

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA46/2022
[2022] NZCA 480

BETWEEN

DEMASOL LIMITED
Appellant

AND

SOUTH PACIFIC INDUSTRIAL LIMITED
Respondent

Hearing: 16 August 2022

Court: Katz, Wylie and Palmer JJ

Counsel: AJB Holmes for Appellant
P J Crombie and P J Anderson for Respondent

Judgment: 13 October 2022 at 9:30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The orders made by the High Court are set aside.**
- C SPI's application to set aside the statutory demand is dismissed.**
- D The time for complying with the statutory demand is extended. The statutory time period of 20 working days is to commence on the day following the release of this judgment.**
- E The judgment of the High Court in respect of costs is set aside under rr 48(4) and 53J of the Court of Appeal (Civil) Rules 2005.**
- F The amount paid by Demasol to SPI for costs in the High Court is to be repaid by SPI to Demasol within five working days of the date of release of this judgment.**
- G The issue of costs in the High Court is referred back to the High Court for consideration under s 57 of the Senior Courts Act 2016.**

H SPI is to pay Demasol’s costs and disbursements in this Court on an indemnity basis. The reasonable quantum of these costs is to be fixed by the Registrar in the event that counsel do not agree.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellant, Demasol Ltd (Demasol), appeals a decision of Associate Judge Sussock setting aside a statutory demand it served on the respondent, South Pacific Industrial Ltd (SPI) under s 289 of the Companies Act 1993.¹ The statutory demand sought payment of the amount claimed in payment claims served by Demasol on SPI pursuant to s 20 of the Construction Contracts Act 2002 (the CCA).

[2] Demasol seeks that this Court should set aside the Associate Judge’s orders and dismiss SPI’s application to set aside the statutory demand. SPI supports the Associate Judge’s decision and seeks that her orders should not be disturbed.

Background

[3] SPI was the head contractor in respect of various demolition works at a redundant gas facility owned by a third party in Penrose, Auckland. The facility to be demolished included a large bin tank which contained asbestos. In October 2020, SPI put out a request for quotes for the demolition of the bin tank.

[4] Demasol specialises in asbestos removal. It quoted a price of \$100,000 plus GST for the work. Its quote also recorded that “the only thing not included is the asbestos we cannot see”. Following negotiations and an exchange of correspondence, Demasol was engaged by SPI as a subcontractor to demolish the bin tank. The engagement was recorded in a purchase order issued by SPI dated 9 December 2020. The purchase order recorded the quote and noted that additional amounts were payable

¹ *South Pacific Industrial Ltd v Demasol Ltd* [2021] NZHC 3597.

by SPI depending on the type and volume of asbestos which had to be removed and disposed of.

[5] Demasol carried out the contracted works. This took much longer than the parties initially envisaged. Demasol claimed that the scope of the works had increased during the course of the contract. It sought payment for the additional works, claiming that they were variations to the contract. It said that there were seven variations in total.

[6] Demasol served two payment claims on SPI, one on 27 January 2021 for \$114,425.00 inclusive of GST (payment claim 1) and the other on 29 March 2021 for \$276,572.29 also inclusive of GST (payment claim 2). SPI did not dispute the claims by issuing payment schedules as required by the CCA.² Nor did SPI pay the amounts claimed. Rather, on 4 April 2021, SPI wrote to Demasol advising that it rejected all but one of the variations claimed. It also asserted that both it and the third party owner of the site had claims against Demasol for “non-performance”.

[7] Demasol considered that the amount claimed in the payment claims had fallen due for payment and, on 27 April 2021, it wrote to SPI seeking payment. SPI responded to Demasol on 30 April 2021, again denying liability for the disputed variations and asserting claims of its own.

[8] On 5 May 2021, SPI made a payment to Demasol of \$86,846.85. At the same time it issued a document described as a payment schedule showing the amounts it accepted were payable (including for one of the claimed variations) and recording the amounts it claimed it was entitled to deduct from the contract price.

[9] On 6 May 2021, Demasol served a statutory demand on SPI for \$304,997.29 in respect of the amounts claimed under both payment claims 1 and 2.

[10] On 20 May 2021, SPI filed a notice of application seeking to set aside the statutory demand. Four days later, on 24 May 2021, SPI made a further payment of \$47,502.39 to Demasol. This payment was made against the balance owing under

² Construction Contracts Act 2002, ss 21 and 22.

payment claim 1 and in part payment of payment claim 2. It was said to be for tipping costs for asbestos from glass blocks and contaminated concrete, and the amount owing for the variation it accepted. As a result of this payment, the amount that Demasol says is outstanding and owing to it arises under payment claim 2. Payment claim 1 has been paid in full.

