IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2022-409-000140
[2022] NZHC 1786

UNDER	Section 290 Companies Act 1993 and Part 19 of the High Court Rules 2016
IN THE MATTER	of an application to set aside a statutory demand
BETWEEN	MELBOURNE LIMITED Applicant
AND	BARTLETT CONCRETE PLACING LIMITED Respondent

Hearing: 13 July 2022

Appearances: K R Narayan for Applicant
G K Holm-Hansen for Respondent

Judgment: 26 July 2022

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 26 July 2022 at 11.00 am
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] Melbourne Ltd (Melbourne) engaged Bartlett Concrete Placing Ltd (Bartlett) to perform civil construction work. In the course of the work, Bartlett sent by email to Melbourne payment claims under the Construction Contracts Act 2002. The payment claims were not fully paid. Bartlett says Melbourne did not issue a valid payment schedule in respect to either payment claim.

[2] Bartlett has issued a statutory demand to recover the balance of the payment claims as a debt due. Melbourne applies to set aside the statutory demand under s 290(4) of the Companies Act 1993. Melbourne says it is solvent and there is a genuine dispute as to whether the debt is due and owing. Bartlett opposes the application to set aside the statutory demand.

Background

[3] Melbourne is an established construction company. Its website indicates it was established in 1988 and has 32 years' experience within the construction industry. Stephen Cohen is the sole director of Melbourne.

[4] Melbourne was engaged by a third party to carry out civil work at a property in Byron Street, Christchurch. Melbourne, in turn, engaged Bartlett to carry out some of the work to an exterior yard at the property.

[5] Bartlett provided a quotation for the work dated 29 October 2020, which included terms and conditions of trade. The quotation was accepted by Melbourne. Relevantly, Bartlett's terms and conditions included:

(a) Bartlett could make monthly progress payment claims under the Construction Contracts Act 2002.

(b) Melbourne was to make payment of progress payment claims in accordance with ss 16 and 17 of the Construction Contracts Act and would make payment on the due date for payment as defined in s 18 of that Act.

(c) Interest would accrue on amounts overdue at the rate of 2.5 percent per month and would be calculated on a day by day basis until payment in full was made.

(d) All costs incurred by Bartlett as a result of a default by Melbourne, including debt collection costs and legal costs as between solicitor and client, were payable by Melbourne.

[6] In the course of the work, Bartlett issued several payment claims to Melbourne. Two of those payment claims are the subject of this proceeding. The first of those payment claims is dated 31 October 2021 for $89,768.43 (issued 9 November 2021). The second is dated 30 November 2021 for $25,673.32 (issued 8 December 2021).

[7] Both of these payment claims were sent by email to Melbourne's accounts department and to Mr Cohen. The following features of the emails should be noted:

(a) The email addresses to which the payment claims were sent are ones that had been used by Bartlett on several previous occasions without demur by Melbourne.

(b) Each of the payment claims is clearly stated to be a payment claim issued under the Construction Contracts Act.

(c) There is no suggestion that the payment claims did not satisfy the requirements of s 20(2) of the Construction Contracts Act.

(d) Each payment claim had attached to it the prescribed form setting out the matters in s 20(3) of the Act.

(e) The payment claims were sent as attachments to the emails. In each case, as was Bartlett's practice, the covering email read as follows:

> Dear Valued BCP Customer
>
> Attached is your payment claim (tax invoice) issued under the Construction Contracts Act 2002.

> Please read the enclosed notice that is attached to the payment claim.
>
> If you are unable to detach or download your invoice please contact us immediately at accounts@bcpltd.co.nz or phone (03) 359 4962.
>
> Please email remittance advices to accounts@bcpltd.co.nz

[8] The payment claims were received by Mr Cohen on or about the date they were sent. However, Mr Cohen says it became clear to him in December 2021 that there were issues with the work.

[9] On 15 December 2021, Mr Cohen emailed Lance Tuhi of Bartlett. He referred to a meeting they had the previous day. Mr Cohen also referred to areas of concern that had apparently been discussed by telephone and stated that these areas would require repair. He also referred to three invoices (payment claims) that had been issued by Bartlett and raised some queries in respect of them before stating, "Please reissue the payment claims at the correct figures".

