IN THE COURT OF APPEAL OF NEW ZEALAND

CA444/2014
[2014] NZCA 564

BETWEEN	WATTS & HUGHES CONSTRUCTION LIMITED Appellant
AND	COMPLETE SITEWORKS COMPANY LIMITED Respondent

Hearing: 11 November 2014

Court: Wild, Simon France and Asher JJ

Counsel: G J Kohler QC and R E Catley for Appellant
C L Bryant and G J Luen for Respondent

Judgment: 26 November 2014 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent's actual and reasonable costs of the appeal with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This appeal is against a judgment of Associate Judge Smith delivered on 31 July 2014 refusing an application to set aside a statutory demand the respondent

(Siteworks) had issued to the appellant (Watts & Hughes).[1] The Associate Judge ordered Watts & Hughes to pay Siteworks $306,077.23 within seven days of the judgment, failing which Siteworks could apply to put Watts & Hughes into liquidation.

[2] The statutory demand and the sum ordered to be paid arise from non-payment by Watts & Hughes of a progress payment claim made by Siteworks under a construction subcontract agreement (the subcontract).

[3] There is no real dispute as to what happened. Counsel agree that the core legal issue for decision is: what does cl 5, and in particular cl 5(b), of the subcontract mean?

[4] In addition to his interpretation argument on cl 5(b), Mr Kohler QC advanced for Watts & Hughes two further arguments. Neither of these had been put to the Associate Judge in the High Court, but both were points included in the Notice of Appeal. We deal with these points in [39] to [47] below.

The Construction Contracts Act 2002 and the subcontract

[5] P D Sloan (Sloan) contracted with Watts & Hughes as head contractor to build a supermarket in Ferrymead in Christchurch.

[6] On 30 July 2013 Watts & Hughes subcontracted the construction of the supermarket carpark to Siteworks. The subcontract comprised the Master Builders standard form of subcontract agreement (SC1/June 2003) which incorporated the "full intent and meaning" of the Head Contract (the New Zealand Standard "Conditions of Contract for Building and Civil Engineering Construction" NZS3910:2003).

[7] Section 12 of the Construction Contracts Act 2002 (the Act) provides: "This Act has effect despite any provision to the contrary in any agreement or contract." The parties thus accept the subcontract was governed by the Act.

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1 *Watts & Hughes Construction Ltd v Complete Siteworks Co Ltd* [2014] NZHC 1797 [High Court judgment].

[8] However, s 14 of the Act provides that the parties to a construction contract "are free to agree between themselves on" the progress payment provisions in the contract. The subcontract contains such provisions. They are at the heart of this appeal. As Mr Kohler accepted, the default provisions, ss 16–18 of the Act, are accordingly displaced by the progress payment provisions in the subcontract.

[9] Sub-part 3 of pt 2 of the Act contains ss 19–24 which stipulate the procedure for making and responding to payment claims. There are in the subcontract agreement provisions which mirror those sections.

[10] The provisions in the subcontract relevant to this appeal are:

> …
>
> **PAYMENT**
>
> **Subcontractor's claims**
>
> 5 (a) …
>
> (b) The Subcontractor shall submit monthly Payment Claims for work carried out or on such other basis as is specified in clause 19 or at such other interval(s) specified in clause 19. Each Payment Claim shall be submitted so as to be received on the Due Date specified in Schedule 1 (the first Payment Claim may be for a period less than one month or less than such other interval(s) specified in clause 19). Where a Payment Claim is received after the claim Due Date the Contractor may at its sole discretion elect to treat that Payment Claim as having been received (and having been due for receipt) on the next claim Due Date.
>
> (c) Each Payment Claim submitted by the Subcontractor under clause 5(b) is deemed a "payment claim" and the amount specified for payment deemed the "claimed amount" for the purposes of [the Act]. …
>
> **Assessment of claim**
>
> …
>
> **Claim Response**
>
> (g) The Contractor may respond to a Payment Claim by providing a Payment Schedule (which is deemed a "payment schedule" for the purposes of [the Act]) to the Subcontractor. The Payment Schedule must be provided within 22 Working Days after the Due Date for receipt of the Payment Claim by the Contractor. The Payment Schedule shall contain all the

information contained in the sample Payment Schedule set out in Appendix 2.

