

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2017-404-000447  
[2017] NZHC 1400**

BETWEEN                      LOT 8 INVESTMENT LIMITED  
   Applicant  
  
AND                                RPS CONSTRUCTION LIMITED  
   Respondent

Hearing:                      19 June 2017

Appearances:                C J McLean for the Applicant  
   A Ho for the Respondent

Judgment:                    23 June 2017

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**JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**

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*This judgment was delivered by me on  
23.06.17 at 3:30pm, pursuant to  
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar  
Date.....*

[1] The applicant, Lot 8 Investment Limited (Lot 8) applies to set aside the statutory demand served by the respondent RPS Construction Limited (RPS).

[2] On 10 March 2017 RPS served a statutory demand dated 7 March 2017 claiming \$54,067.07 (including GST) as being the amount due under a payment claim dated 10 January 2017, and a payment claim dated 7 February 2017.

### **Background**

[3] RPS was contracted to do building work for Lot 8. This arrangement was subject to the provisions of the Construction Contracts Act 2002 (the Act). RPS was entitled to payment upon its payment claims unless the Act permitted otherwise.

[4] The Act's regime is strict and rigid. Its purpose is to ensure a payee's payment obligations are not bypassed except for good reason and properly authorised by the Act. Payment claims are required to be met in full unless in response, a payment schedule was delivered within 20 working days which provided a proper reason for payment of a lesser sum – that proper reason required observance of the Act's limitations. The Act required a payer to serve a payment schedule containing that information sufficient to explain why the payment made was less than what was invoiced.

[5] The Act's provisions are of significant focus. Each party calls in aid its own point of view of its operation. There is considerable case authority that provides assistance. However, in some respects this case provides a different view.

[6] RPS' first payment claim was dated 10 January 2017 and claimed \$48,034.58 (excluding GST). It required, incorrectly, that payment be made by 30 January 2017. Because the parties had not agreed upon an arrangement to pay within 20 days, the Act required payment be made within 20 working days, and in this case would mean by 9 February 2017.

[7] RPS issued its second payment claim for \$32,494.24 (excluding GST) on 7 February 2017.

[8] Some detail of the payment claims and payment schedules is required and is set out below.

### **The payment claims**

[9] This noted the claim period from 28 November to 31 December 2016. It provided details of retail purchases and plant hire, labour costs and digger hire including hours claimed for and rates per hour charged. Invoices were attached to prove materials purchased. Daily worksheets were attached to prove hourly rates charged or services contracted for. The daily worksheets also provided a general description of the work undertaken, including:

- Site inspection
- Hoarding
- Digger Driving
- Paint and shutters
- Foundation prep
- Foundation
- Foundations poly
- Scoria/land fill
- Ground beam
- Steel cages

[10] A similar practice was followed regarding RPS' second payment claim which covered the period 1 January to 31 January 2017.

### **The payment schedules**

[11] On 9 February 2017, Lot 8 served a payment schedule in response to both payment claims 1 and 2, within the 20 working days (as the Act requires) after both payment claims 1 and 2 had been served. It provided Lot 8's reasons for its payment of \$36,796.93 (including GST), of both payment claims 1 and 2 – an amount which by error included a small amount in excess of what Lot 8 says was the scheduled amount.

[12] On 6 March 2017 Lot 8 emailed RPS with a second payment schedule in relation to the second payment claim which provided additional information in

support of its earlier calculation of liability. That second payment schedule referred to a recent discovery of boxing and foundation work located as incorrectly sited and requiring removal and replacement.

[13] The parties' contract was terminated on 31 January 2017 i.e. before payment was due on the first payment claim and before delivery of the second payment claim – and also before the issue of Lot 8's first payment schedule.

[14] RPS' statutory demand claims the balance it says is owing and unpaid in relation to the first and second payment claims. RPS' position is that a debtor's recourse to s 290 of the Companies Act 1993 to counterclaims, set offs or cross demands, is precluded – as indeed it is by s 79 of the Act which confirms this Court must not give effect to any counterclaim, set off or cross demand if the Act provisions apply, unless, that is, Lot 8's payment schedule obligations have been satisfied.

