

IN THE MATTER OF a statutory demand served by the defendant dated 14 September 2005

Legislation : The Companies Act 1993 s290
Part 4A and Rule 458D(1)(a)(vi) High Court Rules

JUDGMENT : ASSOCIATE JUDGE D.I. GENDALL High Court, New Zealand, Wellington Registry. 6th December 2005.

In accordance with r540(4) I direct the Registrar to endorse this judgment with a delivery time of 3.00pm on the 6th day of December 2005.

Introduction

- [1] This case concerns an issue which is likely to come before the courts on an increasingly regular basis in the future over the relationship between the winding up provisions of the Companies Act 1993 on the one hand, and Sections 19 to 24 and Section 79 Construction Contracts Act 2002 ("the Act") on the other.
- [2] The plaintiff and the defendant are developer and contractor respectively under a construction contract for a large apartment development in Wellington.
- [3] The plaintiff applies pursuant to s290 for an order setting aside a statutory demand dated 14 September 2005 issued by the defendant.
- [4] The statutory demand claims the sum of \$226,374.92 (including GST) which is stated to be: "*the total sum owing by 10 Gilmer Limited to Tracer Interiors and Construction Limited in respect of the unpaid balance of payment claims under the Construction Contracts Act 2002 full particulars of which have previously been provided for the apartment development at 10 Gilmer Terrace, Wellington...*"
- [5] The present application is made by the plaintiff upon the basis that:
 - a) There is a substantial dispute as to whether or not the debt is owing, and
 - b) The plaintiff company is able to pay its debts.
- [6] The application is opposed by the defendant upon the following stated grounds:
 1. The sum ... demanded from the plaintiff by the defendant ... is a debt due on payment claims made by the defendant in accordance with the Construction Contracts Act 2002.
 2. Accordingly there is not a substantial dispute as to whether the sum of \$226,374.92 (including GST) is owing.
- [7] The defendant's broad position is that the plaintiff has not complied with the proper processes under the Act, and in particular sections 19-24 and 79 (as supplemented by Regulation 9 Construction Contracts Regulations 2003) and therefore any right to dispute the amount claimed in the statutory demand is lost.

Background Facts

- [8] The plaintiff owns 10 Gilmer Terrace, Wellington ("the property"). In March 2004 it entered into a contract with the defendant for the construction of 61 new apartments on the property.
- [9] The statutory demand in question concerns the last four of twelve payment claims made by the defendant in relation to the apartment construction contract for the property.
- [10] Progress claims number 1 to number 8 have been settled with the defendant for work done between 13 April 2004 and up to 25 December 2004. There is no dispute as to this.
- [11] Payment claim no. 9 for \$202,780.92, exclusive of GST, was issued around 24 December 2004. Payment claim no. 10 for \$330,235.26, exclusive of GST, was handed to the plaintiff at a meeting on 3 February 2005. Payment claim no. 11 for \$117,441.57, exclusive of GST, was sent to the plaintiff on 28 February 2005. Payment claim no. 12 for \$58,425.44, exclusive of GST, was posted to the plaintiff on 17 June 2005.
- [12] Certain payments were made under these claims which left a balance outstanding, according to the defendant, of \$226,374.92, the amount originally claimed in the statutory demand.
- [13] Notwithstanding that, the final date for handover of the completed apartments to the plaintiff was 21 March 2005, the defendants state that significant amounts have continued to remain outstanding to them under the construction contract for many months both before and after that date. Indeed, as the hearing of this matter was approaching, it was not until 30 November and 1 December 2005 that two further payments were made by the plaintiff under the construction contract. These payments were for \$43,040.32 and \$27,003.43 (plus GST), a total (GST inclusive) of \$78,799.22.
- [14] According to the plaintiff's calculations, the amount which is now claimed by the defendant under the statutory demand is in the order of \$144,080.30 (inclusive of GST). There may be some slight variation between the parties as to calculation of this amount, but for the purposes of the present application, this seems to be the appropriate figure to be taken into account.
- [15] It is the plaintiff's position that amounts claimed in the statutory demand are disputed and that a liquidated damages claim is to follow. It is on this basis that the statutory demand is opposed.
- [16] In turn, the defendant's position is that the plaintiff has not complied with the proper processes under the Act, and therefore any rights to dispute the amount claimed in the statutory demand have been lost.
- [17] The defendant also complains that it is only recently and since the statutory demand was issued that the plaintiff has threatened any claim for liquidated damages.