(h) If the Contractor does not respond to a Payment Claim by providing a Payment Schedule by the expiry of the said period in clause 5(g) then the Contractor becomes liable to pay the claimed amount in the Payment Claim. If a Payment Schedule is provided by the expiry of the said period then the Contractor becomes liable to pay the scheduled amount in the Payment Schedule to the Subcontractor.

Date for payment

(i) The amount due for payment shall become payable and a debt due to the Subcontractor as follows:

(i) In the case of a Payment Claim, 22 Working Days after the Due Date for receipt of the claim.

…

…

SPECIAL CONDITIONS

19. The special conditions including the "Miscellaneous" section as defined in Schedule 1 shall apply notwithstanding anything hereinbefore contained.

Schedule 1 contained this clause:

5. **PAYMENTS**

5(b) Due Date for receiving the first Payment Claim is: 25 July 2013 and the Due Date for each subsequent Payment Claim will be the same day of each relevant month.

What happened

[11] Up to the end of January 2014 Siteworks submitted five payment claims to Watts & Hughes under the subcontract. Four of those were submitted after the Due Date provided for (via cl 19) in Schedule 1 – that is, after the 25th of the relevant month. Watts & Hughes nevertheless treated each of them as if it had been submitted on the Due Date. It did, however, repeatedly point out to Siteworks the consequences of submitting its payment claims late.

[12] The Due Date for Progress Claim 6 was 25 February 2014. Once again Siteworks submitted its claim late; Watts & Hughes received it on 28 February.

[13] Watts & Hughes did not pay Progress Claim 6. Nor did it respond to the payment claim by providing a Payment Schedule or in any other way, until 11 and 17 April. We detail the responses it gave then in [19] and [20] below.

[14] The Associate Judge had evidence from Siteworks' director, Mr Te Amo, that Watts & Hughes, in late March, purported to remove the "sealing" component of the contract works from Siteworks' subcontract and award that work to a different subcontractor. The relevance of this is that it indicates a souring of contract relations between the parties.

[15] In terms of cl 5(i)(i), Siteworks considered payment of its Progress Claim 6 was due on 27 March, being 22 working days after the Due Date for Progress Claim 6, 25 February 2014. Mr Te Amo deposed he became "very concerned" when Siteworks received neither a Payment Schedule nor any payment from Watts & Hughes. Accordingly, on 2 April, Siteworks used two of its diggers to dig up and stockpile the metal it had laid since 28 February on part of the carpark, so that it could remove it to another site. Mr Te Amo deposed that police, on 3 April, prevented Siteworks from removing the metal from the site.

[16] On 3 April Siteworks became aware of a press release by Watts & Hughes in which it stated:

> … We were under the belief that agreement had been reached and payments would be secured for Mr Te Amo in our February claim. This has not eventuated and deadlines for negotiation have not been met as agreed. We confirm that today we served formal legal proceedings on the developer. …

[17] Mr Te Amo gave evidence he interpreted that press statement as "clear confirmation to me that [Watts & Hughes] had chosen to treat [Progress] Claim 6 as having been received by the 'Due Date' in February 2014 (as it had done with our previous claims)", entitling Siteworks to receive a Payment Schedule and payment of any scheduled amount on 27 March.

[18] Having still not received payment, on 8 April Siteworks served a statutory demand for $306,077.23 on Watts & Hughes. It was Watts & Hughes' application to set aside that demand which the Associate Judge dismissed.

[19] On 11 April Watts & Hughes' solicitors wrote to Siteworks' solicitors advising:

> …
>
> 10. Payment Claim No. 6 was received after the Due Date and so was late. Pursuant to cl 5(b) of the Subcontract above, Watts & Hughes was entitled to treat the Payment Claim as having been received in the next period, and is accordingly treated as having a due date of 25 March 2914.[2] This being the Due Date, Watts & Hughes is not required to respond with a payment schedule until 22 working days after this date, being 29 April 2014.
>
> …

[20] On 17 April Watts & Hughes served a Payment Schedule in respect of Siteworks' Progress Claim 6. The Schedule calculated Watts & Hughes had overpaid Siteworks $77,386.57. That calculated overpayment included $70,531.48 for "damage caused by [Siteworks] before leaving site".

