IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2009 425 000341

BETWEEN	SMG PROPERTIES LIMITED Applicant
AND	J K STEVENSON LIMITED Respondent

Hearing: 17 0ctober 2009

Appearances: A N Riches for Applicant
H M Scott and T Stevens for Respondent

Judgment: 24 November 2009 at 4pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

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[1] SMG Properties Limited ("SMG") developed an apartment complex called "The Rees" at Queenstown. In 2006 and 2007 SMG entered into two contracts with J K Stevenson Limited ("JKS") for exterior walkways and for the supply and installation of structural steel. The contracts contained materially identical terms. They were respectively for fixed sums of $599,999.00 and $532,257.00 (each plus GST). JKS completed the work required under the contracts. In fact, JKS completed more work than provided for in the contracts. SMG has paid to JKS substantially more than the sum of the two contract prices. The sum of the prices was $1,132,256.00, exclusive of GST. (From this point for simplicity I will quote all figures exclusive of GST).

[2] It is common ground that SMG has paid JKS $2,163,014.00. There is then disagreement on the evidence as to the total invoiced and therefore the balance claimed to be owing on the invoices. According to Lindsay Neil Singleton of SMG

the total invoiced has been $2,455,111.00. According to Peter Leonord Edwards of JKS, the total invoiced with $2,669,331.19. Accordingly, the difference between sums invoiced and paid is either $292,097.00 (the SMG view) or $506,316.20 (the JKS view).

[3] SMG (through Mr Singleton) accept that in addition to the $1,132,256.00 of the contract sums JKS were entitled to $113,494.00 for authorised variations (for a walkway bridge and for a reception structure). SMG accordingly says that JKS was entitled to a total payment of $1,245,750.00. But it is common ground that JKS has been paid $2,163,014.00. In other words, SMG claims that it has paid some $917,264.00 more than it should have. Its position is that that sum represents an over-charge by JKS which SMG is entitled to recover from JKS.

Setting aside of statutory demands – the principles

[4] JKS issued a statutory demand in relation to the unpaid invoices. SMG applies for an order setting aside the demand.

[5] The Court's jurisdiction to set aside a statutory demand is contained in s290 Companies Act, and I refer specifically to the basis upon which the Court may grant an application as contained in s290(4) which reads:

> **290 Court may set aside statutory demand**
>
> …
>
> (4) 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.

[6] For the purposes of this hearing I adopt as a general approach to the exercise of this jurisdiction these 5 principles, which were recognised by both counsel as applicable principles -

- The applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt.

- The mere assertion that the debt exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.

- If such material is available the dispute should normally be resolved other than by means of proceedings in the Court's Companies Act jurisdiction.

- An applicant must establish that any counterclaim, cross demand or set-off is reasonably arguable in all the circumstances.

- It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

The main factual issues between the parties – waiver

[7] The central issue impacting on the litigation between the parties is whether SMG waived contractual requirements relating to variations of the contract. There are other issues and I will return to those briefly. However, the waiver issue is so fundamental that it is appropriate to deal with that first. If SMG did not waive the contractual provisions as to variation then JKS accepts through Mrs Scott that no contractual right to payment for a "variation" exists. On the other hand, if SMG waived the variation provisions then it is entitled to appropriate remuneration for the variation.

[8] On the evidence before the Court on this application it is not possible to resolve the issue as to whether or not there has been a waiver. There is therefore arguably a genuine and substantial dispute as to the existence of the debt.

[9] If the statutory demand were to be upheld, Mrs Scott would have had to be able to point to material satisfying the Court that there was simply no room for SMG's waiver argument. I recognise that notwithstanding that waiver by its nature depends upon the conduct of the parties, there may occasionally be cases in a summary context where the Court can be satisfied, without the testing of evidence which occurs at trial, that a particular conduct has amounted to the unambiguous representation that is required to constitute waiver.

[10] For JKS Mrs Scott invited the Court to find waiver in this case as the Court had in *Mullaney v Brown* HC AK CIV 2008 404 6364, 14 July 2009 Stevens J. That too was a case involving a construction contract. But the matter came before the High Court on appeal from the District Court. Stevens J, in upholding the decision of the District Court Judge, noted that the District Court Judge had heard evidence and was able to assess the credibility of witnesses. The High Court upheld the District Court decision on the main issue on appeal, relating to the meaning to be given to the term "PC sum" in the contract between the parties. The High Court also upheld the District Court's secondary line of reasoning, namely that a requirement that any variations be in writing had been waived. While the case illustrates waiver in relation to a similar issue, it to some extent emphasises the different situation pertaining in a trial court (or indeed in an appellate court following trial). The District Court Judge had heard evidence, had been able to assess the witnesses, and had the benefit of the exploration of the parties' conduct through examination.

