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

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-960**
**[2021] NZHC 3597**

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|---|---|
| UNDER | Section 290 of the Companies Act 1993 |
| IN THE MATTER | of an application to set aside a statutory demand dated 6 May 2021 |
| BETWEEN | SOUTH PACIFIC INDUSTRIAL LIMITED<br>Applicant |
| AND | DEMASOL LIMITED<br>Respondent |

Hearing: 11 August 2021

Appearances: PJ Crombie and PJ Anderson for the Applicant
M Russell and C Smith for the Respondent

Judgment: 22 December 2021

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**JUDGMENT OF ASSOCIATE JUDGE SUSSOCK**

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*This judgment was delivered by me on 22 December 2021 at 3.30pm pursuant to r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

Solicitors:
CooneyLees Morgan, Tauranga
Rice Speir, Auckland

**Introduction**

[1] This dispute arises from the demolition of a large concrete tank in Penrose owned by BOC Ltd. BOC invited South Pacific Industrial Ltd ("SPI") to provide a quote for demolishing the tank which contained materials contaminated by asbestos. The tank and all associated materials required removal.

[2] Demasol Ltd specialises in asbestos removal so SPI asked Demasol to provide a quote to carry out the bulk of the work as its subcontractor.

[3] SPI says that the contract agreed with Demasol was for a fixed price of $100,000.00 exclusive of GST and tipping costs. Two payment claims were issued by Demasol for a total of $390,997.29. No payment schedules were issued in respect of either. Demasol therefore issued a statutory demand relying on the provisions in the Construction Contracts Act 2002 ("CCA") which allow a party to recover the whole of a payment claim as a debt due where no payment schedule is issued and no payment made.

[4] SPI has applied to set aside the statutory demand on the following grounds:

(a) there is a substantial dispute as to whether the debt is owing;

(b) the contract covering the works performed by Demasol was for a fixed price of $100,000.00 plus GST, plus tipping costs for foam glass blocks at a maximum of $600.00 per tonne plus GST;

(c) the payment claim issued by Demasol, which the statutory demand is largely based on, was not calculated in accordance with the agreed contract price and is therefore not a valid payment claim under the CCA;

(d) variations claimed by Demasol were neither permitted under the fixed price contract nor agreed by SPI; and

(e) SPI has paid Demasol the agreed contract price, together with variations that were agreed by it, in full.

[5] Demasol submits in response that the contract price was an estimate only and allowed variations and that it has issued two valid payment claims to which payment schedules were not issued. It was therefore entitled to issue the statutory demand and it ought not to be set aside. In Demasol's submission, setting aside the demand would be inconsistent with the "pay now, argue later" regime provided for in the CCA.

[6] Furthermore, Demasol says it has reason to believe that SPI cannot pay its debts as they fall due and is insolvent.

[7] SPI has now paid the first payment claim in full.

[8] If the second payment claim ("Payment Claim 2") is not a valid payment claim under the CCA then there is no obligation to issue a payment schedule in response. The statutory demand may then be set aside because there would be no debt due under the CCA.

[9] An applicant only has to establish that it is reasonably arguable that the payment claim is not valid for an application to set aside a statutory demand based on the operation of the payment claim provisions in the CCA to succeed.

**Issues**

[10] The issues for determination are therefore:

(a) Is it reasonably arguable that Payment Claim 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?

**Preliminary issue – was privilege waived in the legal advice?**

[11] At the outset of the hearing, counsel for Demasol applied for a ruling on whether Mr Hebberd had waived privilege in legal advice obtained and referred to in paragraph 51 of his affidavit dated 20 May 2021. Mr Hebberd stated in this paragraph:

> After taking legal advice, SPI is today making a further payment in the sum of $47,502.39 to Demasol's solicitors trust account. This was the amount we earlier sought to set off. We are doing so on the basis SPI reserves its right to make a claim for set off later.

[12] Counsel for Demasol relied on s 65(3)(a) of the Evidence Act 2006 and *McCullagh v Robt. Jones Holdings Ltd* to submit that SPI had waived its privilege in the legal advice as SPI had put the privileged information in issue in the proceeding.[1]

[13] A passing reference to legal advice having been obtained however will not waive the privilege. The principles underlying s 65(3)(a) were set out by Panckhurst J in *Astrazeneca Ltd v Commerce Commission* as follows:[2]

> The mere relevance of a privileged communication to an issue in the case provides no basis for waiver. Even a party's asserted reliance upon a privileged communication is generally insufficient. Waiver [under s 65(3)(a)] occurs where a party both asserts reliance upon the privileged communication and also seeks to inject the substance of the communication in evidence. At that point an abuse of the privilege exists. The claimant cannot have the benefit of reliance upon the substance of the advice and still seek to shield that advice from disclosure to the other side. To permit this would give rise to unfairness in the required sense, and that the party's conduct would be offensive to the trial process.