The High Court's judgment

[21] The argument before the Associate Judge differed from that advanced to us by Mr Kohler and Ms Bryant, neither of whom appeared in the High Court. Indeed, the Associate Judge recorded:[3]

> … Neither party had addressed the interpretation of cl 5(b) on the basis that February 25 would be the "default" Due Date for the receipt of payment claim No. 6, and that the only relevant election for Watts & Hughes to make was whether that Due Date should be deemed to be extended to 25 March 2014.

[22] Before the Associate Judge counsel agreed Watts & Hughes' application to set aside the statutory demand turned on whether Watts & Hughes needed to communicate to Siteworks its election to treat the Due Date for Progress Claim 6 as 25 March 2014 and, if yes, whether it had communicated that election. If communication of any election was required, counsel for Watts & Hughes accepted it would have had to be communicated before 27 March 2014, being the date by which Watts & Hughes would have had to provide its Payment Schedule if the Due Date for receipt of Progress Claim 6 had remained 25 February 2014.

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2 Obviously a mistake for 2014.

3 High Court judgment, above n 1, at [35].

[23] Watts & Hughes' argument to the Associate Judge was that cl 5(b) did not require it to communicate its election to Siteworks. Alternatively, if communication of an election under cl 5(b) was required, then non-payment by 27 March coupled with Watts & Hughes' earlier timely provision of Payment Schedules and warnings to Siteworks as to the possible consequences of submitting late payment claims constituted communication of an election to treat the Due Date for receipt of Progress Claim 6 as 25 March 2014.

[24] The Associate Judge thoroughly and accurately analysed the legal principles relating to election. He recorded the parties' acceptance that those principles applied, giving Watts & Hughes the right to elect that the Due Date for Progress Claim 6 would be 25 March 2014.

[25] For four reasons the Associate Judge held Watts & Hughes was required to communicate any election it made under cl 5(b) to treat Progress Claim 6 as having been received on 25 March 2014:

(a) Clause 5(b) did not *automatically* deem a late progress claim to have been received on the next monthly date for submission of payment claims – here 25 March 2014.[4]

(b) Drafting an automatic deeming provision which had that effect would have been easy enough. Instead, cl 5(b) gave Watts & Hughes the option to alter the rule which would otherwise apply.[5]

(c) There is a default position if no election is made: cl 5(h) stipulated Watts & Hughes immediately became liable to pay the amount in the payment claim. Communication of the election is required to avoid that default position.[6]

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4 At [51].
5 At [51].
6 At [53].

(d) Siteworks was entitled to know where it stood on the date for payment: was there or was there not a debt due to it which it could immediately enforce?[7]

[26] Next, the Associate Judge expressed the firm view Watts & Hughes had not communicated to Siteworks any election pursuant to cl 5(b). He rejected Watts & Hughes' submission that its non-payment by 27 March coupled with its previous warnings to Siteworks about the consequences of late payment comprised communication of an election.[8]

[27] As a result of those findings the Associate Judge held Progress Claim 6 had become due and owing by Watts & Hughes to Siteworks on 27 March 2014, leaving Watts & Hughes with no arguable defence to the statutory demand. He accordingly refused to set the demand aside.[9]

Watts & Hughes' argument

[28] As it applied to Siteworks' Progress Claim 6, Mr Kohler submitted cl 5(b) operated in this way:

(a) As Watts & Hughes had received Progress Claim 6 late, it could elect to treat that claim as having been received on the next claim Due Date 25 March 2014, with the result that it was due for payment on the next claim due date, 29 April 2014.

(b) Watts & Hughes did that. Mr Reston of Watts & Hughes deposed he elected to treat Claim No. 6 as received on the next progress claim date, 25 March 2014.

(c) The Associate Judge erred in holding Watts & Hughes needed to communicate that election to Siteworks. Neither cl 5(b) nor the Act required that.

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7 At [57].
8 At [60]–[62].
9 At [62].