The contract provisions

[11] Mrs Scott, for JKS, does not challenge the clarity of the contractual provisions in this case. I summarise them with reference to the clauses in the contract –

(a) The contract price is to be paid by progress payments approved by the project manager on GST invoices for the proportion of the works carried out, to be issued in appropriate proportions of the contract price: cl 2.2.

(b) The contract price is subject to adjustments for approved variations: cl 2.3.

(c) All claims for payment of the contract price or variations are to be submitted to the project manager as the claim certifier responsible to process each claim: cl 2.6.

(d) The offering, or accepting, of any payment shall not prejudice any other right to which either party may be entitled: cl 2.9.

(e) The word "approved" in the contract means approved by the project manager by the issue of a written contract instruction or variation: cl 1.1.

(f) The word "variation" used in the agreement means a substitution or variation to the works signed in writing by the principal (SMG) and the contractor (JKS) prior to commencement of the substitution or variation.

Areas of argument

[12] Against the background of these express contractual provisions, JKS recognises the binding nature of the provisions but asserts that their application in relation to the variations claimed was waived. SMG says this occurred through the conduct of the parties. I refrain from an item by item evaluation of the strength or weakness of the various points made by counsel on each side. The fact is that there is ample room for dispute in relation to the meaning and effect of the conduct. I therefore comment only briefly on the following matters:

(a) The Court has been provided with no detailed evidence as to the allegedly varied work; when that work was requested; what discussion occurred; when it was invoiced; what discussions followed invoicing; and so on. When the Court sought from Mrs Scott an indication of the clearest evidence as to the various variations, Mrs

Scott referred to a sub-contractor's payment claim which JKS had submitted on 8 April 2009. While that document at least tabulates the variation claims, it is a bare table of the claims, their amounts and the balance claimed outstanding. It does nothing to inform the Court as to the background including details such as timing. It is a document prepared substantially after the event and provides no light on the conduct of the parties through the period of the work.

(b) For JKS Mrs Scott submits that the extent to which SMG, upon presentation of JKS's invoices, paid very substantially more than the contract prices (and the two variations which SMG acknowledges were payable) – over $900,000.00 – strongly evidences a waiver. SMG was repeatedly, for substantial sums, paying out on variations which had not been approved in writing beforehand. Mrs Scott invites the Court to conclude that that conduct involved a waiver by SMG of the requirements for written variation. That submission is clearly available to JKS, but it is one piece of an argument which would need to be placed into the context of the conduct of the parties through the relevant period. In relation to this application the Court does not have evidence of the invoicing and what conduct occurred through the invoicing.

(c) Both parties rely on a number of communications which occurred, including through email. The correspondence and emails do not give a complete picture. The point can be illustrated by reference to an email exchange upon which Mrs Scott placed emphasis. Mr Edwards exhibited an email dated 1 October 2008 which Mr Edwards sent to Vaughan Wharton, who had a supervision role for SMG. Mr Edwards states in the email that "All the invoices to date have been discussed and clarified between Dwight and Anton...there are no issues we are aware of other than the lack of payment...". A number of observations arise. First, the propositions being put are attributed to other staff members of the two organisations. The first-named has not given any evidence. The second-named (Anton Woitasek) has

subsequently died. A Court would need to carefully consider the evidence as to what had been accepted. Secondly, the matter is put not in terms of unequivocal positions but in terms of "unawareness of any issues". Thirdly, Mr Edwards' exhibit includes a response from Mr Wharton indicating that Mr Edwards' comments of 1 October 2008 would be forwarded to Anton (Woitasek) with the implication that it would be Anton Woitasek who would be able to comment on them. The Court has not been provided with information as to the subsequent responses (if any) from Mr Woitasek. These few observations indicate the extent to which there are other relevant witnesses and information. As the evidence stands, it does not point clearly to a waiver.

(d) In addition to submissions expressed in the terminology of waiver, Mrs Scott submitted that it would be unjust for SMG to have accepted oral requests for variations but to later assert that the variations were unauthorised because they were not in writing. Mrs Scott acknowledged that an argument based upon an inequitable outcome would have to be formulated as something in the nature of an equitable estoppel. With the matters I have already referred to, this case is far from being one of those rare cases where a Court might find in a summary context that an injustice or inequity was proved beyond argument.