[14] Waiver will therefore only occur if a party places some reliance on the substance of the advice as having justified its actions so as to make it unfair to continue to withhold that advice.

[15] The reference by Mr Hebberd does not reach that standard as he does not rely on the substance of that advice as having justified his actions.[3]

[16] On that basis, I made an oral ruling at the hearing that privilege in the legal advice referred to was not waived and so it did not need to be disclosed to Demasol.

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1 *McCullagh v Robt. Jones Holdings Ltd* [2015] NZHC 1462 at [102].
2 *Astrazeneca Ltd v Commerce Commission* (2008) 12 TCLR 116 at [39].
3 See also Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA 65.4].

**Legal principles for setting aside a statutory demand issued following failure to provide payment schedule under CCA**

[17] Before considering the regime for payment claims and payment schedules under the CCA, it is useful to bear in mind the principles that apply to an application to set aside a statutory demand.

[18] Failure to comply with a statutory demand is one of the mechanisms by which insolvency is established under Part 16 of the Companies Act 1993. A creditor may serve a statutory demand on a company in respect of any debt owed that is not less than the prescribed amount, currently $1,000.00.[4] A company served with a statutory demand must apply to the Court within 10 working days of service for the statutory demand to be set aside.[5]

[19] The application to set aside is brought pursuant to s 290(4) of the Companies Act 1993 which states:

> **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.
>
> ...

[20] The Court of Appeal helpfully confirmed the principles a court should apply when exercising the s 290(4) discretion in *Confident Trustee Limited v Garden and Trees Limited*:[6]

> [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

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4 Companies Act 1993, s 289.
5 Section 290.
6 *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 at [16].

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.

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

(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.

(footnotes omitted)

[21] Statutory demands issued in respect of amounts owing under construction contracts must be considered in the context of the CCA provisions.

[22] Where a payment schedule is not issued in response to a payment claim, s 23 of the CCA allows the party who issued the payment claim (referred to as the "payee") to recover the amount claimed as a debt due.

[23] Because it may be claimed as a debt due, the party who did not issue a payment schedule cannot rely on a dispute over whether the amounts included in the payment claim are properly owing as a "substantial dispute" for the purposes of s 290(4)(a).

[24] Section 290(4)(a) may only be relied upon if there is a question whether the payment claim issued was valid in the first place. If the payment claim was invalid no payment schedule is required to be filed in response and therefore s 23 cannot be relied on to issue a statutory demand.

[25] In addition, s 79 of the CCA provides that when seeking to recover an amount claimed as a debt due under the CCA (including under s 23) the party responding to the demand may not rely on any counterclaim, set-off or cross-demand "unless

judgment has been entered for that amount" or "there is not in fact any dispute between the parties in relation to the claim for that amount".[7]

[26] For some time there was debate about whether s 79 precluded reliance on s 290(4)(b) when applying to set aside a statutory demand but the Court of Appeal confirmed in *Laywood v Holmes Construction Wellington Ltd* that s 79 applies to proceedings to set aside statutory demands, with any other interpretation undermining the "pay now, argue later" regime in the CCA.[8]

[27] The only sections that can be relied on for setting aside a demand are therefore s 290(4)(a), to the extent that the validity of the payment claim is reasonably arguable, or s 290(4)(c).

[28] The meaning of "other grounds" in s 290(4)(c) was considered in *Commissioner of Inland Revenue v Chester Trustee Services Ltd* where Tipping J held that all cases involving s 290(4)(c) came down to the court's judgment whether the creditor's prima facie entitlement to liquidate the company is outweighed by some factor making it plainly unjust for liquidation to ensue.[9]

**What is required for a valid payment claim?**

[29] I note at the outset that s 23(4) of the CCA expressly provides that a court must not enter judgment in favour of the party who issued a payment claim (payee) "unless it is satisfied that the circumstances in subsection (1) exist." Those circumstances are that the payer has become liable to pay the claimed amount to the payee as a consequence of failing to provide a payment schedule. Such circumstances can only exist where the payment claim meets the requirements of the CCA.

[30] Section 20 of the CCA sets out the requirements for a payment claim:

> **20 Payment claims**
>
> (1) A payee may serve a payment claim on the payer for a payment,—

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7 Construction Contracts Act 2002, s 79.

8 *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243 at [63]-[64].

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

(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).