[10] On 20 December 2021, Bartlett issued a credit to Melbourne for $7,430.15 which was stated to be invoicing adjustments in accordance with the email from Mr Cohen. The credit note was sent by email to the accounts department of Melbourne and to Mr Cohen in the same manner as the payment claims.

[11] Despite further correspondence between the parties, there has been no resolution of Melbourne's complaints that Bartlett's work was defective and requires repairs.

[12] On 5 April 2022, Bartlett issued to Melbourne a notice of its intention to recover the unpaid amount in the payment claims and to suspend work. The amount it claimed was due and payable was $100,011.60.

[13] At this stage, the parties engaged their lawyers. Bartlett's lawyers threatened to issue a statutory demand, and Melbourne's lawyers asserted the payment claims had not been validly served. Bartlett's lawyers responded that the payment claims had been validly served and, as Melbourne had not served a valid payment schedule, there was no genuine dispute as to the amount owing.

[14] Also, on 7 April 2022, Bartlett issued Melbourne with the statutory demand which is the subject of this application. The statutory demand required payment of $100,011.60 as:

> being the combined outstanding amount owed to the Creditor pursuant to the October 2021 payment claim, reference number 16712, issued by the Creditor on 31 October 2021 and the November 2021 payment claim, reference number 16790, issued by the Creditor on 30 November 2021 less the sum of $15,430.15 which consists of a partial payment by the Debtor to the Creditor of $8,000 received on 14 December 2021 and a credit note prepared by the Creditor of $7,430.15, dated 17 December 2021 (supporting documents **enclosed**). The October and November payment claims were issued pursuant to the Construction Contracts Act 2002, for works at 73 Byron Street, Sydenham, Christchurch 8023.

[15] On 21 April 2022, Melbourne's sole shareholder, Melbourne Trustees Ltd, made payment into Melbourne's solicitors' trust account of the $110,011.60, which it relies on as evidence of its solvency.

[16] On 26 April 2022, Melbourne made this application to set aside the statutory demand.

[17] On 27 May 2022, Melbourne commenced adjudication proceedings against Bartlett under the Construction Contracts Act. In that proceeding it seeks orders as to the amount that is payable by it to Bartlett, and an order that Bartlett pay it for the cost of repairing the defective work. The adjudicator's decision is presently due to be released on 26 August 2022.

Setting aside statutory demands – the principles

[18] The relevant statutory provisions are ss 289 and 290 of the Companies Act 1993 which provide:

> **289 Statutory demand**
>
> (1) A statutory demand is a demand by a creditor in respect of a debt owing by a company made in accordance with this section.
>
> (2) A statutory demand must—
>
> (a) be in respect of a debt that is due and is not less than the prescribed amount; and

(b) be in writing; and

(c) be served on the company; and

(d) require the company to pay the debt, or enter into a compromise under Part 14, or otherwise compound with the creditor, or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within 15 working days of the date of service, or such longer period as the court may order.

290 Court may set aside statutory demand

(1) The court may, on the application of the company, set aside a 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.

…

(7) An order under this section may be made subject to conditions.

[19] The principles applicable to applications under s 290(4) were not contested and are as follows: [1]

(a) The onus is on the applicant to show a fairly arguable basis that there is a genuine and substantial dispute as to the existence of the debt.

(b) The task of the Court is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due.

(c) The mere assertion that a dispute exists is not sufficient. Material, short of proof, is required to support the claim that the debt is disputed; if

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[1] *Brookers Insolvency Law & Practice* (online ed, Thomson Reuters) at [CA290.02] and the authorities that are cited at [CA290.02(1)].

such material is not available, the dispute should normally be resolved by means other than by ordinary civil proceedings.

(d) If a counterclaim, cross-demand or set-off is suggested, an applicant must establish that it is reasonably arguable in all the circumstances.

(e) It is not usually appropriate to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise unless such evidence is contrary to the available documents or earlier statements made by the parties.