(d) Alternatively, if Watts & Hughes did need to communicate its election to Siteworks, then it did so. Its non-response to Siteworks' Progress Claim 6 coupled with its meticulous response to Siteworks' Progress Claims Nos 1–5 and its warnings about the consequences of late claims indicated and communicated to Siteworks an election to treat the late No. 6 claim as one received on 25 March.

(e) If, contrary to (c) and (d), Watts & Hughes was required to communicate its election to Siteworks and failed to do so, then the result is that Progress Claim 6 was invalid. Watts & Hughes' failure to communicate its election would not render Siteworks' non-compliant Progress Claim 6 a compliant one. "Put another way, clause 5(b) did not deem by default that a non-compliant payment claim becomes a compliant one."

(f) What Siteworks then needed to do to submit its Progress Claim 6 validly, was include it in its next payment claim – the claim it needed to submit by Due Date 25 March 2014.

[29] Mr Kohler based this argument on the first part of s 20 of the Act which provides:

> **20 Payment claims**
>
> (1) A payee may serve a payment claim on the payer for each progress payment,—
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> (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, at the end of the relevant period referred to in section 17(2).
>
> (2) A payment claim must—
>
> (a) be in writing; and
>
> (b) contain sufficient details to identify the construction contract to which the progress payment relates; and

(c) identify the construction work and the relevant period to which the progress payment relates; and

(d) indicate 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.

…

[30] Mr Kohler accepted Siteworks' Progress Claim 6 complied with the requirements in s 20(2), but argued it did not comply with s 20(1), in that it was submitted after the Due Date stipulated in the subcontract. That rendered the claim invalid, and it is only when a valid payment claim is submitted that ss 21 and 22 of the Act apply.

Our view

[31] We do not accept Mr Kohler's interpretation of cl 5, in particular of cl 5(b). We consider the interpretation advanced by Ms Bryant is the correct one, and largely for the reasons she gave. To summarise, we consider cl 5 operates in the following way:

(a) Clause 5(b) required Siteworks to submit its Progress Claim 6 to Watts & Hughes by the Due Date, 25 February 2014. The aim of the words in cl 5(b) "so as to be received on the Due Date specified in Schedule 1" is to permit submission of a progress claim earlier than the Due Date, but to deem such earlier claim a claim received on the Due Date. That interpretation is necessary because cl 5(g) and (i), respectively, require a claim response and payment 22 Working Days after the Due Date.

(b) Clause 5(b) uses mandatory language – "shall submit" and "shall be submitted". Notwithstanding that mandatory language, a payment claim received after Due Date is a valid payment claim. There are three reasons for that. First, that interpretation is consistent with the more permissive language in s 20(1) of the Act – "may serve a

payment claim … at the end of the relevant period … specified in or … determined in accordance with the terms of, the contract". Secondly, it follows from cl 5(c), which deems each payment claim received under cl 5(b) to be a "payment claim" for the purposes of the Act. Clause 5(b) deals both with payment claims submitted on the Due Date and payment claims received after the claim Due Date. Thirdly, Mr Kohler's argument that payment claims submitted late are invalid renders the election cl 5(b) gave Watts & Hughes nugatory. As Mr Kohler accepted, his argument is that exercise of that election by Watts & Hughes renders the invalid late payment claim valid. Ms Bryant pointed to the fundamental difficulty in submitting that an election can somehow "revive" or breath life into a claim that was never valid to begin with.

(c) The consequence of Siteworks submitting its Progress Claim 6 to Watts & Hughes late (that is, after the Due Date 25 February 2014) was:

- *not* to render that claim invalid, but

- to give Watts & Hughes the discretion to elect to treat that claim as having been received on 25 March 2014.

(d) In order to give effect to any election it made under cl 5(b), Watts & Hughes needed to communicate that election to Siteworks. That is because the cl 5(b) election "consists of making an unequivocal choice and communicating that choice to the other party to the contract". Those words come from the excellent summary of the principles relating to the doctrine of election in the judgment of Associate Judge Abbott in *North Holdings Development Ltd v Kim*.[10] Associate Judge Smith adopted that summary in [45] of his judgment. We also endorse it as comprehensive and accurate.