[31] Section 19 defines "claimed amount" as:

> … an amount of a payment, specified in a payment claim, that the payee claims to be due.

[32] A "payment" is defined as either:[10]

(a) a progress payment for construction work carried out under a construction contract; or

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[10] Construction Contracts Act, s 19.

(b) another type of payment under a construction contract to which a party who has agreed to carry out construction work under the contract is entitled for, or in relation to, construction work carried out by that party under the contract.

[33] Section 14 of the CCA provides that the parties are free to agree between themselves on the mechanism for determining the number of payments to be made under the contract, the intervals between them, the amount of each of those payments and the date when payments become due. Section 14(2) expressly provides that the parties may "expressly agree to a single payment".

[34] Section 15 provides that if the parties fail to agree on a mechanism for determining the matters in s 14 then ss 16 to 18 apply to the extent that those provisions relate to any matter that the parties have not agreed.

[35] Pursuant to s 16, a party who has agreed to carry out construction work is entitled to progress payments calculated in accordance with s 17.

[36] Section 17 then provides:

> **17 Amount of progress payment**
>
> (1) The amount of a progress payment must be calculated by reference to—
>
> (a) the relevant period for that payment; and
>
> (b) the value of the construction work carried out, or to be carried out, during that period; and
>
> (c) any relevant provisions in the construction contract (including, without limitation, provisions relating to the retention of money or liquidated damages).
>
> (2) For the purposes of subsection (1)(a), the relevant period for a progress payment under a construction contract is—
>
> (a) the period commencing on the day of the month on which construction work was first carried out under the contract and ending on the last day of that month (the first period); and
>
> (b) each month after the first period.
>
> (3) For the purposes of subsection (1)(b), the value of construction work must be calculated with regard to—
>
> (a) the contract price for the work; and
>
> (b) any other rates or prices set out in the contract; and

(c) any variation to the construction work authorised under the contract; and

(d) if any work is defective, the estimated cost of rectifying the defect.

(4) If the contract does not expressly provide for the matters referred to in subsection (3)(a) and (b), the value of construction work must be calculated with regard to—

(a) the reasonable value of the work; and

(b) the reasonable value of any variation to the construction work authorised under the contract; and

(c) if any work is defective, the estimated cost of rectifying the defect.

[37] The operation of ss 14 to 17 therefore depends on the agreed terms of the contract and requires consideration of whether payment terms were agreed to, including whether the parties agreed to a single payment.

[38] SPI submits that the Court ought to consider the pre-contractual negotiations to assist in answering this question.

[39] Demasol relies on *Investors Compensation Scheme Ltd v West Bromich Building Society (No 1)*[11] to submit that the Court does not need to undertake a detailed analysis of the background to the contract because:

(a) the words in the contract are unambiguous;

(b) SPI does not seek to rectify the contract;

(c) there is no evidence that something has gone wrong with the language in the contract such that the Court needs to consider the background to the contract; and

(d) the contract on its face makes common sense in the circumstances.

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[11] *Investors Compensation Scheme Ltd v West Bromich Building Society (No 1)* [1998] 1 WLR 896 (HL) at 912–913.

[40] In the recent decision of *Bathurst Resources Ltd v L&M Coal Holdings Ltd* the Supreme Court clarified the law in relation to both pre-contract and post-contract evidence, confirming that the correct approach is that, applying the provisions of the Evidence Act 2006, the court must ask itself whether the conduct (either pre or post contract) tends to prove anything relevant to the objective approach to interpretation. The conduct need not necessarily be mutual, but non-mutual conduct is more likely to be relevant to a claim in estoppel. Further, in assessing the relevance of subsequent conduct it must be remembered that the court is interpreting the contract at the time it was made. [12]

[41] On this basis, I consider the correspondence leading up to the contract to assess whether it is reasonably arguable that the payment claim is invalid because it does not comply with the provisions of the CCA.

*Correspondence leading up to contract*

[42] On 27 October 2020 SPI sent Demasol the "Request for Quote" ("RFQ") that had been provided to it by BOC. The RFQ set out the scope of work that BOC required to be performed in some detail and included photos and diagrams. Mr Colson of SPI sent an email to Demasol that said:

> Please see that attached doc and quote by COB today [sic].
> Please send info regarding the tooling.
> Asbestos removal will be included in the scope – price worst case as the type has to be determined for dumping.
> Concrete removal and make good for wall and platform.
> If you require SPI will do the concrete work.
> Please send a method statement for a stand demo like this steel tanks.