Counsel's Arguments and My Decision

[18] The present application is made pursuant to s290(4) which sets out the grounds upon which the Court may set aside a statutory demand. This subsection provides:

The Court may grant an application to set aside a statutory demand if it is satisfied that:

- (a) *There is a substantial dispute whether or not the debt is owing or is due; or*
- (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*
- (c) *The demand ought to be set aside on other grounds.*

[19] Here the plaintiff contends first, that there is a substantial dispute as to the debt, and secondly, that the plaintiff company is solvent and able to pay its debts. I turn first to consider the substantial dispute question.

Substantial Dispute as to the Debt

[20] It need hardly be said that in order to succeed, the plaintiff must demonstrate that the dispute which it raises is a genuine one - **Taxi Trucks Limited v Nicholson** [1989] 2 NZLR 297 at page 299.

[21] And there is no doubt first, that the onus is on the plaintiff to show a fairly arguable basis upon which it is not liable for the amount claimed and secondly, that the standard of proof required is proof sufficient to establish a truly arguable case - **Queen City Residential Limited v Paterson & Co Partners Architects (No. 2)** (1995) 7 NZCLC 260, 936.

[22] Turning now to the provisions of the Act, the purpose of the Act is set out in s3, which provides:

3. Purpose

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 for the recovery of payments under a construction contract.*

[23] In considering this general purpose, the Court of Appeal in **George Developments Limited v Canam Construction Limited** (CA244/04, 12 April 2005) stated at paragraph 31: "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 (quoted in **Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd** [1973] 3 All ER 195, 214 (HL) Lord Diplock) said: 'There must be a 'cashflow' in the building trade. It is the very life blood of the enterprise'."

[24] And, in **Salem Ltd v Top End Homes Ltd** (CA1 69/05, 27 September 2005) the Court of Appeal again reiterated this: "The whole thrust of the Act is to ensure that disputes are dealt with promptly and payments made promptly, because of the disastrous effects that non-payment has, not only on the head contractor, but also on its employees, subcontractors, and suppliers: **George Developments Ltd v Canam Construction Ltd** CA244/04 12 April 2005 at [41]-[42]. It is relevant to note, for instance, that employers cannot set up counterclaims, set-offs, or cross demands as a bar to the recovery of a debt under s23 of the Act, unless the employer has a judgment in respect of its claim or there is not in fact any dispute between the parties in relation to the employer's claim: s79. The fundamental position under the Act is that, if a progress claim is made and the employer does not respond within the period stipulated in the construction contract or, by default, within the time specified in the Act, the amount of the claim becomes payable forthwith."

[25] In the present case there is no dispute that the contract in question is a construction contract to which the principles of the Act applies.

[26] Subpart 3 of the Act provides for the procedures for achieving the first of the purposes of the Act set out in Section 3(a), that is: "... to facilitate regular and timely payments between the parties to a construction contract..."

The present case concerns a consideration of the application of those procedures.

[27] It is useful to consider the overall scheme of the procedures which is:

- a) *A payment claim is made by the payee (here the defendant) - s20(1).*
- b) *The payment claim must contain certain information - s20(2).*
- c) *Upon service on the payer (here the plaintiff) the payer may respond by way of a payment schedule - s21(1).*
- d) *That payment schedule must in turn contain certain information - s21(2) and (3).*
- e) *The payer must serve such payment schedule on the payee within 20 working days after the payment claim is served - s22(b)(ii).*
- f) *If the payer fails to do so, the payer becomes liable to pay the amount claimed on the due date in the payment claim - s22.*
- g) *If unpaid, the payee may recover that sum from the payer as "a debt due" in any Court - s23(2).*

[28] Other provisions of importance in the Act are Sections 79 and 80.

[29] Section 79 states:

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.
- [30] Section 80 provides:
80. Service of notices
Any notice or any other document required to be served, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if -
(a) the notice or document is delivered to that person; or
(b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
(c) the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or
(d) the notice or document is sent in the prescribed manner (if any).
- [31] And, so far as service of notices under the Act is concerned, Regulation 9 Construction Contracts Regulations 2003 provides requirements as to additional modes of service. This regulation states:
9. Additional modes of service
(1) In addition to the modes of service specified in section 80 of the Act, any notice or any other document required to be served on, or given to, any person under the Act or these regulations is sufficiently served if -
(a) It is sent by fax; or
(b) It is sent by email or other means of electronic communication and the requirements of regulation 10 are met.
(2) A notice or document sent by fax under subclause (1)(a) is, in the absence of proof to the contrary, served or given if the fax machine generated a record of the transmission of the notice or document to the fax machine of the recipient, and the date of the record is taken to be the date of receipt of that notice or document.
- [32] In considering s79 Construction Contracts Act 1993, in the present case the plaintiff does not have judgment for a set-off of any liquidated amount, and any counterclaim, set-off or cross-demand by the plaintiff is strongly disputed by the defendant.
- [33] And, as to this, the words of Venning J. in *Top End Homes Ltd v Salem Ltd* (unreported, HC Whangarei, 19 July 2005, CIV-2005-488-332) at paragraph 30 are apposite: "Given that clear statement (recently by the New Zealand Court of Appeal in *George Developments Ltd v Canam Construction Ltd*) as to the purpose of the Act and the provisions of s79 this Court cannot take into account any potential counterclaim, set-off or cross-demand the defendant may wish to raise against the plaintiff. A fortiori it follows that where the defence is a challenge to the quantum of the claim the appropriate way for that to be challenged is by means of the payment schedule process."
- [34] As I have noted above, the statutory demand makes demand for the unpaid balance of four payment claims issued by the defendant. The direct issue arises here as to whether the plaintiff as payer has properly responded to each of those payment claims under the payment schedule process. In each instance, in response to a payment claim, has the plaintiff issued an appropriate payment schedule and served this upon the defendant as payee within the 20 working day period specified in s22(b)(ii)?
- [35] If not, then as Randerson J confirms in *Volcanic Investments Ltd v Dempsey and Woods Civil Contractors Ltd* (HC AK, CIV-2005-404-1320, 24 May 2005) at paragraph 12: "Failure to provide a payment schedule may result in liability to pay under s23 the consequences of which are that the payee may recover from the payer as a debt due to the payee in any court ... the unpaid portion of the claimed amount ...(s23(2)(a)(i))"
- [36] I turn now to consider each of the four payment claims in question.
- Payment Claim No. 9**
- [37] Payment claim no. 9, in my view, is clearly a payment claim issued in accordance with s20(2) of the Act. As I understand it, the claim followed the precise form of previous payment claims numbers 1-8 inclusive (about which no objection was raised by the plaintiff), and it contained sufficient information for the plaintiff to identify the basis for the claim made and the due date.
- [38] This payment claim was served on the plaintiff by fax on 24 December 2004 - Regulation 9(2) Construction Contracts Regulations 2003.
- [39] By my calculations, the 20 working days within which the plaintiff was to respond with a payment schedule expired on 2 February 2005. No payment schedule was received by the defendant from the plaintiff within that period.
- [40] And, in any event, even if a payment schedule had been received within this period, an issue arises as to whether the plaintiff's response in what it described as "Progress Payment Certificate No. 9" constituted a proper payment schedule in terms of s21(2) and (3).
- [41] Progress payment certificate no. 9 issued by the plaintiff purports to indicate a scheduled amount, \$190,326.66, which is less than the claimed amount of \$228,128.53. It does not, however, indicate the manner in which this amount was calculated nor the plaintiff's reasons for the difference between these amounts, nor the plaintiff's reasons for withholding payment in terms of s21(3). For this additional reason, therefore, I am satisfied that the consequences prescribed in sections 22 and 23(2) of the Act follow. The unpaid balance of the defendant's payment claim no. 9, being \$30,254.84, including GST, constitutes a debt due under the Act and the plaintiff becomes liable to pay this amount.

Payment Claim No. 10

- [42] For similar reasons to those outlined at paragraph [37] above, payment claim no. 10, in my view, is also clearly a payment claim issued in accordance with s20(2) of the Act.
- [43] This payment claim was handed to the plaintiff at a pre-occupation meeting on 3 February 2005. This is not rebutted in any cogent way by any evidence put forward by the plaintiff.
- [44] Again by my calculations, the 20 working day period from that service date expired on 3 March 2005.
- [45] I am satisfied on the evidence that no payment schedule was received by the defendant from the plaintiff within this required 20 working day period. The evidence from the defendant is that progress payment certificate no. 10 issued by the plaintiff was not received by it at the time and indeed it was some six months later in September 2005 when it was actually received. The plaintiff, however, contends that a letter dated 14 February 2005 was faxed to the defendant with respect to this payment claim, but the plaintiff is unable to establish any evidence to show this fax was sent to effect service in accordance with Regulation 9(2) Construction Contracts Regulations 2003.
- [46] And again, in any event, for similar reasons to those noted at paragraphs [40] and [41] above with respect to payment claim no. 9, the document referred to as "Progress Payment Certificate No. 10" by the plaintiff also does not comply with the requirements of s21(2) and (3) to constitute a proper payment schedule in terms of the Act.
- [47] For all these reasons, I am satisfied that in terms of sections 22 and 23(2) of the Act, the unpaid balance of the defendant's payment claim no. 10 also constitutes a debt due under the Act and the plaintiff is liable to pay this amount.
- [48] It seems that on or about 5 April 2005 the defendant apparently issued a Notice of Adjudication under the Act, which was followed by attempts between the parties to settle a number of outstanding issues. This, however, does not change the position that strict compliance with the payment claim and payment schedule provisions of the Act which triggered the requirement for payment to be made promptly were not complied with.