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[10] *North Holdings Development Ltd v Kim* HC Auckland CIV-2010-404-4261, 16 August 2011 at [37].

(e) Watts & Hughes needed to communicate any election by 27 March 2014, the last day on which it could have served a Payment Schedule. As it did not communicate any election or serve a Payment Schedule by 27 March, it became liable to pay Progress Claim 6, in terms of cl 5(h) of the subcontract and s 22 of the Act. The subcontract, by its terms, thus terminated Watts & Hughes' ability to make the election cl 5(b) gave it. It is thus unnecessary to resort to the general law. But this is an instance of the following situation described by Goff LJ in his judgment in *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India (The Kanchenjunga)*:[11]

> In all cases, [the party having the right to elect] has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come where the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it.

[32] As this Court observed in *George Developments Ltd v Canam Construction Ltd (Canam)*, analysis of a construction contract must be undertaken with the purpose of the Act in mind.[12] This Court endorsed that approach in its very recent judgment in *Sol Trustees Ltd v Giles Civil Ltd*.[13] We consider the interpretation just set out is consistent with the purposes set out in s 3 of the Act which include:

(a) to facilitate regular and timely payments between the parties to a construction contract; and

…

(c) to provide remedies for the recovery of payments under a construction contract.

[33] The Draconian consequences for Watts & Hughes of not serving a Payment Schedule by 27 March ((e) in [31] above) are confirmed by two judgments in

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11 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 (HL) at 398 [*The Kanchenjunga*]. The Associate Judge cited this passage in the High Court judgment, above n 1, at [44].

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

13 *SOL Trustees Ltd v Giles Civil Ltd* [2014] NZCA 539 at [23]–[25].

particular. The first is the decision of this Court in *Salem Ltd v Top End Homes Ltd*.[14] Delivering this Court's judgment Panckhurst J stated:

> 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 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 referred to earlier 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.

[34] Second is the judgment of the High Court in *Marsden Villas Ltd v Wooding Construction Ltd*.[15] Toward the end of his judgment Asher J explained:

> [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 *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.

[35] One concern about the workability of the interpretation we have set out in [31] above was aired in the course of argument. Here, Siteworks submitted its Progress Claim 6 on Friday 28 February 2014. That was three working days late. But what if Siteworks had submitted the claim very late, or actually on the date for payment? And what if that date for payment had been a Saturday or a Sunday or a holiday?

[36] But for the subcontract agreement, s 22(b)(ii) of the Act would take care of this situation because it provides Watts & Hughes becomes liable to pay the claimed amount "20 working days after the payment claim is *served*" (our emphasis). However, the effect of cl 5(i)(i) was that Progress Claim 6 became payable and a debt due to Siteworks "22 Working Days after the *Due Date for receipt of the claim*" (again, our emphasis).

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[14] *Salem Ltd v Top End Homes Ltd* CA169/05, 12 December 2005 at [22].
[15] *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC).

[37] Watts & Hughes needed to make its own progress claims on Sloan. Given the Act proscribes "only pay when paid" provisions in a construction contract, Watts & Hughes needed to include its subcontractors' progress claims in its own progress claims on Sloan.[16]

[38] To reflect that situation and protect itself, Watts & Hughes could have given Siteworks a notice to the effect:

> We have not received your progress claim for Due Date 25 February 2014. We need to submit our own progress claim to Sloan today. Accordingly, pursuant to cl 5(b) of the subcontract, any payment claim you submit for Due Date 25 February will be treated as received on 25 March.

Or the message could have been simpler:

> Any payment claim you submit for Due Date 25 February will now be treated as having been received on 25 March.

Watts & Hughes could have given that advice to Siteworks in an email.

Work undone

[39] In [15] above we mentioned that Siteworks, on 2 April, dug up some of the metal it had laid on the carpark. It accepts it did that. There were photographs in evidence showing what it did.

[40] Mr Kohler argued this action debarred Siteworks from making its Progress Claim 6. This was not an argument Watts & Hughes made in the High Court. Its foundation rested on the words we have italicised in this opening part of cl 5(b): "the subcontractor shall submit monthly Payment Claims *for work carried out* ...".