[43] On the same day Mr Doyle of Demasol replied to Mr Colson of SPI saying:

> Our price for the work is coming out at around 90-100k, I have based this on working within a live BOC store and no being able to drop anything from height. We do not have standard method statement for this kind of work, they are all different however I will knock something up that's will be fairly loose, and I'll get that over to you later.
>
> Basically we would use a 50 ton crane to lift a man cage, the cut the top of the mild steel tank, we would then cut the stainless tank using a plasma cutter and allow it to fall into itself.

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12 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85 at [89].

This would work in sections 2mts [high], taking the outside tank and lifting it down, then dropping the inside tank into itself. This would keep the rest of the yard open and at minimal risk whilst we were working.

I reckon it would take us about 3-4 weeks.

There'll be more detail in the method statement though.

[44] On 28 October 2020 Mr Colson replied to Mr Doyle stating:

I need to lock down the price and make sure you have included all the scope items.
Please send me what you have allowed for,
Tanks demo and disposal
Wall and roof demo and removal
Asbestos removal and all works associated with testing, encapsulation and dumping
Craneage
Labour
Cutting consumables and equipment
Insurances
Payments 20th of the month after completion.
Total quote price with a variation for the type of asbestos worst case post report.

[45] Mr Doyle responded to Mr Colson on the same day stating:

I have got everything included at $100k the only thing not included is the asbestos we cannot see, removal is included but not tipping as I have no way of working any estimated weights.

Our tipping costs are $600 per tonne, so asbestos in the flanges is included and ALL removal, but not tipping of the blocks that would be on ticket at $600 per tonne.

All training, consumables and [craneage] is included.

Mr Colson responded to this email on the same day saying: They have estimated 100 ton of bricks. Please send price and state that it is based on this weight and cost / ton.

[46] Ten minutes later, Mr Doyle replied saying:

Just to confirm the removal of the asbestos bricks to tip would be $600/ton at an approximate weight of 100 tonnes, that would be $60,000. This is an extra to our demolition cost.

[47] Still on 28 October 2020, Mr Doyle further clarified the Demasol quote to Mr Colson, setting out the following terms which were ultimately incorporated into the contract ("Price Email"):

> Our price breakdown for the tank removal and buildings as shown in the drawings is:
>
> Demolition (including cranage and waste removal) insurances, competencies, consumables, wall and cover demolition and removal, all asbestos removal and clearance for flanges on associated pipework, any labour and access requirements.
>
> $100k.
>
> Extra over cost for tipping of asbestos foam glass blocks if they come back as:
>
> A class 10 tonnes $6000
>
> B class 10 tonnes $3500
>
> Hope this clears things up a bit.

[48] On 4 November 2020 Mr Colson emailed Mr Doyle in respect of perlite at the bottom of the tank, saying:

> BOC have just told me that 800mm of perlite is at the bottom between the two tanks, to remove this will there be any increase in your price, note that the job is looking very good for us so we don't want to scare them away.
>
> Mr Doyle responded by email on the same day: If it's just the insulation stuff and it's not contaminated with anything, which I doubt it would be, happy to include it in our price.

[49] Mr Colson replied the following day, 5 November 2020, saying:

> Jeremy [BOC] did state that we must assume the perlite is contaminated with asbestos as it is sitting on top of the bricks, it is normally sucker truck removed? What do you think?

[50] Mr Doyle responded on 5 November 2020 saying:

> We can move it with a sucker truck, it may not suit the way we're doing it. But we can worry about the details with the methodology when we develop a site specific method statement.

[51] On 5 November 2020, SPI provided a quote to BOC for the works including $115,000.00 for: "[d]emolition of the tanks, concrete support structure and canopy wall/roof inclusive of cranage and removal", plus an additional $21,275.00 described as being for: "[a]sbestos removal is an estimate only subject to the report also encapsulation requirements will be subject to the type of asbestos and the NZ regulations".

[52] On 9 December 2020 SPI emailed Demasol the purchase order for the work. The purchase order describes the project as the "BOC Bin Tank Demo" with a unit cost of $100,000.00 plus GST. Demasol's Price Email was set out on the Purchase Order.

[53] The email attaching the purchase order also attached a letter described as the "Demasol quote response letter" which began by saying that BOC has awarded SPI the work to demolish the BOC Bin Tank over the 2020 Christmas and 2021 New Year period with an expected start date in the week of 14 to 18 December 2020. The letter then stated: "Demasol has been selected by SPI to be our subcontractor to complete the site demolition which consists of all work activities in the SOW [Scope of Works]."

[54] The letter quoted the Price Email for the work to be undertaken under the heading "Demasol Quote".