The judgment

[11] After outlining the factual background, the Associate Judge summarised the issues for determination as follows:³

- (a) Is it reasonably arguable that [p]ayment [c]laim 2 was not a valid payment claim under the CCA?
- (b) If not, is there any other basis upon which the statutory demand ought to be set aside?

[12] The Associate Judge addressed a preliminary issue regarding privilege (not challenged on appeal) before summarising the legal principles applicable to SPI's application to set aside the statutory demand. She then turned to consider what is required for a valid payment claim. She recorded the requirements for a payment claim set out in s 20 of the CCA. She went on to note that s 14 provides that the parties are free to agree between themselves on a mechanism for determining the number of payments required to be made under a construction contract, the intervals between payments, the amount of each payment and the dates when payments become due. She noted that, pursuant to s 14(2), the parties can expressly agree to a single payment. She then referred to the statutory regime for progress payments set out in ss 16 and 17 of the CCA. She commented that the operation of ss 14–17 of the CCA depends on the terms that were agreed. She recorded SPI's submission that the Court ought to consider the pre-contractual negotiations to determine what was agreed and Demasol's counter-argument that detailed analysis of the background to the contract was unnecessary. Referring to the Supreme Court's recent decision in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, she recorded that she would consider the correspondence leading up to the contract to assess whether it was reasonably arguable

³ *South Pacific Industrial Ltd v Demasol Ltd*, above n 1, at [10].

that payment claim 2 was invalid because it did not comply with the provisions of the CCA.⁴

[13] The Associate Judge then outlined the correspondence leading up to the purchase order. She found that it was “reasonably arguable that the contract was a fixed price contract”.⁵ She went on to consider the payment terms agreed between the parties. She commented that if a single payment term was agreed, the validity of both payment claims was in question, because s 20(1) of the CCA provides when a payment claim can be served.⁶

[14] The Associate Judge referred to *Jamon Construction Ltd v Bricon Asbestos Ltd*.⁷ The Court there held that the payment claims in issue were arguably invalid because it was reasonably arguable that there was a fixed price contract and that the value of the construction work claimed had not been calculated having regard to the contract price.⁸ The Associate Judge then referred to *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd*.⁹ She relied on this case as authority for the proposition that payment claims issued in respect of unauthorised variations “cannot be legitimate” under the contract and on this basis alone could not be valid payment claims.¹⁰

[15] The Associate Judge concluded that it was reasonably arguable that payment claim 2 was not valid because much of the amount claimed related to variations that were arguably not authorised.¹¹ She further held that in any event, it was reasonably arguable that both payment claims 1 and 2 were invalid on the basis that a single payment on completion was expressly agreed in accordance with s 14(2) of the CCA and the payment claims were not issued in accordance with this agreed term. As we

⁴ At [40]–[41], citing *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [89].

⁵ *South Pacific Industrial Ltd v Demasol Ltd*, above n 1, at [87].

⁶ At [101].

⁷ At [105]–[107], citing *Jamon Construction Ltd v Bricon Asbestos Ltd* [2015] NZHC 1926.

⁸ *Jamon Construction Ltd v Bricon Asbestos Ltd*, above n 7, at [47].

⁹ *South Pacific Industrial Ltd v Demasol Ltd*, above n 1, at [108], citing *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd* [2019] NZHC 1439 at [187].

¹⁰ At [108].

¹¹ At [109].

have noted at [10] above, only the validity of payment claim 2 was in issue in these proceedings, as payment claim 1 had already been paid in full.¹²

[16] Given her conclusion that it was reasonably arguable that payment claim 2 was not valid, the Associate Judge set aside Demasol's statutory demand. It seems that she did so under s 290(4)(a) of the Companies Act because she recorded that, as a result, she did not need to decide whether it was appropriate to exercise the discretion conferred by s 290(4)(c).¹³

The appeal

[17] The appeal is brought pursuant to s 56 of the Senior Courts Act 2016.¹⁴ Rule 47 of the Court of Appeal (Civil) Rules 2005 provides that the appeal proceeds by way of rehearing. The appropriate approach in such cases was discussed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.¹⁵ The Chief Justice there stated:

[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the [appellate] [c]ourt to defer to the lower [c]ourt's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

(Footnote omitted.)

The issues/submissions

[18] The issues raised by this appeal were agreed between the parties. They are as follows:

- (a) Is it reasonably arguable that payment claim 2 served by Demasol on SPI on 29 March 2021 was not a valid payment claim under the CCA?¹⁶

¹² At [110].

¹³ At [112].

¹⁴ Senior Courts Act 2016, s 56(1)(a).