(d) SMG's evidence (and I refer particularly to that of Mr Singleton) is that JKS was, especially during the earlier parts of the contract, poorly organised and supervised on site and did not perform efficiently. The allegation is made that a walkway construction task which was taking JKS fifteen working days in the first twelve months was improved (after Mr Wharton was engaged) to five working days. The allegations of poor performance are strenuously denied, especially in the detailed evidence of Mr Edwards. The Court cannot resolve that conflict. What it leaves open is the possibility that, should a Court accept that poor performance was proved, at least a

proportion of the additional value of billing by JKS relates to its own poor performance. JKS did not provide the Court with any breakdown of the "variations costs" between additional time and additional materials. There is evidence, especially from Mr Singleton, that JKS was basing its claims on hours worked and steel tonnage rather than on the basis of "the appropriate proportions of the contract prices" as referred to in cl 2.2 of the contract. On the state of the evidence before me, the Court has no means of determining to what extent, if any, the total JKS billing should in fact have been attributed to and limited by the contract prices. There is evidence of Mr Wharton's requesting job cost reports from JKS in order to complete a reconciliation. It is again a matter for further evidence to determine to what extent any information supplied by JKS permitted a full reconciliation. The evidence provided to the Court falls well short of allowing a reconciliation.

(e) The evidence filed on each side is redolent with accusation, one against the other, of incompetence with regard to management systems and personnel. This covers both individual managers and arrangements such as in relation to cranage. Each side champions the quality of its own systems and management. Each side denounces the other. Only a trial Court can resolve such issues.

Substantial dispute

[13] There is in these circumstances a substantial dispute as to whether the sum claimed by JKS is owed by SMG. In the absence of a reconciliation and the testing of that reconciliation the substantial dispute extends to the full amount of the debt.

[14] This conclusion is reinforced by cl 18.4 of each contract which reads:

> 18.4 Any claim for extra work resulting from insufficient coordination by the Contract will not be approved by the Principal. Any cost incurred by the Principal as a result of insufficient coordination by the Contractor will be deducted from monies due to the Contractor.

[15] As I read cl 18.4 the first sentence gives rise not to a counterclaim or set-off but rather means that there is no right to claim for a variation based on extra work if that work has resulted from insufficient co-ordination by the contractor. Whether insufficient co-ordination occurred and impacted on the extent of work is one of the very issues that will need to be determined at a trial.

Counterclaim or set-off

[16] Given the conclusions reached above it becomes unnecessary for the Court to determine whether SMG in the alternative is in a position to assert a counterclaim or set-off. The evidence of Mr Singleton was that SMG had suffered losses as a result of breaches by JKS and that he would "estimate that it is well in excess of $1,500,000.00". He then went on to suggest two components of damages being "monthly interest…approximately $463,000.00, being approximately $1,852,000.00 for four months" – flowing from Mr Singleton's assessment that JKS's alleged breaches delayed the contract completion by four months. Secondly, Mr Singleton asserted that various people had been engaged for unstated times as a result of the inadequate work of JKS and "taking a conservative view, I would estimate these costs to exceed $200,000.00".

[17] Mrs Scott submitted that the evidence provided was extremely thin. No documentary evidence or calculations were required to support the value of claims. No breakdown was provided to support the labour costs. There was also the unexplained discrepancy between Mr Singleton's estimate of the damages being "well in excess of $1,500,000.00" and the sum of the two figures in fact given (which was $2,052,000.00). The Court and the JKS are entitled to expect better evidence of quantification and justification than that. There is an argument, as Mrs Scott advanced, that the applicant in this case had made a mere assertion that the debt exists, which the authorities treat as insufficient.

[18] In the event I am not required to make any ruling in relation to the counterclaim or set-off argument by reason of the fact that there is a substantial dispute as to the sum demanded.

The current financial position of SMG

[19] Mr Riches did not submit that SMG was solvent in the cash flow sense which is relevant under the Companies Act 1993. Evidence had become available to JKS very late before the hearing as to SMG's financial position. It came in the form of a letter written by solicitors acting for SMG in Auckland. In relation to an unrelated dispute which SMG has, the solicitors in question wrote:

> We are instructed to respond to you as follows:
>
> 1. SMG Properties Limited has ceased operations and trading. It is in the process of being wound up.
>
> 2. The company has no assets.
>
> …

[20] The letter dated 10 November 2009 was written in the context of an indication that SMG was therefore not intending to take any further steps in relation to that dispute at this time. The other party to that dispute provided an affidavit in this proceeding stating that he claims against SMG a sum of $35,000.00 arising out of his employment relationship.

[21] The director of another supplier has deposed that it is still owed $54,261.54 by SMG in relation to "The Rees" project. He refers to lengthy delays in payment and a rolling out of excuses.

[22] Faced with the less than attractive evidence of its financial position, SMG through counsel provided an explanatory letter written by the Auckland solicitors who had said that SMG was being wound up. The explanatory letter dated 11 November 2009 stated:

> For the sake of clarity, we advise that it is the activities of the company that are being wound up, not the company itself. It has ceased trading.

[23] The letter is arguably more significant for what it does not alter. It leaves intact the earlier statement that SMG has no assets.

[24] From the bar, Mr Riches explained that on his instructions that the statement as to "no assets" was incorrect in that the company has assets in the form of its debtors, which the company is collecting in order to pay its creditors. Mr Riches was not in a position to point to any evidence indicating whether the creditors who are being paid include any related entities nor was he able to give any undertaking in that regard from the bar.