[55] The letter continued with a heading "Demasol SOW" which set out the RFQ issued by BOC for the tank demolition and noted in red below each of the items whether it was a matter included in Demasol's quote, for information only, or for which SPI was to be responsible.

[56] The following bullet points in the RFQ each had a note below stating "[i]ncluded in Demasol's quoted price":

(a) "All materials associated with the vessel, foam glass, asbestos sheeting and gaskets and concrete supports and block wall and roof to be removed from site".

(b) "Concrete pillars and block wall to be cut off flush with a surrounding ground and made good with existing surface".

(c) "Inside the outer steel tank at the bottom of 7 layers of foam glass blocks with asbestos paper in between each layer".

(d) "There is approximately 1m high residual perlite insulation left on top of the foam glass blocks in the space between the inner and outer tanks".

[57] SPI noted below the bullet point referred to in (d) above, in addition to being included in Demasol's quoted price, that the remaining 1m of perlite is to be removed. There are two further bullet points that are relevant:

(a) "There are a number of flanges on the tank where it is believed that the gaskets contain asbestos".

(b) "Fibreglass is used as insulation around the pipes entering the tanks".

Under each of these, the letter recorded: "[i]nformation – Demasol to remove".

[58] Finally the letter, after referring to a number of other matters including health and safety and who was responsible for permits and so forth, included a bullet point "cover all SW drains" (SW being short for stormwater) under which it recorded "(Chris – Demasol)".

[59] The email sending the purchase order and letter also attached SPI's standard terms and conditions of trade ("SPI's standard terms") although neither the email, purchase order nor letter referred to those terms.

*Correspondence in relation to payment claims*

[60] On 27 January 2021 Demasol issued Payment Claim 1 for $114,425.00 (including GST). The schedule attached to the tax invoice recorded that the demolition works were 90 per cent complete and claimed $90,000.00 of the total $100,000.00 contract price. There were then two further charges for 10 tonnes of A Class asbestos at $6,000.00 plus 10 tonnes of B Class asbestos at $3,500.00 so that the total to date was $99,500.00.

[61] SPI did not pay the amount claimed or issue a payment schedule by 25 February 2021, the due date recorded on the invoice.

[62] Although it appears from the correspondence above that the works were to be undertaken to coincide with BOC's Christmas/New Year shutdown period, issues arose on site resulting in considerable delay and SPI's evidence is that the works were not completed by Demasol until 12 March 2021.

[63] On 26 March 2021 Mr Paul Hebberd of SPI wrote to Mr Doyle of Demasol in response to Payment Claim 1, saying that the works exceeded the quoted timeframes by a large margin and as a result both BOC and SPI had incurred significant extra costs. Two credits were claimed, one in respect of an amount claimed from SPI by BOC and the other in respect of extra costs directly incurred by SPI. SPI was prepared to discount the latter if matters could be agreed. SPI asked Demasol to re-issue "your full and final invoice" for a total of $69,205.00 plus GST. Mr Hebberd stressed that he considered that both BOC and SPI were being very reasonable and that provided Demasol could agree those terms before 2 April 2021, it would be treated as full and final settlement.

[64] Three days later, on 29 March 2021, Demasol issued Payment Claim 2. The schedule attached recorded that the demolition works were now 100 per cent complete and claimed $100,000.00 plus the original claims for 10 tonnes of A Class and 10 tonnes of B Class asbestos. The schedule included seven variations totalling $230,497.64. Payment Claim 1 was deducted from the total of $339,997.64 resulting in a total of $240,497.64. GST was then added to this number for the claim of $276,572.29 in Payment Claim 2.

[65] Demasol was therefore seeking payment of the final $10,000.00 of the contract price plus seven variations amounting to $230,497.64 plus GST.

[66] In total Demasol was claiming $390,997.29 for the works.

[67] On 4 April 2021 Mr Hebberd of SPI wrote to Demasol setting out the reasons why SPI rejected six of the seven variations claimed. The letter states:

> Other than V02, which [SPI] accepts as below, no further variation claims were made by Demasol on site in any written or verbal form and no written agreement to any variation which would have had to be also agreed with the client, BOC, was made, as in the case of V02.

[68] The letter discusses each of the variations claimed. It accepts that V02 is a valid variation but disputes "the content and value of this variation, other than as documented and agreed on site in the attached document". SPI says it would agree to a variation of 19 hours labour and 14 bags of concrete for a total of $1,142 plus GST as compared to the amount of $14,541.21 claimed by Demasol.