¹⁵ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

¹⁶ This question was broken down into three sub-questions: (a) To what extent was the Court entitled

- (b) Should the statutory demand served by Demasol on SPI be set aside under s 290(4)(a) of the Companies Act on the basis that SPI has a genuinely arguable dispute as to whether it is liable to pay the amount claimed in payment claim 2?
- (c) Should the statutory demand otherwise be set aside under s 290(4)(c) of the Companies Act?
- (d) If payment claim 2 was a valid payment claim under the CCA and the statutory demand is not set aside, is Demasol entitled to its actual and reasonable costs in this Court (as well as in the High Court) under s 23(2)(a) of the CCA?

Demasol's submissions

[19] Mr Holmes, for Demasol, submitted that it was not reasonably arguable that payment claim 2 was not a valid payment claim under the CCA. He argued that its validity fell to be determined by reference to s 20 of the CCA and that payment claim 2 complied with that section's requirements. He further argued that whether or not there were disputes about, for example, the variations, the value of the contract works, or whether the claimed amounts reflected the amounts payable under the contract, was irrelevant to the Court's assessment of the validity of payment claim 2. He put it to us that the contractual terms do not form a gateway through which a payment claim must pass and that any enquiry into the validity of a payment claim is limited.

[20] Mr Holmes further submitted that the Associate Judge erred when she assessed the validity of payment claim 2 by reference to the parties' pre-contractual negotiations. He argued that in engaging with this issue, the Associate Judge was attempting to assess whether the claimed amount matched the Court's view of the amount that should have been claimed. He put it to us that this was a departure from the statutory payment claim process; on his argument, as SPI failed to provide a

to consider the validity of payment claim 2 against the requirements of the construction contract, and/or s 17 of the CCA? (b) Did payment claim 2 comply with each of the requirements of s 20 of the CCA? (c) Is it reasonably arguable that payment claim 2 is invalid if it did not comply with the requirements of the construction contract and/or s 17 of the CCA?

payment schedule within time, the claimed amount set out in payment claim 2 became payable pursuant to s 23(2) of the CCA regardless of the merits of the claim that was made.

[21] Mr Holmes accordingly submitted that the matters raised by SPI do not invalidate payment claim 2 and that the CCA requires that such issues are raised through the payment schedule process and not in opposition to an attempt to enforce the debt created under s 23(2) where no payment schedule is issued. He noted that, in any event, the CCA provides avenues through which SPI can dispute the claim but that, in the interim, the CCA requires that SPI pay the amount claimed. He argued that this Court should set aside the Associate Judge's orders and dismiss SPI's application to set aside the statutory demand. He sought costs on an indemnity basis.

SPI's submissions

[22] Mr Crombie, for SPI, submitted that the Associate Judge was not precluded from considering the requirements of the contract and s 17 of the CCA when assessing the validity of payment claim 2. He relied on *Jamon Construction Ltd v Bricon Asbestos Ltd* for the proposition that, on an application to set aside a statutory demand for a sum of money said to be owing under a construction contract, there is scope for the Court to decide, albeit on a summary basis, whether it is arguable that the payment claim is valid.¹⁷ He then took us through the Associate Judge's findings that it was "clearly reasonably arguable that the contract was a fixed price contract",¹⁸ that only one relatively minor variation was agreed, and that SPI denied that any of the other claimed variations were approved. He argued that, on these findings, it was reasonably arguable that payment claim 2 was not a valid payment claim.

[23] Mr Crombie further submitted that, assuming the parties expressly agreed to a single payment after completion pursuant to s 14(2), the payment claim did not comply with the requirements of the contract and that it is reasonably arguable that it did not therefore comply with the requirements of s 20(1). He also dealt with whether or not Demasol was entitled to a progress payment. He argued that, for s 17(4) to apply, there

¹⁷ *Jamon Construction Ltd v Bricon Asbestos Ltd*, above n 7.

¹⁸ *South Pacific Industrial Ltd v Demasol Ltd*, above n 1, at [87].

must be “authorised variations” in accordance with s 17(3). He said that, apart from the one variation authorised by SPI, none of the other variations were approved and therefore the work was not capable of being valued under s 17(1)(b). He submitted that, where the default provisions apply, the Court is entitled to have regard to the requirements of s 17 in determining whether a payment claim is valid and that it is not sufficient to have regard solely to the requirements of s 20.

[24] Mr Crombie confirmed that SPI relied upon s 290(4)(a) of the Companies Act, on the basis that there is a dispute as to whether the debt claimed by Demasol is owing or due because it is reasonably arguable that payment claim 2 is not a valid payment claim. Alternatively, SPI relied on s 290(4)(c). In this regard, it was submitted that it would be unjust if Demasol is entitled to proceed with liquidation proceedings in reliance on a failure by SPI to issue a payment schedule given that there was a fixed price contract for the work, the job was supposed to have taken three to four weeks to complete but took nearly three months, and because Demasol has sought to charge more than double the contract price for variations that were not authorised. Mr Crombie urged us to uphold the Associate Judge’s decision.