Payment Claim No. 11

- [49] Again, payment claim no. 11, as I see it, is clearly a payment claim issued in accordance with s20(2) of the Act. Similar reasons to those outlined at paragraph [37] above apply here.
- [50] This payment claim was posted to the plaintiff on or about 28 February 2005. It was also faxed to the plaintiff on 3 March 2005.
- [51] In terms of Regulation 9(2) Construction Contracts Regulations 2003, therefore the payment claim was served at the latest on 3 March 2005.
- [52] Again by my calculations, the 20 working days within which the plaintiff was to respond with a payment schedule expired on 4 April 2005.
- [53] A progress payment certificate (no. 11) dated 5 April 2005 was received by the defendant some time after that date. This is not rebutted in evidence put forward by the plaintiff.
- [54] Another progress payment certificate (no. 12) was also received by the defendant on 4 May 2005. This purported to be for work carried out for the month ending 31 March 2005. Payment claim no. 11, however, was for work carried out for the month ending 28 February 2005, and no payment claim was apparently issued by the defendant (at this time) for work carried out for the month ending March 2005. Accordingly, the defendant credited the payment made under progress payment certificate no. 12 to payment claim no. 11.
- [55] So far as payment claim no. 11 is concerned, no payment schedule was served by the plaintiff on the defendant on or prior to the expiry of the 20 working day period, being 4 April 2005.
- [56] The consequences prescribed in sections 22 and 23(2) of the Act follow, and the unpaid balance in this payment claim totalling \$14,953.83 (including GST) is a debt due under the Act.
- [57] Further, and in any event, for similar reasons to those noted at paragraphs [40] and [41] above, I am satisfied here that the plaintiff's response by way of "progress payment certificate numbers 11 and 12" did not constitute a proper payment schedule in terms of s21(2) and (3) of the Act.
- [58] For these reasons, therefore, I am satisfied that in terms of s22 and s23(2) that the unpaid balance of \$14,953.83 in the defendant's payment claim no. 9 is a debt due under the Act for which the plaintiff is liable.

Payment Claim No. 12

- [59] Payment claim no. 12 is also, in my view, clearly a payment claim issued in accordance with s20(2) of the Act. Similar reasons to those outlined in paragraph [37] apply here.
- [60] This payment claim was posted to the plaintiff on or about 17 June 2005 and also faxed to the plaintiff on that date. Again, this is not rebutted by any evidence put forward by the plaintiff. In terms of Regulation 9(2) Construction Contracts Regulations 2003, the date of service of this payment claim was 17 June 2005.
- [61] Again, by my calculations, the 20 working day period within which the plaintiff was to respond expired on 15 July 2005.

- [62] No payment schedule was received by the defendant from the plaintiff prior to 15 July 2005. Indeed, it seems that nothing was received by the defendant prior to the defendant issuing the statutory demand on 14 September 2005. It is clear that no document, whether by way of progress payment certificate or letter or otherwise, is relied upon by the plaintiff here as constituting a payment schedule in response to payment claim no. 12.
- [63] The consequences prescribed in sections 22 and 23(2) of the Act must follow.
- [64] As part of its complaint over the amount claimed by the defendant in the statutory demand, the plaintiff contends that the defendant has still to complete maintenance work under the contract and to provide numerous guarantees which it agreed to do. These are matters upon which the plaintiff may bring separate proceedings against the defendant. They are not to delay payments properly due under the procedures set out in the Act. As Randerson J. noted in **Volcanic Investments Ltd** at paragraph 32: "...there is a clear statutory intention that payments due under construction contracts should be paid and disputes resolved quickly. It is intended that the recovery of debts found to be due following an adjudication or which become payable under ss23 and 24 of the Act, should be promptly recoverable with very limited opportunity for further dispute..."
- [65] In summary, it follows, therefore, that given the general purposes of the Act which I have noted above, the plaintiff's failure to respond in a proper and timely fashion to each of the progress claims made in payment claims 9, 10, 11 and 12 means that the amounts remaining owing under those claims became payable forthwith - s22 of the Act and **Salem Ltd v Top End Homes Ltd** (CA).
- [66] It is clear, therefore, that in terms of s23(2) of the Act, the defendant may recover these amounts as "a debt due" from the plaintiff "in any Court". I therefore reject the plaintiff's suggestion that there is any substantial dispute as to whether the debt in question may be owing in terms of s290(4)(a) Companies Act 1993.