[20] The Court has a wide discretion to set aside a statutory demand and is not obliged to set aside a statutory demand even if it finds that any of the grounds set out in s 290(4) are established.[2]

The issues

[21] Melbourne says the statutory demand ought to be set aside because:

(a) It is solvent.

(b) There is a genuine dispute as to whether the debt is due and owing because:

(i) the payment claims were not validly served;

(ii) Mr Cohen's email of 15 December 2021 is a valid payment schedule in relation to at least one of the payment claims; and

(iii) there is defective and incomplete work resulting in a counterclaim and/or set-off which exceeds the sum claimed in the statutory demand.

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2 *Alfex Doors & Windows Ltd v Alutech Windows & Doors Ltd* HC Wellington M201/00, 19 February 2001 at [13] and *Primary Health Remuera Ltd v Avoca Residential Construction Ltd* (2004) 9 NZCLC 263,647 (CA) at [42].

[22] The issues for determination are:

(a) whether Bartlett validly served the payment claims;

(b) whether Melbourne served a valid payment schedule in response to either of the payment claims;

(c) whether the statutory demand should be set aside on the grounds:

(i) that Melbourne is solvent; and/or

(ii) that Melbourne has a counterclaim and/or set-off for defective or incomplete work.

Were the payment claims validly served?

[23] Section 80 of the Construction Contracts Act deals with the service of notices and provides as follows:

> **80 Service of notices**
>
> Any notice or any other document required to be served on, 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 manner (if any) prescribed in regulations made under this Act.

[24] Also relevant are regs 9 and 10 of the Construction Contracts Regulations 2003, which provide:

> **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.
>
> …
>
> (3) A notice or document sent by email or other means of electronic communication under subclause (1)(b) is, in the absence of proof to the contrary, regarded as having been served or given,—
>
> (a) in the case of an addressee who has designated an information system for the purpose of receiving emails or other electronic communications, at the time the email or communication enters that information system; or
>
> (b) in any other case, at the time the email or communication comes to the attention of the addressee.
>
> (4) For the purposes of subclause (3), information system means a system for producing, sending, receiving, storing, displaying, or otherwise processing emails or other electronic communications.
>
> **10 Requirements for service by email or other means of electronic communication**
>
> (1) A notice or document may be sent by email or other means of electronic communication under regulation 9(1) (b) only if—
>
> (a) the information in the notice or document is readily accessible so as to be usable for subsequent reference; and
>
> (b) the person to whom the information is required to be served or given consents to the information being given in electronic form and by means of an electronic communication, if applicable.
>
> (2) For the purposes of subclause (1),—
>
> (a) a person may consent to use, provide, or accept information in an electronic form subject to conditions regarding the form of the information or the means by

> which the information is produced, sent, received, processed, stored, or displayed:
>
> (b) consent may be inferred from a person's conduct.

[25] Melbourne relies on s 22 of the Construction Contracts Act which provides that liability to pay, on the due date for payment, an amount claimed in a payment claim only arises where:

> (a) the payment claim is validly served; and
>
> (b) the party served does not provide a payment schedule within the time required by the relevant construction contract or, if the contract is silent, within 20 working days of service of the payment claim.

[26] Melbourne argues valid service of payment claims requires strict compliance with regs 9 and 10 of the Construction Contracts Regulations and is only permitted if the person to whom the payment claim is issued gave its consent to receipt of payment claims by email (reg 10(1)(b)). Melbourne says it did not give its consent, nor can its consent be inferred (reg 10(2)(b)).

[27] Mr Cohen does not deny that the parties corresponded by email and Melbourne received invoices by email, but said that his understanding was that:

> … if a document had legal consequences, it would have been delivered in person. Melbourne Limited did not consent to service of any documents which would have legal implications by email.

[28] Mr Cohen said that on one other occasion when Melbourne was served with documents under the Construction Contracts Act, they were delivered in person, so he realised they had some significance and had those documents delivered to Melbourne's lawyers on the morning after they were served.

[29] Ms Narayan submitted that all previous correspondence between the parties by email was of an informal nature. She considered it significant that the words "payment claims" and "invoices" were used interchangeably in the correspondence between the parties and that the credit note issued on 20 December 2021 was also stated to be a payment claim, but clearly was not.