Analysis

Section 290(4) of the Companies Act

[25] SPI’s application to set aside the statutory demand was brought pursuant to s 290(4) of the Companies Act. It provides as follows:

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.

[26] Relevantly, this Court has summarised the applicable principles as follows:¹⁹

[16] The general principles under s 290(4) are well settled:

- (a) The onus is on the applicant seeking to set aside the statutory demand to show that there is arguably a genuine and substantial dispute as to the existence of the debt. The Court's task is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due.
- (b) 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.
- (c) If such material is available, the dispute should normally be resolved first in ordinary civil proceedings before any statutory demand is issued.
- ...
- (e) It is not usually possible 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.

[27] As the Associate Judge noted, statutory demands issued in respect of amounts owing under construction contracts must be considered in the context of the provisions of the CCA. It was common ground that, given s 79 of the CCA (which sets out the limited circumstances in which a counterclaim, set-off or cross demand can affect proceedings for recovery of a debt),²⁰ the only paragraphs of s 290(4) that could be relied on by SPI were s 290(4)(a) and (c).

The CCA

[28] The Construction Contracts Bill was introduced on 15 May 2001. The Bill was based on work undertaken by the Law Commission and by a working party made up of representatives from various sectors of the construction industry. It received its third reading on 19 November 2002 and it was assented to on 26 November 2002. It came into effect as from that date. It applies to all construction contracts entered into on or after 1 April 2003 (as well as to existing contracts renewed after that date).²¹

¹⁹ *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 (footnote omitted).

²⁰ See also *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243 at [63]–[64].

²¹ See *Building Law in New Zealand* (online ed, Thomson Reuters) at [CCIntro.01]–[CCIntro.02].

[29] It was common ground that the CCA applied to the purchase order of 9 December 2020. It is a construction contract as defined in the CCA, entered into after the date of commencement of the CCA.²²

[30] The purpose of the CCA is set out in s 3. That section provides as follows:

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.

[31] This Court has held that any analysis of the CCA “must be undertaken with the purpose of the Act in mind” and that a “technocratic” or “formalistic” interpretation would undercut Parliament’s intent that cashflow in the construction industry be maintained.²³

[32] Payments under construction contracts are dealt with in pt 2 of the CCA. Conditional payment provisions in construction contracts are prohibited but otherwise the CCA provides that parties to a construction contract are free to agree on the payment provisions in their contract.²⁴ They can expressly agree to a single payment.²⁵ If the parties fail to agree, the default provisions set out in ss 16–18 of the Act apply. Section 16 confers on a party who has agreed to carry out construction work under a construction contract the right to progress payments, calculated in accordance with s 17. Section 17 in turn provides how the amount of each progress payment must be calculated. Section 18 sets out when a payment, as defined in s 19, becomes due and payable.

²² Construction Contracts Act, s 5 definition of “construction contract” and s 9.

²³ *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA) at [41] and [52].

²⁴ Construction Contracts Act, ss 13 and 14.

²⁵ Section 14(2).

[33] Subpart 3 of pt 2 of the CCA deals with the procedure for making and responding to payment claims. It contains its own interpretation section — s 19. Relevantly, the words “claimed amount” are defined to mean “an amount of a payment, specified in a payment claim, that the payee claims to be due”.

[34] Section 20 deals with the making of payment claims. It provides as follows:

20 Payment claims

- (1) A payee may serve a payment claim on the payer for a payment,—
 - (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
 - (b) if the contract does not provide for the matter in the case of a progress payment, at the end of the relevant period referred to in section 17(2); or
 - (c) if the contract does not provide for the matter in the case of a single payment expressly agreed under section 14(1)(a), following the completion of all of the construction work to which the contract relates.
- (2) A payment claim must—
 - (a) be in writing; and
 - (b) contain sufficient details to identify the construction contract to which the payment relates; and
 - (c) identify the construction work and the relevant period to which the payment relates; and
 - (d) state a claimed amount and the due date for payment; and
 - (e) indicate the manner in which the payee calculated the claimed amount; and
 - (f) state that it is made under this Act.
- (3) A payment claim must be accompanied by—
 - (a) an outline of the process for responding to that claim; and
 - (b) an explanation of the consequences of—
 - (i) not responding to a payment claim; and
 - (ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

- (4) The matters referred to in subsection (3)(a) and (b) must—
 - (a) be in writing; and
 - (b) be in the prescribed form (if any).

[35] Section 21 deals with responses by a party served with a payment claim. It provides as follows:

21 Payment schedules

- (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.

