Russell McVeagh

Breaking Ground

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Case Law Update - NZ

Demasol Limited v South Pacific Industrial Limited [2022] NZCA 480

The Court of Appeal has confirmed the court's approach to payment claims and payment schedules in circumstances where a statutory demand has been issued.

Background

The case concerned a dispute between South Pacific Industrial Limited (SPI), the head contractor, and Demasol Limited, its subcontractor.

Demasol had served two payment claims alleging sums were due for extra work performed. SPI did not provide a payment schedule in response. Instead, it sent Demasol a letter denying that any sum was due, though later agreed to make a partial payment.

Demasol issued a statutory demand for the unpaid amounts. SPI applied to the High Court to have the demand set aside.

The decisions

A statutory demand may be set aside where the court is satisfied that there is a "substantial dispute" as to whether or not the debt is owing or is due. In the High Court, the associate judge set aside Demasol's statutory demand on the basis it was reasonably arguable that the relevant payment claims were invalid, as they had not been issued in accordance with a particular term of the parties' contract, or because the amount claimed related to variations that were arguably not authorised.

The Court of Appeal reversed that decision. It confirmed that the only enquiries required in relation to SPI's application to set aside the statutory demand were:

- whether the relevant payment claim (by this point, only one claim remained in dispute) complied with s 20 of the Construction Contracts Act 2002 (CCA); and
- if so, whether SPI had either (1) provided a payment schedule contesting its liability; or (2) paid the amount claimed by the due date.

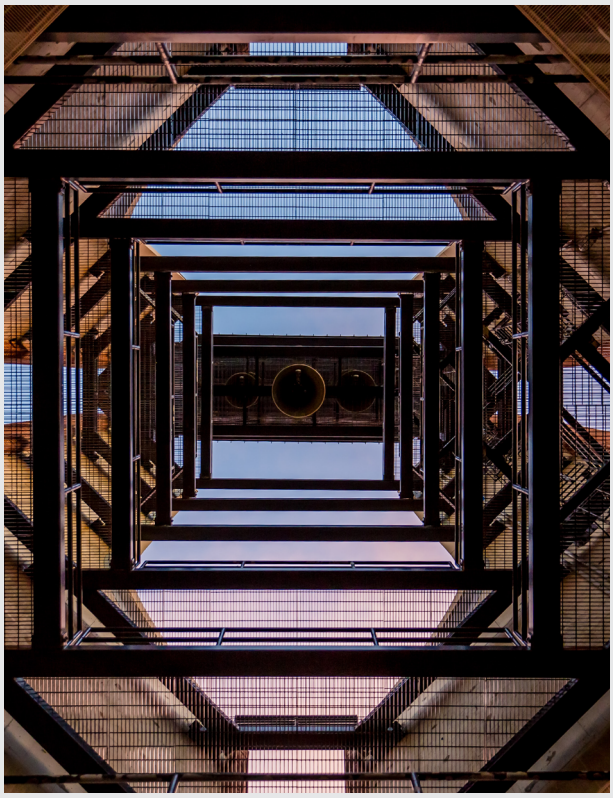
The Court held that the general merits of Demasol's payment claim were not open for consideration and were irrelevant in the statutory demand context. Here, the payment claim had complied with the statutory requirements of the CCA. In response, SPI had neither provided a payment schedule contesting the claim, nor paid the amount claimed. Under s 23(1) of the CCA, Demasol was accordingly entitled to recover from SPI the unpaid portion of the claimed amount, together with its actual and reasonable costs of recovery.

The Court of Appeal further said:[1]

> *This consequence may seem harsh, but it is mandated by the CCA. We agree with the conclusion reached by Asher J in* Marsden Villas Ltd v Wooding Construction Ltd *[[2006] NZHC 569; [2007] 1 NZLR 807 (HC)], where the Judge commented as follows:*
>
> *"The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain time frame and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim.*
>
> *[…]*
>
> *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 a 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 cash flow."*

Conclusion

While the appropriate treatment of payment claims and schedules under the CCA is well established, this case provides useful confirmation that, even where a statutory demand has been served on the non-paying party, the strict requirements of the CCA will continue to be applied.



CONTRIBUTOR:

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Footnotes

1. At [50].

Case Law Update - UK

Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)

A recent decision of the High Court of England and Wales, *Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council*, has provided guidance as to how to assess concurrency of delay.