[15] Therefore Lot 8's recourse, if any, must rely upon whether its payment schedule is compliant with the requirement of s 21 of the Act.

[16] Lot 8's payment schedule dated 9 February 2017 provided:

THIS IS A PAYMENT SCHEDULE UNDER 2.21 OF THE  
CONSTRUCTION CONTRACTS ACT 2002

To: RPS Construction Limited From: Lot 8 Investment Limited – 9  
February 2017  
Claim 1 for the period 28 November 16 to 31 December 16: and  
Claim 2 for the period 1 January 17 to 31 January 17.

...

Lot 8 values the works to 31 January 17 at materials \$7,177.33 plus GST, steel placing \$3,600 plus GST, steel supply (following rectification) \$13,200 plus GST, machine hire \$3,000 plus GST, labour \$7,200 and project management \$10,000 plus GST a total of \$44,177.33 plus GST less steel supply (to be invoiced) at total of: **\$30,977.33 plus GST (Scheduled Amount)**.

[17] Section 21 details the minimum requirements of a payment schedule:

- (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) state 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.

[18] What is unusual here is that Lot 8's payment schedule refers to both payment claims 1 and 2. Lot 8's position is that the Act does not require a payment schedule to only relate to one payment claim. RPS' position is that the payment schedule is invalid because it refers to more than one payment claim.

[19] The submissions of counsel focus upon factors which ought to be considered when interpreting the Act's provisions.

[20] For Lot 8 it was submitted the payment schedule was compliant because it was in writing and it identified the payment claims to which it related and indicated a scheduled amount for which it accepted liability. Payment of that amount was provided as required. The email by which the payment schedule was sent also detailed Lot 8's complaints of defective work, poor workmanship and overcharging.

[21] RPS says Lot 8's payment schedule was not compliant because two payment claims were responded to by a single payment schedule when a separate scheduled ought to have been provided.

[22] RPS's Mr Gilberton provides evidence of his understanding of the payment schedule. He deposes it was impossible to determine what amount was being paid in relation to items in each claim.

[23] Mr Gilberton submits that each payment claim was about distinct work aspects. He says RPS was entitled to know the specifics of the issues in dispute and that did not allow payment claims to be combined into one because RPS did not know how the scheduled amounts for each payment claim could be reviewed and assessed. RPS says the payment made could have been applied to payment claim 1 alone or entirely to payment claim 2 with the balance payable to payment claim 1.

### **Considerations**

[24] The Act prescribes for a payment to be made even if issues arise regarding the work done. The process is designed to prevent claims of poor workmanship, without reason. The payment schedule provides an opportunity for a payer to detail clearly the reasons justifying claims of any deductions made on payment claims. The procedure is strict, and unless the payment schedule is s 21 compliant then liability for payment cannot be avoided. It is not enough for a payer to say that it did not like the work done, without a clear indication of reasoned value for that dislike being provided.

[25] Although a second payment schedule was delivered about a month later, this does not feature for present purposes. Although it did refer to claims of other defective work not notified in the first payment schedule, it does not claim for any further payment deductions to be made. In effect it provided an explanation for claims made in the first payment schedule.

[26] It can be implied that by s 21 each payment claim, if challenged, ought to be the subject of a separate payment schedule.

[27] In *Loveridge Ltd v Watts & Hughes Construction Ltd*<sup>1</sup> Associate Judge Doogue may have given that indication but His Honour's focus was not upon payment schedules but upon payment claims and his purpose was to identify the requirements of the latter rather than the former.

[28] In *Loveridge* His Honour held:

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<sup>1</sup> CIV 2011-470-275, 29 September 2011.

... By using the terminology that it did in enacting ss 20 and 21, the legislature has made it clear that there will be only one payment claim relating to each progress payment and one payment schedule responding to it. I also consider that unnecessary confusion would result unless the clear position is adhered to. The Act after all is designed to assist those who are engaged in the construction industry who are not lawyers. Simplicity and not undue complexity is required when approaching interpretation of the Act.