[36] A payer becomes liable to pay the claimed amount if he or she does not serve a payment schedule on the payee within the time limit specified in the CCA.²⁶ To this end, s 22 provides as follows:

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within—

²⁶ The payee also acquires the right to suspend the contract works: s 24A.

- (i) the time required by the relevant construction contract; or
- (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[37] The legal consequences of not paying a claimed amount where no payment schedule is provided are set out in s 23. Relevantly, that section provides as follows:

23 Consequences of not paying claimed amount where no payment schedule provided

- (1) The consequences specified in subsection (2) apply if the payer—
 - (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
 - (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the payment to which the payment claim relates.
- (2) The consequences are that the payee—
 - (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the claimed amount; and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and

...
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

[38] Commenting on the statutory scheme put in place by ss 20–23, this Court has observed:²⁷

What is plain is that ss 20 to 23 of the Act are designed to facilitate regular and timely payments between the parties to a construction contract. If a property owner does not respond to a payment claim by serving a payment

²⁷ *Salem Ltd v Top End Homes Ltd* CA169/05, 12 December 2005 at [22]. See also *Willis Trust Company Ltd v Green* HC Auckland CIV-2006-404-809, 25 May 2006 at [20]; and *George Developments Ltd v Canam Construction Ltd*, above n 23, at [41], citing *Gilbert--Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) at 716 per Lord Diplock, quoting a statement by Lord Denning MR in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162 at 167.

schedule, then the contractor is entitled to recover the amount of his claim as a debt due. Put colloquially, the payer is under an obligation to pay first and argue later. This, we are satisfied, is the intention of the legislation. No doubt it reflects the philosophy ... that cashflow is the very life blood of the building industry. Contractors (and their sub-contractors in turn) are entitled to be promptly paid where they have invoked the payment regime under the Act and the payer has not responded as the Act requires.

[39] It is noteworthy that the CCA also provides for the adjudication of disputes. Any party to a construction contract has the right to refer a dispute to adjudication and can exercise that right even though the dispute is the subject of proceedings between the same parties in a court or tribunal.²⁸

Section 290(4)(a) of the Companies Act — was it reasonably arguable that payment claim 2 was not a valid payment claim?

[40] Demasol served a payment claim on SPI.

[41] The Associate Judge sought to consider the contract between Demasol and SPI to determine whether Demasol was entitled to serve the claim. In our view, she erred in undertaking this enquiry. Section 20(1) of the CCA deals with when a payee may serve a payment claim. If the construction contract provides for the matter, a payment claim can be served at the end of the period specified in or determined in accordance with the contract.²⁹ If the contract does not provide for the matter, in the case of a progress payment, a payment claim can be served at the end of the relevant period referred to in s 17(2) — that is, the period commencing on the day of the month on which the construction work was first carried out and ending on the last day of that month, and each month thereafter.³⁰ In the case of a single payment expressly agreed under s 14(1)(a), if the contract does not provide for the matter then a payment claim can be served following the completion of all of the construction work to which the contract relates.³¹

[42] There was considerable debate before the Associate Judge as to which of these various provisions applied. We are not persuaded that it makes any difference for

²⁸ Construction Contracts Act, s 25(1).

²⁹ Construction Contracts Act, s 20(1)(a).

³⁰ Sections 20(1)(b) and 17(2).

³¹ Section 20(1)(c).

present purposes. If SPI wished to contend that Demasol was not entitled to serve a payment claim on it when Demasol did so, that was a point it could and should have taken by way of response in a payment schedule. However, SPI failed to file a payment schedule, and instead sought to raise the issue, along with others, only when Demasol took steps to enforce the debt in reliance on s 23(2)(a) of the CCA.

[43] The payment claim was some 31 pages long. It met each of the requirements of s 20(2), 20(3) and 20(4). It was in writing. It identified the construction contract to which it related by reference to SPI's purchase order number as well as by reference to the location of the contract works. It identified the construction work carried out, including each of the variations claimed and the relevant periods to which the payment sought related. It specified the total amount claimed. It specified a due date for payment. It set out the manner in which Demasol had calculated the claimed amount. It contained copious detail in this regard and had attached receipts from third party providers. It stated that it was made under the CCA. It was accompanied by the prescribed information, namely an outline of the process for responding to the claim and an explanation of the consequences of not responding and not paying.

[44] The requirements set out in s 20(2) of the CCA were summarised by this Court in *CJ Parker Construction Ltd (in liq) v Ketan* as follows:³²

[26] A payment claim must be sufficiently detailed and comprehensible to enable a payer to understand the basis on which the claim is made. Only then can the payer decide whether to accept it or to put the payee on notice of a dispute by providing a payment schedule in response which explains the payer's reasons for disagreeing with the claim. This requirement is implicit in the payee's obligation to provide a claim that indicates "the manner in which the payee calculated the claimed amount" and in the payer's obligation to respond by giving reasons for the difference between the amount claimed and the amount the payer is prepared to pay.