[30] She also relied upon a decision of the District Court in *Buchanan Construction Ltd v Watson*,[3] where it was held that the fact the parties corresponded day to day on matters by email was insufficient to establish consent to service by email of a payment claim.

[31] There have been several other decisions of this Court dealing with the methods of service under the Construction Contracts Act. Mr Holm-Hansen submits the methods of service in s 80 are not mandatory or exclusionary. If the processes in s 80 are followed, that will provide incontrovertible evidence that a document is sufficiently served, but it is not necessary that documents be served using those methods. He argues that if some other method is used, the party issuing the notice or document bears the onus of establishing that it was in fact brought to the recipient's attention. Under this approach, evidence that a document did in fact come to the attention of a party will be sufficient proof of service.

[32] There is support for this approach. In *NCB 2000 Ltd v Hurlstone Earth Moving Ltd*, the Court stated:[4]

> The Construction Contracts Act provides that a payee may serve a payment claim on the payer. Section 80 provides for service. Any notice or any other document required to be served on or given to any person under the Act is sufficiently served if it is delivered to that person. Parties to a construction contract cannot contract out of the Act. It follows that it suffices if the serving party can show that the document came to the recipient party's attention. Here, NCB does not suggest that the payment claim was not brought to its attention. In my view, there can be no question but that the payment claim was properly served on NCB.
>
> …
>
> (footnotes omitted)

[33] In *West City Construction Ltd v Edney*, the Court said:[5]

> Next, the provisions of s 80 are not mandatory. As Mr Wilson accepted during the course of submission, s 80 provides a means by which a party may satisfy the Court on any evidentiary basis that proceedings have been served. If a party complies with s 80 then there can be no dispute that the notice has been properly served. However, the provisions are not mandatory nor exclusionary. If a document is served on a party by another means and the evidence satisfies

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3 *Buchanan Construction Ltd v Watson* [2018] NZDC 4570 at [30].

4 *NCB 2000 Ltd v Hurlstone Earthmoving Ltd* HC Auckland CIV-2010-404-8096, 23 June 2021 at [25].

5 *West City Construction Ltd v Edney* (2005) 17 PRNZ 947 at [35].

> the Court that the document has come to the attention of that party then that is sufficient proof of service.

[34] The approach in *Edney* was followed in *Marsden Villas* where Asher J said:[6]

> In *West City Construction Ltd v Edney* … it was held that the service provisions of s 80 of the Act are not mandatory or exclusionary. If a document is served on a party in a different way and the evidence satisfies the Court that the document has come to the attention of the party, then that is sufficient proof of service (para [35]). The same practical approach must apply to r[eg] 9.

[35] Ms Narayan recognised these authorities and did not attempt to argue that they were incorrectly decided. Her position was that service by email or other electronic means is a special case, because to hold otherwise would be to ignore the words "only if" in reg 10, which indicate that service in such manner could only be effected in the circumstances set out in the regulation and not otherwise.

[36] Without deciding the matter, I can see some force in Ms Narayan's submission. However, I am satisfied that Melbourne's consent to the receipt of the payment claims by email can and must be inferred from its conduct (reg 10(2)(b)).

[37] Inferential reasoning involves the making of a conclusion based on existing information, data or evidence. The process is probabilistic and must be tested against the relevant applicable burden and standard of proof.[7] What I must determine is whether a reasonable person having all the background knowledge of the parties would conclude that Melbourne had given its consent to receipt of the payment claims by email. That requires consideration of the identities of the parties, their prior dealings, the manner in which they communicated with each other in the past, the content of those communications, and the context in which all of this occurred.

[38] Melbourne and Bartlett are commercial parties engaged in a contract for the performance of civil works. They had dealings with each other from at least October 2020, and the dealings were regularly conducted by email. Mr Cohen acknowledges this. The evidence of Claire Dixon for Bartlett (which I accept) is that email was the

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6 *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 at [93].

7 See discussion in Daniel Greenberg (ed) *Jowitt's Dictionary of English Law* (3rd ed, Sweet and Maxwell, London, 2010) at 1178.