[69] Regarding the remainder of the variations, SPI disputes that there was any change in scope and says that the amounts claimed ought to have fallen within the requirements or worst-case pricing SPI requested in the first place. The letter records that SPI would in good faith pay for the hire of fencing panels to protect the trenches and pipes (V06), stating that originally SPI had intended to supply fencing panels but Demasol offered to supply its own at no cost to SPI, apparently owning 600 panels. Fencing panels were ultimately hired from Hire Pool to the surprise of SPI but SPI agreed in good faith to pay the cost of hiring the panels. The letter finishes by saying that it suggests Demasol re-issue the claim in line with the above factual-based assessment and SPI would make full and final payment accordingly.

[70] On 27 April 2021 Demasol's solicitors wrote to BOC care of SPI stating that as no valid payment schedules had been received under the CCA, BOC was now out of time for disputing Payment Claims 1 and 2 and the amounts claimed were now due and owing under s 23 of the CCA. The letter requested that BOC make payment to Demasol of the full $390,997.00 (GST inclusive) by close of business the following day.

[71] On 30 April 2021 Mr Hebberd wrote to Mr Charlton of Demasol updating his earlier letter dated 4 April 2021 by adding further commentary in relation to each of the variations. This included that SPI had spoken to BOC in relation to V05, which related to the closing of the site due to COVID-19 restrictions and suggested that there may be a case for this variation. SPI said however that it required evidence of Demasol's true costs to submit to BOC.

[72] On 5 May 2021 SPI issued a payment schedule. SPI accepts that this payment schedule was not issued within the time required by the CCA. Mr Hebberd's evidence is that its purpose was to set out for Demasol the parts of Demasol's claim that were (and were not) accepted and to quantify deductions.

[73] SPI paid the amount set out as owing in the payment schedule (referred to as the "scheduled amount" under the CCA) of $86,846.85 including GST around the same time.

[74] On 6 May 2021 Demasol's solicitors wrote to SPI advising that because SPI had not issued payment schedules in response to the first or second payment claim within 20 working days of receiving them, Demasol would be issuing a statutory demand.

[75] On 6 May 2021 Demasol served the statutory demand on SPI demanding $304,997.29, which is not quite the difference between the amount claimed and the amount paid.

[76] Correspondence was then exchanged between solicitors for the parties. SPI's lawyers relied on *Jamon Construction Ltd v Bricon Asbestos Ltd* to say the payment claims were not valid and therefore no statutory demand could be issued.[13] Demasol's lawyers refuted this, saying that unlike in *Jamon* there is not even a "technical quibble" here and Demasol's payment claims are valid claims under the CCA.

[77] Furthermore, Demasol's lawyers said that SPI clearly acknowledged that the payment claims were valid by the payment schedule it issued on 5 May 2021, even though that payment schedule was issued outside the time frame set out in the CCA.

[78] SPI then filed its application to set aside the statutory demand together with supporting affidavit and paid the amount of $47,502.39. This amount had been claimed as a set-off for the extra costs incurred by BOC and SPI as a result of alleged breaches of the contract.

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[13] *Jamon Construction Ltd v Bricon Asbestos Ltd* [2015] NZHC 1926.

[79] Mr Hebberd for SPI's evidence is that by making this payment, SPI will have paid Demasol the contract price in full without deductions together with $14,672.00 for the tipping of the B Class asbestos (following the asbestos classification report), $1,142.00 plus GST for the agreed variation V02 plus a payment of $1,163.14 including GST for 20 days of fencing.

*Is it reasonably arguable that it was a fixed price contract?*

[80] In my view, the correspondence discussed above makes it difficult for Demasol to argue that the quote of $100,000.00 was an estimate only and that it was only for the removal of asbestos that could be seen.

[81] The first email asking Demasol for a price asks for it to be on a worst-case basis and this is repeated the next day. This supports SPI's position that the contract was a fixed price contract.

[82] Demasol does record in one of its emails that "the only thing that is not included is the asbestos we cannot see". The sentence continues however "removal is included but not tipping as I have no way of working out any estimated weights". The email then refers to the tipping costs being $600.00 per tonne "so asbestos in the flanges is included and ALL removal, but not tipping of the blocks that would be on ticket at $600 per tonne". The meaning of this passage is not completely clear but given the emphasis on the word "all", it appears to allow for all removal rather than just removal from the flanges.

[83] Although Demasol's email setting out its price is far from clear, the purchase order letter includes under the heading "Demasol SOW" (presumably Scope of Works) at the third bullet point "all materials associated with the vessel, foam glass, asbestos sheeting and gaskets and concrete supports and block wall and roof to be removed from site". The letter records that this is included in Demasol's quoted price.