[45] In our clear view, payment claim 2 complied with the statutory requirements. There was more than sufficient information provided from which SPI could ascertain what the claim was, the basis on which it was made and what steps SPI had to take if it wanted to contest the claim.

³² *CJ Parker Construction Ltd (in liq) v Ketan* [2017] NZCA 3 (footnotes omitted).

[46] SPI belatedly disputed a number of matters raised in the payment claim. It:

- (a) disputed the value of the works completed;
- (b) denied that the claimed amount reflected the amount payable under the contract;
- (c) disputed whether its own terms and conditions which it attached to the purchase order formed part of the contract;
- (d) disputed whether the quoted price provided by Demasol covered only the removal of visible asbestos or whether it extended to concealed asbestos;
- (e) queried whether the amount of perlite insulation removed by Demasol exceeded the allowance made in the original scope of works it issued and on which Demasol had quoted;
- (f) disputed whether the contract allowed for progress payments or required that there be a single payment for the work undertaken;
- (g) disputed all but one of the variations claimed, asserting that they were unauthorised and therefore fell outside the variation provisions contained in s 17 of the CCA; and
- (h) asserted that it had its own claim against Demasol for non-performance.

[47] Mr Crombie responsibly accepted that all of these issues could have been covered in a payment schedule. We agree with Mr Holmes that the disputes raised by SPI are irrelevant in the present context. In our view, the only enquiries required in relation to SPI's application to set aside the statutory demand were:

- (a) whether the payment claim complied with s 20 of the CCA; and
- (b) whether SPI had provided a payment schedule contesting its liability or paid the amount claimed by the due date.

The general merits of Demasol's payment claim were not open for consideration and were irrelevant in the statutory demand context.³³ In our view, the Associate Judge erred when she embarked on an enquiry into the terms of the contract and the quantum and merits of payment claim 2.

[48] The purchase order did not specify a time within which any payment schedule was required from SPI. It follows, pursuant to s 22(b)(ii) of the CCA, that SPI had 20 working days to provide a payment schedule after the payment claim was served. It did not do so. Nor did it pay Demasol the amount claimed. The consequences of these failures are spelt out in ss 22 and 23. Pursuant to s 22, SPI became liable to pay the claimed amount on the due date for payment. The due date for payment fell to be calculated by reference to s 18 of the CCA. It was 20 working days after the payment claim was served.

[49] Because SPI became liable to pay the claimed amount to Demasol under s 22 as a consequence of failing to provide a payment schedule to Demasol, and because SPI failed to pay the claimed amount on or before the due date for payment, the provisions of s 23(1) applied, with the consequence that Demasol became entitled to recover from SPI, as a debt due to it, in any court, the unpaid portion of the claimed amount and its actual and reasonable costs of recovery (once they were awarded by the court).³⁴ Given the provisions of the CCA, there could be no substantial dispute regarding the debt owing by SPI to Demasol.

[50] 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*, where the Judge commented as follows:³⁵

[16] 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

³³ *Salem Ltd v Top End Homes Ltd*, above n 27, at [24]–[25] (in the context of an appeal against entry of summary judgment).

³⁴ Section 23(2).

³⁵ *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC).

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. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.

[17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of that procedure, and the quick resolution of disputes. The processes that it sets up are designed to sidestep 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 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.

...

[111] The non-provision of the payment schedule is one of the crucial hinges of the Act. The structure appears to be that there will be absolute and irreversible consequences resulting from the non-provision of such a payment schedule. This appears to be consistent with the purpose of the Act to facilitate regular and timely payments, and the approach of the Court of Appeal in [*George Developments Ltd v*] *Canam*. In *Canam*, the focus was on the provision of the progress payment claim, rather than the provision of payment schedules. However, it appears to have been the assumption that the severe consequences of the non-provision of a payment schedule in time were absolute.

[51] The Associate Judge relied on two decisions — *Jamon Construction Ltd v Bricon Asbestos Ltd* and *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd*.³⁶ We comment on each in turn.