"primary" means of communication and that such correspondence related to negotiating and concluding the contract between the parties, amending the contract, and issuing payment claims.

[39] Ms Dixon's unchallenged evidence is that the communications by email included:

(a) the negotiations and conclusion of the contract for the work at Byron Street which is the subject of the payment claims;

(b) the issue of a payment claim by Bartlett to Melbourne dated 30 November 2020, that was paid in full by Melbourne;

(c) the issue of a payment claim by Bartlett to Melbourne dated 31 March 2021, that was paid in full by Melbourne;

(d) the provision by Bartlett of an updated quotation on 4 June 2021 and negotiations in relation to that;

(e) correspondence on 6 July 2021 between Bartlett and Mr Cohen regarding an outstanding payment claim, to which Mr Cohen responded the same day advising that payment would be made by 20 July 2021;

(f) on 2 August 2021, Bartlett issued a payment claim dated 30 July 2021, which was subsequently paid in full by Melbourne;

(g) on 3 September 2021, Bartlett issued a payment claim dated 31 August 2021 to Melbourne, which was paid in full by Melbourne; and

(h) on 27 September 2021, Bartlett issued a payment claim dated 27 September 2021, which was paid in full by Melbourne.

[40] What is particularly notable is that prior to issuing the two payment claims that are now in issue, Bartlett had issued five previous payment claims, all delivered by email and all paid in full without any complaint by Melbourne as to the manner in which those documents were sent to it. Bartlett's emails attaching payment claims were always in the same form, clearly identifying that the document being sent was a payment claim under the Construction Contracts Act.

[41] I do not accept Ms Narayan's submission that, prior to the issue of the payment claims, all email communications concerned informal matters. That is plainly not the case as those communications involved the negotiation of the parties' contract and, as noted, at least five of those prior communications were the delivery of payment claims.

[42] Melbourne is an experienced construction company which, even on Mr Cohen's evidence, has previous experience with payment claims under the Construction Contracts Act. It is inconceivable that an experienced contractor is not familiar with the manner in which the Act operates.

[43] Mr Cohen's evidence is that he understood documents that had legal consequences would be served in person. This suggests a level of naïvety which would be astonishing in a director of a construction company with many years' experience. It is the case that the service of a payment claim has legal implications for the recipient, but Mr Cohen does not, apparently, take issue with invoices being sent by email or negotiating contracts by email, both of which have legal consequences. Further, I do not see why Mr Cohen would consider a document delivered in the post (as s 80(c) provides) should be taken more seriously than the same document received by email.

[44] *Buchanan Construction Ltd v Watson* does not assist Melbourne. It is distinguishable because it concerned a residential construction contract, the homeowner did not have experience in the building industry, she did not have actual notice of a payment claim, and there was no history of delivery of payment claims by email. In the particular circumstances of that case, it is entirely understandable that the Court was not prepared to draw an inference the homeowner had consented to service of a payment claim by email.[8]

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8 *Buchanan Construction Ltd v Watson*, above n 3, at [29]-[30].

[45] One can compare *Buchanan* with *PHI Construction Ltd v Insight Plumbing (NZ) Ltd,* which involved a developer and plumbing contractor engaged to do work on significant developments. Associate Judge Johnston appeared to have little difficulty concluding the developer's consent to receive payment claims by email could be inferred.[9] He said:[10]

> On the evidence, I am satisfied that all six of the claims were emailed to PHI by Insight on or about their dates. Moreover, it is quite clear from the body of the correspondence between the parties contained in the evidence that the parties' conventional mode of correspondence was email, which is of course now very much the norm for business correspondence. Indeed, until the parties' solicitors became involved, there is no evidence of their correspondence taking any other form. Accordingly, I am satisfied that Insight was entitled to serve any payment claim by email, and that each of the claims in this case was served by that means.

[46] For those reasons, I am satisfied that Melbourne received the payment claims that are in issue on or about the days that they were issued. I am also satisfied that, by its conduct, Melbourne's consent to receipt of the payment claims by email must be inferred. It is not fairly arguable, therefore, that the payment claims were not validly served.

Did Melbourne serve a valid payment schedule?

