payment and/or the time for provision of a payment schedule. If they do not, a period of twenty days is provided for each – by s 18 in the case of time for payment, by s 20(b)(ii) for provision of a payment schedule.

[18] The anomaly of which Mr Rooney complains – a longer period for delivery of the payment schedule than for payment – is not dictated by the legislation. It results from an agreement of the parties which is permitted by the legislation and, in my view, is not in any way inconsistent with its purpose or its scheme. It is, for example, contemplated by s 23 which distinguishes between the date when the payer becomes liable to pay the claimed amount under s 22 and the failure to pay the amount on or before the due date for the progress payment. There is nothing to suggest that the date on which liability arises cannot be later than the date on which payment is due.

[19] It does not cut across the goal of expediting payments and the resolution of disputes. It simply means that consequences which the Act stipulates do not arise until after the time allowed for payment and delivery of a payment schedule – recovery as a debt under s 23 and suspension under s 72(1)(a)(i) for example – cannot, in the case of this contract, occur until after the time for delivery of the payment schedule. If the time of payment had not been agreed, the consequences would have been exactly the same.

[20] I am satisfied the Judge was right to find that S B Properties delivered the payment schedule within the time required by the Act.

Payment schedule

[21] The requirements for a payment schedule are set out in s 21 of the Act, quoted in para [10] above. Mr Rooney contended the letter from S B Properties set out in para [6] was not a payment schedule for the purpose of the Act because:

a) It was written without prejudice;

b) It failed to comply with some of the requirements of s 21.

Without prejudice

[22] The Judge disposed of the without prejudice issue on the grounds that there was nothing in the letter to warrant a without prejudice reservation and, in any case, the letter was before the Court.

[23] Mr Rooney argued that the without prejudice designation was inconsistent with the aim of effecting a speedy resolution of the dispute. It ran counter to the underlying requirement for the parties to identify the issues in dispute at an early stage.

[24] I agree with the Judge that there is no reason why the letter should be treated as privileged. It did not contain an offer of settlement. It did not contain any admission by S B Properties which it might have sought to protect from admission should litigation ensue. It simply set out S B Properties' position concluding, in the last two paragraphs, that it would not make any further payment until detailed time sheets were provided.

[25] The rule which prevents the admission of documents marked "without prejudice" has no application unless the parties are in dispute or engaged in negotiation, and terms are offered for the settlement of the dispute or negotiation –

see *Cross on Evidence* (NZ ed) at paras 10.44 *et seq* and the discussion in *DF Hammond Land Holdings Limited v Elders Pastoral Limited* (1989) 2 PRNZ 232. The parties were in dispute but they were not engaged in settlement discussions and the letter did not contain an offer of settlement. The letter was not privileged.

Compliance with Section 21

[26] Mr Rooney submitted that the letter failed to comply with s 21 in the following respects:

a) To indicate a scheduled amount - s 21(2)(c).

b) To give any reasons for the difference between a scheduled amount and claimed amount – s 21(3)(b).

c) To give any reason or reasons for withholding payment – s 21(3)(c).

Mr Rooney said the letter does not state the amount S B Properties was prepared to pay. He accepted that the amount could have been nil but submitted that is not what the letter said. Nor, said Mr Rooney, did the letter provide reasons for paying a reduced amount.

[27] The Judge held that the letter clearly indicated the scheduled amount was nil and that S B Properties had adequately explained why.

[28] Again I agree with the Judge. 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. Mr Mullane explains why he now doubts the accuracy of Westnorth timesheets and hence the sums he has been charged. He identifies a charge for materials that have been returned and instances of faulty workmanship which would entitle S B Properties to counterclaim. He says he will not pay the two invoices until Westnorth provides him with full particulars of what the contracted labour has done.

[29] The relevant provisions of the New South Wales Building and Construction Industries Security of Payment Act 1999 are almost identical to the provisions of the New Zealand Act governing payment schedules. In the leading case of *Multiplex Constructions Pty Limited v Luikens* [2003] NSWSC 1140, the Court said at para [78]:

> Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. 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.

[30] In my judgment, the letter meets these basic requirements. Westnorth was given all the information it needed to understand S B Properties' position, to decide whether to pursue its claim and the case it would be required to meet at adjudication. I am satisfied the Judge was right to conclude that the letter was a payment schedule which complied with s 21 of the Act.

Result

[31] For these reasons, the appeal is dismissed.

Costs

[32] Mr Hayes sought costs on a solicitor and client basis on the ground that under the Act Westnorth would have been entitled to seek actual and reasonable costs of recovery if pursuing the amount of the claim as a debt due. That is not quite what the Act provides. Section 23(2)(a)(ii) provides that if liability arises under s 22, the payee may recover "the actual and reasonable costs of recovery awarded against a payer by that Court". It does not follow that an unsuccessful claim by the payee should result in liability for costs on the same basis. I see no reason to depart from the scale.

[33] Westnorth must pay costs on a Category 2 Band B basis.