[52] In *Jamon*, Associate Judge Matthews was dealing with an application to set aside a statutory demand. One of the defences raised by *Jamon* was that it did not have a contract with the respondent, *Bricon Asbestos Ltd*, or, in the alternative, that any contract it had with *Bricon* was a fixed sum contract and that it had not been varied. After discussing the various provisions contained in the CCA, the Associate Judge commented that there is potential for the way in which the Court is required to apply the payment provisions of the CCA and the law relating to setting

³⁶ *Jamon Construction Ltd v Bricon Asbestos Ltd*, above n 7; and *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd*, above n 9.

aside statutory demands to collide.³⁷ He took the view that even if a company does not respond to a payment claim by serving a payment schedule, it is nevertheless open to it to establish on a sound arguable basis that no valid payment claim was issued.³⁸

[53] We do not consider that the approach in *Jamon* is soundly based. The CCA contains its own procedure for responding to payment claims. The CCA deems an amount claimed to be a debt, if no payment schedule is issued and the amount claimed is not paid. It requires that payment be made in such circumstances. The payee is entitled to enforce that debt. The CCA does not however shut the payer out from disputing the amount claimed. Rather, it requires that the payer pay first and argue later. The law relating to the setting aside of statutory demands is not totally denied by the CCA. If, for example, a payment schedule has been issued, and the dispute between the payer and the payee has not been resolved, then s 23(2)(a) would not apply, there would be a substantial dispute as to whether or not the amount claimed was owing or due and s 290(4)(a) of the Companies Act could be invoked to set aside a statutory demand based on the payment claim.

[54] In *Oceania Football Confederation*, Associate Judge Smith was also dealing with a statutory demand made after the payer failed to provide payment schedules to the payee. Associate Judge Sussock, in the judgment under appeal, considered that Associate Judge Smith had held that payment claims issued in respect of variations which had not been authorised could not be legitimate and that, on that basis alone, they could not be regarded as valid payment claims. She cited [187] of Associate Judge Smith's decision.³⁹ With respect to Associate Judge Sussock, in the paragraph referred to, Associate Judge Smith was reciting counsel's argument. He did not make the finding attributed to him by Associate Judge Sussock. Rather, Associate Judge Smith's findings were consistent with the view we have formed in this case. He said as follows:

[216] To the extent that [another case before an Associate Judge] might hold that there is nothing preventing a Court dealing with a summary judgment or statutory demand proceeding based on a payer's failure to provide a payment schedule under the CCA from enquiring into the merits of the claim, including whether or not the payee has complied with this or that provision in the

³⁷ *Jamon Construction Ltd v Bricon Asbestos Ltd*, above n 7, at [43].

³⁸ At [44]–[45] and [47].

³⁹ *South Pacific Industrial Ltd v Demasol Ltd*, above n 1, at [108]–[109].

construction contract, I would respectfully disagree with the learned Associate Judge. In my view, the CCA’s objective of securing timely cashflow to contractors and subcontractors in the construction industry, and in particular the “sudden death” provisions of ss 22 and 23 that apply where a payer has failed to submit a payment schedule, could easily be compromised if the Court were to entertain on a s 23 enforcement claim an argument to the effect that the money is not owing on account of some breach of the construction contract by the payee.

[217] In my view the correct approach was summarised by Associate Judge Sargisson in *GPW Investments Ltd*, where [h]er Honour said:⁴⁰

Ordinarily, a court is not entitled to interrogate the merits of a Payment Claim that has crystallised as an enforceable debt under the [CCA]. If the payer has not provided a Payment Schedule in time, the court will not (and cannot) interfere on the basis of a dispute over the amounts claimed.

...

[219] Any challenge must be based on an alleged defect in the payee’s compliance with the statutory requirements of the CCA, not with some additional requirements the construction contract might impose.

We agree with these observations. They accurately state the law.

[55] This analysis answers the first two issues raised by this appeal. In our view, it was not reasonably arguable that the payment claim served by Demasol on SPI on 29 March 2021 was not a valid payment claim under the CCA. There was no genuinely arguable — or substantial — dispute as to whether SPI was liable to pay the amount claimed in payment claim 2 and the Associate Judge erred when she set aside the statutory demand issued by Demasol under s 290(4)(a) of the Companies Act.

Section 290(4)(c) of the Companies Act — should the statutory demand otherwise be set aside?

[56] We can deal relatively briefly with the third issue — should the statutory demand otherwise be set aside under s 290(4)(c) of the Companies Act? Under this provision, the Court must consider whether a creditor’s prima facie right to liquidate a defaulting company is outweighed by some factor making it plainly unjust for a liquidation to ensue.⁴¹

⁴⁰ *GPW Investments Ltd v Dreamhome Construction Group Ltd* [2017] NZHC 2057 at [30].

⁴¹ *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [3] per Tipping J.

[57] In our view, there are no such factors in the present case. Demasol is prima facie entitled to enforce its statutory demand and, if no payment is made, to appoint a liquidator of SPI. Allowing that consideration be given to SPI's substantive disputes by setting aside the statutory demand under s 290(4)(c) would be contrary to the CCA and would undermine its purposes. SPI is not shut out from the CCA's adjudication processes or from other proceedings. It can prosecute the various disputes it has put in issue notwithstanding payment to Demasol. It simply has to pay now and argue later.