[47] This argument was raised very late in the piece. It is not relied upon in the notice of application to set aside the statutory demand or in Mr Cohen's affidavits. It is also accepted by Melbourne that, even if I were to accept the 15 December 2021 email as a valid payment schedule, it was served out of time in respect to the payment claim dated 31 October 2021 and could only ever justify setting aside the statutory demand in part.

[48] Relevant in this context is s 21 of the Construction Contracts Act which sets out the requirements for a valid payment schedule. Section 21 reads as follows:

> **21 Payment schedules**
>
> (1) A payer may respond to a payment claim by providing a payment schedule to the payee.

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9 *PHI Construction Ltd v Insight Plumbing (NZ) Ltd* [2020] NZHC 1944.
10 At [21].

(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.

[49] Melbourne says that the email of 15 December 2021, sent by Mr Cohen to Lance Tuhi of Bartlett, is a valid payment schedule. In it, Mr Cohen refers to defects in the work that he says will require repair. He also raises queries concerning three invoices (two of which are the payment claims in issue) and asks, "Please reissue the payment claims at the correct figure".

[50] Melbourne relies upon *Westnorth Labour Hire Ltd v S B Properties Ltd*,[11] where the Court held that a letter sent by S B Properties to Westnorth listing a variety of reasons why a payment claim was queried and stating "no further payments will be made to you" satisfied the requirements for a valid payment schedule. Westnorth argued that the letter failed to comply with s 21 because it did not indicate a scheduled amount (s 21(2)(c)), failed to give reasons for the difference between a scheduled amount and the claimed amount (s 21(3)(b)), and failed to give any reason or reasons for withholding payment (s 21(3)(c)). Rodney Hansen J held that the letter, which was both detailed and lengthy, clearly indicated the scheduled amount was nil and adequately explained why. He said:[12]

> … 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

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11 *Westnorth Labour Hire Ltd v S B Properties Ltd* HC Auckland CIV-2006-404-1858, 19 December 2006.

12 At [28] and [30].

> 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.
>
> …
>
> 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.

[51] Mr Cohen's email of 15 December 2021 is a very different document than the letter sent in *Westnorth*. It is not lengthy or detailed. It is not a valid payment schedule as it does not state a scheduled amount as required by s 21(2), nor can it be inferred that the scheduled amount is nil. Consistent with this, the email does not indicate the manner in which Melbourne has calculated a scheduled amount and provides no reasons for the difference between a scheduled amount and the amount of the payment claim (s 21(3)).

[52] To accept that Mr Cohen's email amounted to a valid payment schedule would undermine the intention of the Act to protect and encourage cashflow in the construction industry by setting up mandatory processes for the resolution of disputes which:[13]

> … are designed to side-step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden-death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if the principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cashflow.

[53] Furthermore, even if I was of the view that the 15 December 2021 email was arguably a valid payment schedule, Melbourne has failed to make payment of the difference between the claimed and unspecified scheduled amount as required by s 24(2) of the Act.

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13 *Marsden Villas Ltd v Wooding Construction Ltd,* above n 6, at [17].

[54] Finally, for completeness, I should note that despite the scant information provided in Mr Cohen's 15 December email, Bartlett did reconsider its payment claims and issued a credit note to Melbourne on 20 December 2021. The amount demanded in its statutory demand is the balance of the payment claims, taking into account the credit note and a partial payment made on 14 December 2021.

Is Melbourne solvent?

[55] Melbourne's submission is that Bartlett should not have issued or maintained its reliance upon the statutory demand in circumstances where the amount of the demand has been paid into Melbourne's lawyers' trust account and would be available to be released upon resolution of the dispute between the parties. Ms Narayan submits that given its knowledge of the payment, Bartlett can have no intention to liquidate Melbourne, and the statutory demand is being used purely as a debt recovery tool, which she says is improper. She also notes Melbourne has agreed to resolve the dispute between the parties expeditiously by referring it to adjudication, and a determination is expected within a few weeks.

