IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1693
[2017] NZHC 2905

BETWEEN	MARUTI INVESTMENTS LIMITED Applicant
AND	RITELINE ROOFING LIMITED Respondent

Hearing: 22 November 2017

Appearances: Mr Phillip Rice for Applicant
Mr Andrew Swan for Respondent

Judgment: 24 November 2017

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***24.11.17 at 3.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] The background to this case is that the parties entered into a contract in November 2016 pursuant to which the applicant which was intending to construct a house at Blockhouse Bay, Auckland sought and obtained from the respondent, a roofing company, a price to provide the roof on the subject property. The price being acceptable, the parties entered into a contract on 29 November 2016. The respondent as the roofer undertook in terms of the contract to supply and install the roof. The price was to be $22,106.53 for the cost of the roof together with a variation by adding an upgrade in the colour of the roof at a cost of $1,877.26.

[2] I shall refer to other aspects of the parties' contract further on in this judgment.

[3] The roof was duly constructed. Thereafter a dispute developed between the parties. Mr Happy a director and shareholder of the respondent says that in early December 2016 prior to carrying out the installation he undertook two site measures of the property at which time he says it was discovered that the actual roof size was greater than provided for on the plans by approximately 73 metres. He said he advised the applicant through its project manager, Mr A Kumar, of the size cost difference and said that there would be an extra cost for the "addition services based on the standard square metre rate". Mr Happy said:

> The applicant, through Mr Kumar, accepted that the actual roof size was greater than on the plans and authorized the respondent to proceed with the installation and agreed that the applicant would sort out the difference but needed roof on asap.

[4] Subsequently Mr Happy says that the respondent invoiced the applicant in the sum of $3,981.02 for the claimed additional costs and when those were not paid also charged interest under the contract. Further he deposed that the respondent had incurred "collection costs".

[5] Mr Happy was of the belief that could be no dispute over the debt. He said the roof area was greater than provided for on the plans and the applicant agreed to pay the additional costs.

[6] Mr Tailor who was a director of the applicant also gave an affidavit. He produced a copy of the contract that his company had entered into with the respondent. He says that a full set of plans was provided to the respondent prior to the work being undertaken and that the property (by which I understand him to mean the property as built) was slightly smaller than those plans. His assertion therefore is that the roof which the respondent was obliged to construct under the contract was slightly smaller than that which the plans might have indicated. He denied therefore that the roof was larger than anticipated. He produced a copy of the additional invoice which the respondent had charged for the roof. He noted that on that invoice which was dated 20 December 2016 the statement was made that the:

> Invoice was:
>
> For the additional metres of materials and labour due to the increased building size comparative the plans provided. As per our quote our estimate is based on the plans provided. The actual house on site is larger than the plans, so extra meterage has not been allowed in the quote. Aaron had discussed this issue with Ash at the time of measuring the house.

[7] I understand that "Aaron" was the employee of the respondent who carried out the measuring and "Ash" was the project manager for the applicant.

[8] Mr Tailor produced correspondence showing that the applicant had disputed the entitlement of the respondent to charge for an alleged addition to the roof size. Emails were produced apparently from around about July 2017 (although they were not all dated). In the first of these Mr Tailor emailed the respondent company and made the statement that the measurement (I assume of the roof as-built) was smaller than the plans stipulated and that he did not therefore understand how the respondent could be claiming for additional metres. He said that if there was any variance "it would be shorter" by which he apparently meant that the roof was actually less square meterage than the respondent was now claiming.

[9] In a further email dated 9 July 2017 to the debt collection agency that the respondent had instructed, the applicant said that a full set of plans had been provided to the respondent "so there should have been no mistakes when quoting this job". Whether there was any response to these emails is not clear, but if so, it was not exhibited to the affidavit of Mr Tailor.

[10] Then on 10 July 2017 the respondent served a statutory demand on the applicant in the amount of $5,746.26. The demand included the amount of the invoice for variations, $3,981.02 and various other costs including interest and collection fees. Mr Swan told me at the hearing that notwithstanding the amount claimed in the statutory demand the correct amount which the respondent now said the applicant was indebted to it in was the sum of $5,298.76.

[11] Mr Rice, who was only instructed in this matter shortly before the hearing, told me that the ground upon which the applicant seeks to set aside the statutory demand is under s 290 (4)(a) of the Companies Act 1993, that is on the ground that there is a substantial dispute as to whether the debt is payable. Both Mr Rice and Mr Swan made brief reference to the references to the principles which govern applications of this kind. Both counsel were essentially in agreement with the principles that were summarised in the memorandum of the applicant as follows:

> 15. Under s 290(4) of the Act the Court may set aside a statutory demand where it is satisfied that:
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> (a) There is a substantial dispute whether or not the debt is owing or is due; or
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> (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 $1,000; or
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> (c) The demand ought to be set aside on other grounds.
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> 16. The general principles applicable to applications under section 290(4) of the Act, as summarised in *Trinity Hills Retreat Ltd v Kroehl*,[1] are as follows:
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> (a) An applicant must show that there is arguably a genuine and substantial dispute as to the existence of the debt.
>
> (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.
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> (c) If such material is available, the dispute should normally be resolved other than by means of proceedings in the Court's Companies Act jurisdiction.
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> (d) An applicant must establish that any counterclaim, cross demand or set-off is reasonably arguable in all the

[1] *Trinity Hills Retreat Ltd v Kroehl* HC Nelson CIV-2010-442-101, 12 August 2010 at [5].