Background

The dispute arose out of the contract for the construction of a bus station in Blackburn. The project was subject to significant delay and cost increases. The Council ultimately claimed default by Barnes & Sons (B&S) and terminated its contract, then engaged a replacement contractor to complete the outstanding works.

B&S was subsequently placed into administration. Its administrators brought a claim against the Council of around £1.8m as payment for work completed as at the date of termination, losses said to have been suffered as a result of the prolongation of the contract period, and damages for wrongful termination.

The Council disputed that any amount was owed to B&S. It also considered it was entitled to recover its costs in engaging the alternative contractor to complete the works, though, given B&S's financial situation, did not pursue this as a counterclaim.

A key question for the court was whether there was concurrency of delay, and how that affected B&S's claimed entitlement to an Extension of Time (EOT) and cost.

Delays

B&S claimed to have been entitled to an EOT of 172 days. Much of this time related to delays B&S said were caused by an issue with steel deflection (displacement of the steel under load) in some of the building's main steel supports, which required remediation. As this was acknowledged between the parties to have been a design issue, B&S considered the period of delay to be the Council's responsibility.

The Council accepted B&S was entitled to an EOT as a consequence of the steel deflection issue, but disagreed as to the length of its entitlement. In part this was because, at the same time as the steel deflection issue remained unresolved, works had been delayed by a separate issue with the roofing (difficulties sourcing scaffolding and roofing subcontractors), which the Council said had resulted in a total of 57 days' delay.

Discussion

The judge referred to another English case, *Walter Lilly & Company Ltd v McKay*, for the key principles in considering concurrency of delay:[2]

- The court is not compelled to choose between two experts' analysis of the delay. Ultimately it must be for the court to decide, as a matter of fact, what delayed the works and for how long.
- When considering what is delaying a contractor at any given time, one should generally have regard to the item of work with the longest sequence.
- It is not necessarily the last item of work which causes delay.
- A complaint of a concurrent issue that is never agreed upon, established or implemented at the time, is likely to be irrelevant to a delay analysis.

Footnotes

2. *Walter Lilly & Company Ltd v McKay* [2012] EWHC 1773 (TCC).

There was substantial agreement between the parties' experts on the causes of delay. The key disagreements were as to the materiality of the delay to the roofing, and which items were on the critical path.

The judge concluded that both items were on the critical path: both the correction of the steel deflection issue and the roofing works needed to be completed before the structure's internal works could be progressed. As the evidence established that there was a period of overlap between the two issues, there was concurrent delay. The judge rejected B&S's argument that, because there was a problem with the steelwork identified in October 2014, which was not resolved until January 2015, all of the delay between those points resulted from that one cause. That argument ignored the fact that, for a considerable time, there was also a problem caused by the roof coverings.

The judge confirmed that, subject to any contractual allocations, the general position is:

- where concurrent delay is established, a contractor will be entitled to an extension of time for the period of the concurrent delay; and
- a contractor will only be entitled to recover cost if, "but for" the principal's delay, it would not have incurred the cost.

On the basis of those principles, B&S was entitled to an EOT of 119 days (being the period of concurrent delay, plus a period of solely the Council's delay). However, B&S was only entitled to prolongation costs for 27 days (netting off the period of concurrency, leaving only the costs during the period that B&S was not also in delay).

Comment

In addition to reinforcing the approach to concurrent delay, the decision includes some other comments of note.

- Record keeping. The judge noted the fallibility of human memory and the importance of contemporaneous evidence in "getting at the truth". This is an important reminder to keep good records, particularly where they may be required later to establish something as precise as a period of delay, and its specific causes on any given day.
- Witness statements. The judge criticised a number of statements provided by the parties' fact witnesses, on the basis they were "replete with commentary and opinion" rather than keeping to the facts of which the witnesses had personal knowledge. The judge stated that a witness could not complain if a court took their non-compliance with the rules of evidence into account when assessing the overall credibility of their evidence.
- SCL Protocol. The experts for both parties referred to the SCL Delay and Disruption Protocol (a document many readers will be well aware of). The Council invited the judge to treat certain expert evidence with "circumspection" on the basis the expert had not followed specific guidance set out in the Protocol. However, the judge considered it would be wrong to attach too much importance to an analysis of the degree to which each expert had "properly chosen or loyally followed the particular method selected" from the Protocol. It is a guidance document only, and not intended to be a statement of the law.

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