[29] The payment and challenge rules were created for the proper purpose of ensuring some protection for payees to ensure they were paid promptly, and that reasons for those payments being withheld being sufficiently notified. Hence the requirement for payers to provide proper detail about why the invoice sum ought to be reduced – to ensure the payee can properly understand those reasons of why a lesser sum has been offered.

[30] As earlier noted the circumstances in this case are perhaps a little unusual. Routinely with a construction contract, services can be engaged for long periods that may extend over many months. Therefore payment claims are issued monthly, and unless otherwise agreed, payment will be required within 20 working days and likewise within that time any payment schedule is to be delivered.

[31] In this case two payment claims were delivered, the first dated 10 January 2017 covering the period from 28 November to 31 December 2016, and the second dated 7 February 2017 covering the period 1 January to 31 January 2017.

[32] The second was delivered before payment or a payment schedule upon the first payment claim was required – in fact just two days before payment was required on 9 February 2017. Inspection of those reveals they are similar in form, each referring to material costs, material hire and labour hours. Then the payment schedule, with some detail, described why the charges of both were being challenged.

[33] Lot 8 issued a single payment schedule on 9 February 2017 which addressed, separately both payment claims. It did not however separately detail its estimate of the value of works provided by reference to the payment claims separately for the periods ending 31 December 2016 and 31 January 2017.

[34] Rather its estimate was for all works done from 28 November 2016 to 31 January 2017. The payment schedule particulars included, inter alia, materials, steel placing, steel supply (following rectification), machine hire, and labour and project management.

[35] The evidence is that RPS withdrew its services on 31 January 2017. Before then issues had arisen regarding the standard of work provided and costs charged for it.

[36] The second payment schedule, also delivered within time, referred only to other alleged faulty works having been recently located.

### **Conclusions**

[37] It is the Court's view s 21 of the Act does not preclude a single payment schedule dealing with two payment claims provided both are delivered within the timeframe required and, as in this case, within 20 working days of receipt of payment claims and provided that they together clearly identified work and cost issues affecting both, to ensure that the scope of any deduction claims are clearly shown so can be understood.

[38] In the Court's view Lot 8's payment schedule clearly refers to each payment claim separately including its calculation of the valuation of appropriate charges/costs covering all works undertaken to 31 January 2017. The payment schedule estimates its liability to that date. There is no issue about what work was done, or regarding those issues that brought the parties' contract to an end at that time.

[39] The payment schedules do not provide a line-by-line assessment but neither is such required. What they do provide are sufficient details to enable a response. The Court considers it is not a requirement to link each aspect of challenge to an analysis of charges made; that it is sufficient if context is provided by the payment schedule challenged. Otherwise any requirement for technical analysis would likely undermine the ability to challenge payment claims expeditiously.

[40] It is not at all clear what confusion or misunderstanding could, for good reason, have been resolved by apportioning Lot 8's calculations. RPS had withdrawn from its contract work before it issued its second payment claim. Reasons claiming confusion have not, it appears, been raised prior to this proceeding being filed.

[41] There is not a statutory requirement for strict or literal compliance with s 21. There is compliance if certain details are indicated sufficiently to justify reasons for the payment provided.

[42] The Court accepts payment schedule 1 was compliant with s 21. Therefore, s 79 of the Act preventing any cross claims, set offs or cross demands to be taken into account, does not apply here.

[43] It follows those considerations which are at the core of RPS's opposition can be brought into account in making a decision upon the setting aside application.

[44] The Court considers there is a substantial dispute as to whether the debt in question is due or owing. Also Lot 8 appears to have its own claims of an amount that would likely exceed RPS' claim.

[45] Suggestions that there is confusion about the payment schedule sum and the amount of RPS' first payment claim is reasonably explained by Lot 8's evidence of a minor error occurring.

### **Judgment**

[46] RPS' statutory demand is set aside.

[47] RPS shall pay Lot 8's costs and disbursements on a 2B basis.

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**Associate Judge Christiansen**