Solvency

- [67] The plaintiff's second contention is that, in any event, it is solvent and able to pay its debts, and therefore the statutory demand should be set aside upon this basis in terms of s290(4)(c).
- [68] The authorities accept that if the recipient of a statutory demand satisfies the Court that it is arguably solvent, the demand must be set aside pursuant to s290(4)(c) Companies Act 1993 - Rocklands **Park Ltd v Logan Samuel Ltd** (2004) 9 NZCLC at 263, 535 and **Medisys Ltd v Getting and Castle Ltd** (unreported, HC AK, 9 February 2001, M1426/00, Master Kennedy-Grant).
- [69] Here the only evidence before the Court as to the solvency of the plaintiff is the affidavit of its director Mr Hayim Nachum dated 29 September 2005. In that affidavit he states that:
- 12. The company is able to pay its debts. This can be shown by our good credit history and confirmation from our major creditors that all our obligations are met...*
- And:
- 13.1 have enclosed a statement of assets and liabilities to show that the company has sufficient funds and assets to meet its commitments...*
- [70] Annexed to the affidavit of Mr Nachum is a two page document purporting to be a "Balance Sheet as of August 2005" and a "Profit and Loss Statement for the period April 2005 through August 2005" for the company.
- [71] The balance sheet appears to show a total equity for the company of \$3,091,498.39 as at that time. The profit and loss statement which seems to be for a four month period shows total gross income of \$306,889.69, and a total operating profit of \$4,393.80.
- [72] There is no identification on the balance sheet or profit and loss statement as to who prepared these documents, nor are there any other annual accounts or financial details provided for the plaintiff company.
- [73] Instead Mr Nachum has exhibited letters from Guardian Trust and Palmerston North Finance Limited with whom the plaintiff has outstanding loans, which confirm that payments under these loans have been made in a satisfactory manner.
- [74] Counsel for the defendant submitted before me that this material which is provided as evidence of solvency of the plaintiff is inadequate and should not be accepted.
- [75] He notes that both the balance sheet and profit and loss statement which appear to be internal management accounts are not prepared nor signed by independent external chartered accountants, nor are they audited and they do not show the ability of the company to pay its debts as they fall due as required in terms of the solvency test under s4 Companies Act 1993.
- [76] Certainly, before me, Mr Corry for the plaintiff acknowledged that the evidence submitted as to solvency was scanty at best. And, I note that by virtue of s287 Companies Act 1993, unless the contrary is proven, a company is presumed to be unable to pay its debts if it fails to comply with a statutory demand.
- [77] Taking all these matters into account, on balance I take the view that the evidence provided to the Court here is insufficient to establish the solvency of the plaintiff. (As to this, see also **Volcanic Investments Ltd** at paragraphs [36] and [37]. I reject this ground put forward by the plaintiff.

Conclusion

- [78] For these reasons, it will be apparent that the grounds put forward by the plaintiff to set aside the statutory demand here have not been established.
- [79] The plaintiff's application to set aside the statutory demand therefore fails.
- [80] An order is now made in terms of s291 Companies Act 1993 that the plaintiff pay the sum of \$144,080.30 outstanding under the statutory demand within 10 working days of the date of this judgment, and that in default in payment the defendant may apply to put the plaintiff company into liquidation.
- [81] The defendant is entitled to costs against the plaintiff on a category 2B basis, together with disbursements as fixed by the Registrar.

Solicitors: Paul Cheng & Co, Wellington for Plaintiff. Michael Chung Law Office, Wellington for Defendant
Appearances: J.C. Corry for Plaintiff. P.S.J. Withnall for Defendant