> circumstances. The obligation is not to prove the actual claim. Such an obligation would amount to the dispute itself being tried on the application.
>
> (e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise.

[12] I accept the correctness of the foregoing submission.

[13] The question then is whether there is a substantial dispute about extra charges based upon the increased size in the roof which the respondent relies upon is justification.

[14] Mr Swan referred to clause 4.3 of the contract which conferred on the respondent an entitlement to increase the price:

> By the amount of any reasonable increase in the cost of supply of the roofing services that is beyond our control, between the date of the contract and the supply of the roofing service.

[15] He also referred to the entitlement of the respondent to alter the quotation because of circumstances beyond its control. As well, again in clause 5 of the contract as with the provision just referred to, there was included an entitlement "where roofing services are required in addition to the quotation" to charge for them. He also referred me to the fact that interest charges could be charged under the contract.

[16] Mr Rice said that in this case there was a disputed substance as to whether the variation to the charges was properly claimable. In the first place, he referred to the fact that the quotation which had been provided stated "based on plans provided".

[17] He drew attention to the fact that clause 4.1 of the contract provided:

> 4.1 The price of the roofing services is the cost, as agreed between you and us.

[18] Mr Rice referred to the emails which his client had sent to the respondent and its debt collector which asserted that the respondent should have told the applicant

about any variation before the roof was put on.[2] Inferentially, this supports the view that the applicant did not accept that there was an agreement before construction started that there would need to be an increase in the cost of the roof because of an unanticipated larger area to be roofed. I have already referred to the other parts of that email which included the assertion that the roof was actually smaller than that which the plans upon which the contract was based indicated. The applicant also asserted that a full set of the plans had been provided to the respondent so that it was fully informed about the scale of the project and should not have made a mistake.

[19] There are two areas in which I consider there is a substantial dispute in this case.

[20] The first is that the factual background to the parties contracting included the fact that a set of the plans with the dimensions of the roof marked upon it were supplied to the respondent. Plainly that was for the purpose of the respondent costing the project out before providing its estimate. This was of considerable importance in the contract where there was an express provision that the price was "based on plans provided". There was no reservation in the contract to the respondent entitling it to vary its charges upwards to reflect a subsequent measuring up of the work actually carried out.

[21] Further it is at very least arguable that the increase in cost provision which I quoted from the contract which Mr Swan referred me to deals with matters such as suppliers passing on increases of costs. It does not fit easily with the idea that if the contractor subsequently measures up the roof and finds he has made a mistake in quoting, then the increase in cost provision can be prayed in aid.

[22] Another issue is the question of whether there was a oral agreement before the work was started that the job was bigger than the respondent had expected when providing its price for the job. There is at least inferential support in the documentary evidence which suggests that there was a discussion of some sort between "Aaron" and "Ash" "at the time of measuring the house". However the amended invoice also referred to the assertion by the respondent that:

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[2] Email from Mr Tailor to "Olivia". Undated but probably in July 2017.

> As per our quote our estimate is based on the plans provided. The actual house on site is larger than the plans, so extra meterage has not been allowed in the quote.

[23] In this passage the respondent comes close to suggesting that the contractual price that it gave was only an estimate and that the final price could be varied upward if it was found the roof was bigger than expected. This assertion does not fit comfortably with the contents of the written contract which seemed to provide for a fixed price contract. If it was a fixed price contract, then it was incumbent on the respondent as the contractor to ensure that it knew exactly what it was quoting for. It is at least arguable that once it had signed the contract it was too late to come back subsequently and say that the project turned out to be greater in scale than the respondent had expected.

[24] The issues that I have mentioned in my view justify the conclusion that there is a substantial dispute about the enforceability of the claim which the respondent has brought by way of a statutory demand. In my view the statutory demand should be set aside and there will be an order accordingly.

[25] The next issue concerns costs. Both counsel were agreed that costs on a 2B basis would be appropriate. I consider that the respondent should pay 2B costs to the applicant, subject to what I say next.

[26] The applicant has not complied with requirements of the Court Rules. In particular a bundle of documents was not provided. This in my view brings the case within HCR 14.7(f) or (g). There should, in my view, be a reduction in the amount of 2B costs by 50% to reflect the Court's disapproval of the non-compliance with the timetable directions in this case. As well the applicant is entitled to disbursements to be approved by the Registrar.

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J.P. Doogue
Associate Judge