[84] Furthermore, the seventh bullet point states that "[i]nside the outer steel tank at the bottom are 7 layers of foam glass blocks with asbestos paper in between each layer". The letter again records that this is included in Demasol's quoted price. The ninth bullet point records: "[t]here is approximately 1m high residual perlite insulation

left on top of the foam glass blocks in the space between the inner and outer tanks". Below this, it records: "the remaining 1m of perlite to be removed is included in Demasol's quoted price" [sic]. The next bullet point states: "[t]here are a number of flanges on the tank where it is believed that the gaskets contain asbestos". Below that it states: "information – Demasol to remove".

[85] Demasol did not respond to this letter and say that it was not correct. In fact Demasol submits this letter and purchase order together with SPI's standard terms records the subcontract between the parties.

[86] Furthermore the way in which Demasol set out its payment claims is consistent with the contract price agreed being $100,000.00 rather than it being an estimate only with the work to be valued in some other way.

[87] From the above, it is clearly reasonably arguable that the contract was a fixed price contract.

*What are the payment terms of the contract?*

[88] As recorded above, when SPI sent the purchase order email to Demasol, it attached a copy of SPI's standard terms and conditions to the email.

[89] SPI submits that SPI's standard terms were mistakenly provided to Demasol and do not form part of the agreement.

[90] Demasol disputes that the terms were sent by mistake and submits that they are incorporated as terms of the contract. It relies on clause 4.2 as allowing variations to be claimed at Demasol's discretion. Demasol says the evidence that the terms were sent by mistake has only been raised by SPI in Mr Hebberd's second affidavit and no affidavit has been provided by the writer of the email attaching SPI's standard terms.

[91] An affidavit was however filed in reply by the author of the email, Mr Clapham, confirming "the contents of Mr Hebberd's affidavit as true and correct to the best of [his] knowledge and belief".

[92] Demasol further submits the evidence is inconsistent with the party's performance, which Demasol says is consistent with SPI's standard terms. The actions referred to as being consistent with SPI's standard terms are:

(a) the issuing of a payment schedule by SPI;

(b) the disputing of the amounts claimed in variations and correspondence but not the right to claim variations at all;

(c) the reference to arbitration to resolve the claims which was the dispute resolution mechanism provided for in SPI's terms; and

(d) that both parties in correspondence had relied on this being a contract subject to the CCA.

[93] None of the matters referred to by Demasol however are specific to SPI's standard terms. They could simply arise on the basis of the subcontract entered into between the parties and the issue of payment claims under the CCA without any reference to SPI's terms. With any fixed price contract, there is still an ability to agree variations so the fact that a discussion about variations occurred or that some were accepted does not necessarily mean that SPI's terms were being complied with.

[94] There is no reference in SPI's email, the purchase order or the letter including the annotated BOC scope of works to SPI's standard terms. This is in contrast to the contract between BOC and SPI where the contract expressly refers to SPI's terms and conditions. SPI's terms also start halfway down the final page of the contract with BOC. Further, there is no reference to SPI's terms in the correspondence leading up to entry into the contract.

[95] SPI's standard terms themselves do not make sense if Demasol is read as the "Seller" and SPI as the "Customer". Demasol was a subcontractor, not an agent of SPI. SPI had a project manager on site supervising Demasol's work so Demasol had no authority to represent SPI.

[96] Furthermore, several of the terms included in SPI's standard terms are arguably inconsistent with the correspondence leading up to the contract and the steps taken, including issuing the payment terms.

[97] The second email from SPI leading up to the purchase order letter records "payments 20th of the month after completion", indicating that a fixed price will be paid on this date. The email in response from Demasol does not query this term.

[98] Payment Claim 1 was issued prior to completion of the work and for 90 per cent of the contract price. It is not consistent with the payment term above because the work was not completed at the time of issue.

[99] SPI did not respond until after completion, consistent with the payment term in the email referred to above. At that stage SPI proposed a set-off for the extra costs incurred as a result of Demasol's alleged breaches of contract. SPI asked Demasol to re-issue the payment claim for the proposed new figure in "full and final settlement".

[100] From the above, it is reasonably arguable that a single payment term was agreed, as expressly allowed for in s 14, because:

(a) there is an email stating this is the payment term and Demasol does not dispute that term;

(b) the work was originally meant to be completed within 3–4 weeks, supporting a single payment being appropriate;

(c) the purchase order and letter accompanying it are not inconsistent with a single payment term and may support it as otherwise provision for progress payments would be expected;

(d) it is reasonably arguable that SPI's standard terms were not incorporated; and

(e) even if SPI's standard terms were incorporated, the more specific term agreed may override the standard term in any event.