[56] Ms Narayan noted the amount paid into trust was provided by the Victoria Trust. The sole trustee of the Victoria Trust is Melbourne Trustees Ltd. Melbourne Trustees Limited is the sole shareholder of Melbourne. Ms Narayan says the money is a contribution by Melbourne's sole shareholder and many New Zealand companies operate this way. She submits the availability of contributions from shareholders indicates a company is not insolvent.

[57] The question is whether the fact that the amount of Bartlett's demand has now been deposited into Melbourne's lawyers' trust account is a basis to set aside Bartlett's statutory demand.

[58] The starting-point is that Melbourne has not proved it is solvent. There are no financial statements or other documents to verify Melbourne's financial position. The fact of an advance from its shareholder, without more, is hardly evidence of an ability to pay its debts as they fall due. There is no evidence in the affidavits as to the basis

upon which the advance was made or as to the shareholder's ability or willingness to provide further advances.

[59] The next point is that the solvency of a party is unlikely to be a stand-alone ground for setting aside a statutory demand under s 290(4)(c). The issue was addressed by the Court of Appeal in *AMC Construction Ltd v Frews Contracting Ltd*.[14] The Court recognised that the solvency of a company may be a relevant consideration in an assessment of whether an amount is being disputed as a means of buying time to pay or whether the grounds of the dispute are genuine. However, it went on to say:[15]

> … If there is no dispute as to the company's liability, so that para (a) or (b) [of s 290(4)] cannot be invoked, it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid. If the company simply refuses to pay, without good reason, it should not be able to avoid the statutory demand process by proving, at the statutory demand stage, that it is solvent. The demand should be allowed to proceed. If it is not met, and the application for liquidation is filed, in reliance on the presumption in s 287(a) that the company is unable to pay its debts, then the company will have an opportunity on the liquidation application to rebut the statutory presumption, which applies "unless the contrary is proved". There might be circumstances in which it is appropriate to advance the inquiry as to solvency to the s 290 stage, but that would require some particular circumstance not present in this case.

[60] Third, and importantly, the operation of the Construction Contracts Acts' "pay now, argue later" principle is well-understood. To allow solvency to be raised as a stand alone basis to set aside a statutory demand issued on a debt payable under that Act would undermine the Act's objectives.

[61] My view is not changed because Melbourne has referred the dispute to adjudication. It has taken Melbourne more than six months to do so. It has not acted expeditiously, as Ms Narayan submits. I also agree with Mr Holm-Hansen that if the statutory demand is set aside, there is no telling where the dispute may end. Whilst Melbourne presently says the matter will be determined at adjudication, it is not necessarily the case it will accept the adjudication decision. There are potentially

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14 *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, (2008) 19 PRNZ 13.

15 *AMC Construction Ltd v Frews Contracting Ltd*, above n 14, at [7], which was applied in *Gill Construction Co Ltd v Butler* [2010] NZLR 229 (HC).

avenues by which such a decision could be challenged thereby further delaying the resolution of the matter, contrary to the principles in the Act.

[62] I am not satisfied that Melbourne is solvent, but even had I been so satisfied, it would not be the basis on which to set aside the statutory demand.

The defective and incomplete work

[63] Section 79 of the Construction Contracts Act provides:

> In any proceedings for 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.

[64] Ms Narayan accepts that if I decide Bartlett validly served the payment claims and Melbourne did not serve a valid payment schedule, then the existence of a dispute as to the quality of the work undertaken by Bartlett cannot assist Melbourne because s 79 applies. As I did make those findings, it is not necessary to consider this ground further.

The discretion

[65] It would be a rare case for the Court to exercise its discretion where to do so would be inconsistent with the principles underlying the Construction Contracts Act. That is the position here. I can see no basis to exercise my discretion.

Result

[66] Melbourne's application to set aside the statutory demand is dismissed.

[67] There shall be an order that Melbourne is to pay the amount of Bartlett's statutory demand, being $100,011.60, within three working days of the date of this judgment, failing which Bartlett may make application to liquidate Melbourne. In

making this order, I have taken into account that Melbourne says it has the funds to make immediate payment.

[68] Bartlett has been successful and is entitled to costs. If the parties cannot agree as to the quantum of those costs, they may file submissions of not more than five pages within 21 days.

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O G Paulsen
Associate Judge

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