Costs

[58] We now turn to the final issue raised by the parties — is Demasol entitled to an order requiring SPI to pay its actual and reasonable costs in this Court (as well as in the High Court) under s 23(2)(a) of the CCA?

[59] Section 23(2)(a) is set out above. One of the consequences of not paying a claimed amount where no payment schedule is provided is that the payee can recover from the payer not only the unpaid portion of the claimed amount but also “the actual and reasonable costs of recovery awarded against the payer by that Court”.

[60] The word “Court” used in the CCA extends only to the High Court and the District Court (where the amount claimed does not exceed that Court's jurisdiction).⁴² Accordingly, in this Court there is no statutory entitlement to actual and reasonable costs.⁴³

[61] The issue of the appropriate costs on the appeal is however for this Court and we are in no doubt that we have jurisdiction to award to Demasol its actual and reasonable costs. Relevantly, r 53 of the Court of Appeal (Civil) Rules provides as follows:

53 Costs at discretion of Court

The Court may, in its discretion, make any orders that seem just concerning the whole or any part of the costs and disbursements of—

⁴² Construction Contracts Act, s 5.

⁴³ *Salem Ltd v Top End Homes Ltd* CA169/05, 4 April 2006 [*Salem* recall judgment].

(a) an appeal; ...

The power to order costs extends to actual and reasonable costs.⁴⁴ Section 23(2)(a) is relevant to the costs issue. This Court, in its costs decision in *Salem Ltd v Top End Homes Ltd*, observed as follows:⁴⁵

Where, as here, a statutory cause of action is asserted and the statute expressly contemplates actual and reasonable costs in the courts of first instance, it is a short step to the proposition that this Court may do likewise in relation to appeal costs. That is to say that while on its terms s 23(2)(a)(ii) does not apply to this Court, the spirit of the provision may find expression through the breadth of the Court's discretion as to costs.

[62] SPI had judgment in its favour and it could be expected to defend it. However, its arguments did not engage with the plain meaning of the CCA or the well-established authorities in the High Court and this Court. Rather, they were primarily directed at the merits as SPI perceives them to be. They were not relevant. Given this, and the terms of s 23(2)(a) of the CCA, we consider that, in this Court, an award of actual and reasonable costs in Demasol's favour is appropriate. However, we have no information as to Demasol's actual and reasonable costs. Accordingly, it is appropriate to make directions requiring Demasol to file an affidavit detailing its costs, giving SPI the opportunity to object to the same and, in the event of a dispute, directing that Demasol's claim for costs be referred to the Court for determination.

[63] Because we are allowing the appeal, it is appropriate to set aside the costs order made by the Associate Judge. As a result, SPI must repay the costs awarded by the Associate Judge and already paid by Demasol. As for costs in the High Court, the appropriate course is to remit that issue back to the High Court under s 57 of the Senior Courts Act. While Demasol is entitled to its actual and reasonable costs, the High Court has previously held that some proportionality is required in determining a payee's entitlement to costs under s 23(2)(a) of the CCA.⁴⁶ It is for the High Court to consider Demasol's entitlement to costs, taking into account s 23(2)(a) and the matters dealt with in this judgment.

⁴⁴ Court of Appeal (Civil) Rules 2005, r 53E.

⁴⁵ *Salem* recall judgment, above n 43, at [9].

⁴⁶ *Herbert Construction Company Ltd v Alexander* HC Napier CIV-2011-441-500, 29 February 2012 at [35]; *Watts & Hughes Construction Ltd v Complete Siteworks Co Ltd* [2014] NZHC 2600, (2014) 22 PRNZ 238 at [13]; and see *CBC Construction (Auckland) Ltd v Auckland Concrete Ltd* [2019] NZHC 1104.

Result

[64] For the reasons set out above, we allow the appeal and make the following consequential orders:

- (a) the orders made by the High Court are set aside;
- (b) SPI's application to set aside the statutory demand is dismissed;
- (c) the time for complying with the statutory demand is extended. The statutory time period of 20 working days is to commence on the day following the release of this judgment;
- (d) the judgment of the High Court in respect of costs is set aside under rr 48(4) and 53J of the Court of Appeal (Civil) Rules 2005;
- (e) the amount paid by Demasol to SPI for costs in the High Court is to be repaid by SPI to Demasol within five working days of the date of release of this judgment;
- (f) the issue of costs in the High Court is referred back to the High Court for consideration under s 57 of the Senior Courts Act 2016;
- (g) SPI is to pay Demasol's costs and disbursements in this Court on an indemnity basis. The reasonable quantum of these costs is to be fixed by the Registrar in the event that counsel do not agree.

Solicitors:

Kennedys, Auckland for Appellant

Cooney Lees Morgan, Tauranga for Respondent