[101] If a single payment term was agreed, then the validity of the payment claims is in question because s 20(1) provides when a payment claim may be served and relevantly includes that this can be either:

(a) at the end of the period agreed in the contract (s 20(1)(a)); or

(b) in the case of a single payment expressly agreed, where the timing of payment is not agreed, following completion.

[102] Furthermore, the variation term in SPI's standard terms is not consistent with pricing on a worst-case basis, as SPI asked Demasol to do in the correspondence referred to above.

[103] I note that even if SPI's standard terms were incorporated, the variation term that Demasol seeks to rely on still requires "a variation to the seller's quotation" to occur before the "Seller" may change the price. It is reasonably arguable that the variations that Demasol claims in its second payment claim are items that are recorded as being included in Demasol's quote in the annotated version of BOC's RFQ set out in the letter accompanying the purchase order.

*Is there a substantial dispute regarding whether the payment claim is valid?*

[104] As I have found that it is reasonably arguable both that it was a fixed price contract and that SPI's standard terms were not incorporated as terms of the subcontract, the question is whether this affects the validity of Payment Claim 2.

[105] SPI relies on the dicta in *Jamon Construction Ltd v Bricon Asbestos Ltd.*[14] This case also involved the removal of asbestos and a similar dispute as to whether it was a fixed price contract.

[106] The Court held that the payment claims were arguably invalid because it was reasonably arguable that it was a fixed price contract, that the value of the construction work claimed by Bricon was not calculated with regard to the contract price

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14 *Jamon Construction Ltd v Bricon Asbestos Ltd*, above n 13.

(s 17(3)(a)) and that the progress payments claimed were not therefore calculated in the manner required by s 17(1).[15]

[107] Here however the payment claims appear to have been calculated in accordance with the contract price but significant variations were claimed in addition to that price.

[108] Section 17 of the CCA allows variations to be claimed where "authorised by the contract." In *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd* Associate Judge Smith held that payment claims issued only in respect of variations which had not been authorised "cannot be legitimate" under the contract and on that basis alone could not be valid payment claims.[16] Section 17 applied in that case because there was no agreement on payment terms as allowed for under s 14. Here it is not clear whether s 17 applies or not because it is not clear whether a single payment term was expressly agreed or whether SPI's standard terms apply.

[109] On that basis alone it is reasonably arguable that Payment Claim 2 is not valid because $215,956.43 out of the $240,497.64 claimed (excluding GST), or 89.8 percent, related to variations that were arguably not authorised. As was held in *Fletcher Construction Co Ltd v Spotless Facility Services (NZ) Ltd* where a payment schedule, or claim as it is here, partially complies with the CCA, the question is whether it can be described as substantially complying.[17] I do not consider that the substantial compliance threshold would be met if 89.8 per cent of the payment claim is for items that were not authorised under the contract.

[110] In any event (and in addition) it is reasonably arguable that both payment claims are invalid on the basis that a single payment term for payment on completion was expressly agreed in accordance with s 14(2) of the CCA and the payment claims

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15 Note the CCA has been amended since *Jamon Construction Ltd v Bricon Asbestos Ltd* by the Construction Contracts Amendment Act 2015, including the terms of ss 20 and 17, so *Jamon Construction Ltd* needs to be considered with that qualification in mind.

16 *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd* [2019] NZHC 1439 at [187].

17 *Fletcher Construction Co Ltd v Spotless Facility Services (NZ) Ltd* [2020] NZHC 1942 at [80] and [92].

were not issued in accordance with this. Payment Claim 1 has now been paid in full however and so only the validity of Payment Claim 2 needs to be determined.

**Should the statutory demand be set aside on "other grounds"?**

[111] SPI submits that if it is not accepted that there is a substantial dispute as to the validity of the payment claim, the demand ought to be set aside on "other grounds",[18] referring to Associate Judge Smith's discussion in *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd.*[19]

[112] Because I have found it is reasonably arguable that Payment Claim 2 is not valid, I do not need to decide whether it would be appropriate to exercise the discretion under s 290(4)(c) in this case.

**Result**

[113] The statutory demand served on SPI dated 6 May 2021 is set aside.

**Costs**

[114] I reserve costs as I did not hear from the parties on these, although I record my preliminary view that SPI, having succeeded in its application, is entitled to costs on a 2B basis. I expect that costs ought to be able to be agreed but if that is not possible the parties may file memoranda of no more than 5 pages, on behalf of the applicant within 30 working days (taking the holiday break into account) and on behalf of the respondent within 40 working days.

**Associate Judge Sussock**

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18 Companies Act, s 290(4)(c).

19 *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd*, above n16 at [235]–[236].