[25] Against this background, and against the background of an indebtedness which has existed (assuming for the moment that it has existed) for months, Mrs Scott was entitled to express grave concern on the part of her client that JKS's entitlements are simply deferred while other creditors are apparently paid.

The Court's residual discretion

[26] To meet this concern, Mrs Scott submitted that there is under s290 Companies Act a residual discretion which would permit the Court to appoint a liquidator even if a substantial dispute exists.

[27] Support for this proposition may be found in *Brookers Company Law* at CA290.02 (2) where under a heading "Court's Discretion" this is said:

> Even if a substantial dispute or set-off or counter-claim is found to exist so as to warrant the setting aside of a statutory demand, the Court may still order the appointment of a liquidator if it has evidence before it suggesting that the company is unable to pay its debts: *Re Tweeds Garages Limited* [1962] Ch 406; …*Re a Private Company* [1935] NZLR 120. See also *Home Pride Limited v Feature Furniture Limited* HC AK CIV 2007 404 610, 24 July 2007 Associate Judge Sargisson.

[28] I do not consider that this passage in *Brookers* correctly states the law in relation to statutory demands.

[29] A residual discretion does exist under s290 but it is a discretion to refuse an application to set aside a statutory demand even if satisfied that the grounds under s290(4) (for setting a demand) have been established: *Alfex Doors and Windows Limited v Alutech Windows and Doors Limited* (2001) 16 PRNZ 963 (CA).

[30] Section 291(1)(b) provides that where the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute (or other cross claim), the Court may dismiss the application and forthwith make an order putting the company into liquidation on the ground that the company is unable to pay its debts. There is no equivalent provision entitling the Court to put the company into liquidation where a substantial dispute is established. The maxim expressio unius est exclusio alterius applies. By expressly providing for liquidation in the one event, Parliament may be taken as excluding it in the other. Furthermore, it is inherently difficult to understand why Parliament might be taken to have allowed an order putting a company into liquidation at the suit of a party who may turn out not to have been a creditor at all.

[31] The cases primarily relied on in *Brookers*, namely the English decision in *Re Tweeds Garages Limited* and the New Zealand decision in *Re a Private Company*, do not relate to applications to set aside a statutory demand. Both related to petitions to wind up a company. In *Tweeds Garages Limited* there was a dispute as to the precise sum owed but the Court found that there was no doubt that the petitioner was a creditor for a sum. The case is simply authority for the now well-settled proposition that in such circumstances a dispute as to the precise sum is not a sufficient answer to the petition.

[32] In the New Zealand case in *Re a Private Company*, in which the company sought an order staying the winding up petition on the grounds that there was a bona fide dispute as to the petitioning creditor's debt, Johnston J applied a line of authority which established that where there is a bona fide dispute as to the petitioning creditor's debt the Court may stay the proceeding but only does so if the company is solvent.

[33] In *Home Pride Limited v Feature Furniture Limited* the Court referred to the *Brookers Company Law* commentary with apparent approval, but went on to find that on the facts of that case there were in any event no grounds to exercise such a discretion.

[34] I do not consider the case law relied upon in the *Brookers Commentary* supports the proposition advanced. I conclude that there is no residual discretion under s290 to appoint a liquidator where the evidence establishes a substantial dispute as to the existence of the debt claimed.

The winding up of the company generally

[35] Notwithstanding my conclusions as to the orders which I must make in terms of the present application, I accept that JKS is entitled to be concerned at the events which are apparently unfolding. The evidence of insolvency lately received (even accepting the possibility of some errors within it) indicates unequivocally that the company is no longer trading and that those involved with it are getting in its debts with a view to settling with creditors. JKS may in due course prove itself to be a creditor. There is no indication from SMG in the evidence as to what consideration has been given by those associated with the company to placing the company in the hands of liquidators so that liquidators can in the interests of all creditors consider claims and then move to payment or distribution in the light of established claims. The Court looks to those involved with the company to deal with its apparently insolvent position advisedly in accordance with obligations under the Companies Act 1993.

[36] In the meantime, it will be for those advising JKS to determine how best to resolve the dispute over the debt and to engage with those advising SMG as to the most efficient and appropriate means available.

Order

[37] I order that the statutory demand issued by the respondent to the applicant be set aside.

Costs

[38] At the conclusion of submissions, counsel both addressed the Court in relation to costs. It was common ground that costs should be upon a 2B basis and that costs ought to follow the event.

[39] I therefore direct that the respondent pay to the applicant the costs of the application on a 2B basis, together with disbursements to be fixed by the Registrar.

Solicitors
Saunders & Co., Christchurch
Anderson Lloyd, Dunedin