[41] Mr Kohler argued that Siteworks had not "carried out" the work for which it claimed in Progress Claim 6, because it had on 2 April undone that work.

[42] For three reasons, we reject this argument:

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[16] Construction Contracts Act 2002, s 13.

(a) It lacks an evidentiary foundation. In the Payment Schedule 6 Watts & Hughes provided in response to Siteworks' Progress Claim 6 dated 31 March 2014, Watts & Hughes does not dispute that Siteworks had done the work claimed for in Progress Claim 6.

(b) In that Payment Schedule 6 dated 31 March 2014 Watts & Hughes assesses at $70,531.48 the damage caused by Siteworks' actions on 2 April. Even if that figure is accurate, it is only about one quarter of the $306,077.23 Siteworks claimed in its Progress Claim 6.

(c) If Watts & Hughes has a counterclaim in respect of damage done on 2 April, then it must bring it as a separate claim. Section 79 of the Act proscribes the Court giving effect to any counterclaim or set-off other than a set-off where judgment has been entered for a liquidated amount. Watts & Hughes has obtained no such judgment.

Demand should be set aside on other grounds

[43] In the event that nothing in the Act "responds to this situation", Mr Kohler called in aid s 290(4)(c) of the Companies Act 1993 which provides:

> **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-
>
> …
>
> (c) the demand ought to be set aside on other grounds.

[44] Mr Kohler referred to the two affidavits filed in the High Court by Mr Reston, a quantity surveyor employed by Watts & Hughes. In those affidavits Mr Reston describes what Mr Kohler termed "the underlying dispute that affected Complete Siteworks' claim". He gave as an example the fact that the engineer to the head contract did not accept Siteworks was entitled to claim based on rates for new construction in respect of the entire carpark. As we understand the dispute, it is that some of the new carpark was already an existing carpark which had been compacted

and sealed. The engineer considers a lower rate applies to that area, as opposed to the remaining area being developed for carparking from scratch.

[45] This argument is referred to in Watts & Hughes' application to set aside the statutory demand and the affidavits supporting it. But for some reason it is not referred to in the judgment of the Associate Judge, so we do not have the benefit of his views.

[46] We agree with Ms Bryant's submission that it is not a reason for setting aside the statutory demand. Ms Bryant submitted Mr Kohler is attempting to rely on a dispute between Sloan and Watts & Hughes. This seems to us to be correct because Mr Reston deposed in his (first) affidavit sworn on 23 April 2014:

> 9. [Siteworks'] actions [on 2 April] stemmed from an underlying dispute involving the interpretation and application of a priced "matrix" of work types submitted in [Siteworks'] tender to [Watts & Hughes] and in turn in [Watts & Hughes'] tender to the Principal. [Watts & Hughes] is seeking clarification of the applicable rates via an adjudication against the Principal under the Construction Contracts Act. …

[47] Even if this was a matter relevant to the subcontract, it was surely a matter Watts & Hughes needed to put in a Payment Schedule provided to Siteworks by 27 March 2014. As it did not do that, it is not appropriate that it be able to advance this matter as a reason for setting aside a statutory demand based on the amount which became payable and a Due Date to Siteworks pursuant to cl 5(i)(i) of the subcontract.

Result

[48] For the reasons we have given, we consider the Associate Judge was correct to dismiss Watts & Hughes' application to set aside the statutory demand. The appeal is accordingly dismissed.

Costs

[49] Not paying Siteworks' Progress Claim 6 by 27 March put Watts & Hughes in breach of ss 22 and 23(1) of the Act. The consequences of that breach, as stipulated

in s 23(2) of the Act, are that Siteworks can recover from Watts & Hughes, as a debt due, in any court, the unpaid portion of the claimed amount and "… the actual and reasonable costs of recovery awarded against the payer by that court".

[50] Consistent with that statutory consequence, Siteworks is entitled to its actual and reasonable costs of this appeal. We order accordingly.

Solicitors:
Sharp Tudhope, Tauranga for Appellant
Hesketh Henry, Auckland for Respondent