

IN THE DISTRICT COURT  
AT CHRISTCHURCH

CIV-2008-009-54

BETWEEN                      ARNOLD JENSEN 2005 LTD  
   Plaintiff

AND                              TREVOR JAMES BILLS  
   First Defendant

AND                              WILLIAM GARY FOSTER  
   JOHN NEVILLE CREIGHTON  
   MALCOLM FINALYSON HOLLEY  
   As Trustees For the Bills Family Trust  
   Second Defendants

Hearing:      21 April 2008

Appearances: C M Gray for Plaintiff  
                         S M Dwight for Defendants

Judgment:    5 June 2008

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**RESERVED JUDGMENT OF JUDGE R E NEAVE**

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**Introduction**

[1] This is an application for Summary Judgment concerning fees rendered for electrical work done in the course of an obviously expensive construction of a residential property at Dyers Pass Road in Christchurch. The plaintiff has made a claim for payment under the Construction Contracts Act 2002 and seeks to recover it. The papers raise a number of issues - essentially relating to questions of poor performance - but in the end most of those issues are not relevant to the enquiry I have to make.

[2] It seems to me the essential issues are:

1. Who are the parties to the contract;

2. Depending on the answer to the first question, has there been valid service of the plaintiff's payment claim under the Construction Contracts Act;
3. If there has been valid service, when was it effected;
4. Has a payment schedule under the Construction Contracts Act been provided by the defendant in time;
5. Is the plaintiff entitled to judgment against both of the defendants or only one, and if only one, which?

### **Facts**

[3] Mr Anthony Robinson is a director of the plaintiff company. He joined Arnold Jensen on 29 May 2006 after leaving his previous employment with Christchurch Electrical Ltd. At the time Christchurch Electrical had been engaged on the building project at 77 Dyers Pass Road and he took that job with him to Arnold Jensen.

[4] The registered proprietors of 77 Dyers Pass Road are William Gary Foster and John Neville Creighton who, together with Mr Holley, are the Trustees of the Bills Family Trust and the second defendants. Although it is not expressly stated in the papers it seems unquestioned that the first defendant Mr Bills and his family were to live in the house and indeed in paragraph 66 of his first affidavit he speaks of 77 Dyers Pass Road as "our home".

[5] The quote from Christchurch Electrical Ltd (hereafter CEL) describes itself as the "Bill (sic) house Design Built and Quote". It is signed on behalf of the architect or client by Mr Bills. The final clause of the agreement and signature are set out as follows:

"I agree to the terms set out in this statement and agree that this contract will be run in conjunction with the Contracts Act (sic) 2002.

Signed            "T J Bills" 21.06.05  
Name:  
On behalf Architect/Client

The copy in evidence was not signed by CEL but it seems clear this was the foundation contract document. Pursuant to the agreement invoices were sent to Mr Bills at the address of PO Box 24243, Eastgate, Christchurch. Some of the CEL payment claims refer to AMC Construction but the Arnold Jensen invoices and claims were sent to Mr Bills at that address.

[6] Cheques were paid in respect of the various invoices on the Bills Family Trust cheque account, for the most part signed by Mr Bills. It seems clear that the plaintiff regarded Mr Bills as the owner and certainly all its dealings were essentially with him except when he was absent overseas and a Mr Ron Major would be the person with whom the plaintiff dealt.

[7] While working at Dyers Pass Road the plaintiff was also asked to do some work at Mr Bills' business address of Gran Marbello International Ltd at Bromley whose PO Box number was the address referred to above. It was to this address that all accounts were sent, according to Mr Robinson at Mr Bills' request. Mr Bills denies this but as all the invoices were sent to that address and there is no evidence of any complaint by Mr Bills it was clearly acceptable to him and effective to bring accounts and correspondence to his attention as the accounts were all subsequently paid until the point of dispute was reached.

[8] When Mr Robinson moved from CEL to the plaintiff there were discussions about the terms on which the work would continue. Essentially there is a dispute between the plaintiff and the defendant as to whether work was to be on a time and materials basis in respect of the costs involved in completing the job. I suspect the parties may have been at cross-purposes at this point however for reasons discussed below I don't believe it is material in this application.

[9] Regardless of the exact basis on which work was carried out it did continue with invoices being rendered and paid, at least in part. Mr Robinson noted that Mr Bills checked each invoice carefully and discussed any queries with him and this has not been disputed by Mr Bills.

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[10] On 31 October 2006 a payment claim was sent to Mr Bills for work completed in October 2006 totalling \$39,198.99 (including GST). This was sent to Mr Bills at the Eastgate post office box address. It did not include a Notice to Residential Occupier and showed a due date of 20 November 2006. Part payment of this invoice was eventually made on 21 December 2006. The remainder of the invoice is part of the subject matter of the dispute.

[11] Mr Bills said he didn't realise the full extent of the amount charged and subsequently telephoned Mr Robinson to advise him the invoice was not acceptable because they were now over the amount that Mr Bills thought had been agreed. Mr Bills said that Mr Robinson agreed to discuss the matter but never showed up. Mr Robinson says he was waiting to hear further from Mr Bills on the topic.

[12] On 30 January 2007 the sixth payment claim was sent to Mr Bills' PO Box 24243 for work done in November 2006 and January 2007, this time for \$43,389.76. Again the Notice to Residential Occupier was omitted. This claim was in addition to the outstanding sum of \$9,198.99 overdue from the previous invoice.

[13] On 7 February 2007 Mr Bills sent an email setting out issues he had with the plaintiff. He raised issues as to the nature of the charging regime, as to quality and whether he had been appropriately charged for some of the time claimed. This email was exhibited as Exhibit F to his affidavit of 27 February 2008. It is noteworthy that the document is expressed in the first person throughout. He says at the end of the first paragraph:

"I believe at this point that I have unfortunately already overpaid you some \$30K!" (my emphasis)

His concluding sentences are:

"I am equally determined that the original terms of our contractual agreement are met. Andrew will no doubt be in touch to arrange a meeting, I would hope in everybody's interests, you give him your full co-operation."  
(Again my emphasis)

That is signed by Mr Bills. It is noteworthy there is no issue raised in that letter as to who the contracting party should be and it is patent on its face that Mr Bills accepts that he is the person who has the contractual arrangements with the plaintiff.

[14] Mr Robinson replied the following day indicating a desire to keep the lines of communication open.

[15] For reasons which are not clear and again unnecessary for me to determine, the dispute simmered on unresolved for several months thereafter. In the end the plaintiffs were effectively removed from the job and other electricians engaged. A good deal of dispute arises as to the standard of workmanship and to what actually has been agreed between the parties. The plaintiff alleges that a number of changes kept being made to the original agreement which in part explains why there were increased costs. In the absence of any resolution of these issues the plaintiff submitted accounts to Baycorp which should not have been done at that stage because it had not yet served valid payment claims.

[16] In response to that action the defendant's solicitors Cavell Leitch Pringle & Boyle (hereafter "Cavell Leitch") wrote to the plaintiff on the 6 June. That appears to be the first reference to the allegation that Mr Bills was not contracting in his personal capacity and that he (as opposed to some other party) had never engaged the plaintiff to carry out work for him. That letter, one has to say, is directly in contradiction of the first defendant's letter of 7 February.

[17] No doubt as a result of that letter, the fifth and sixth payment claims were re-sent by the plaintiff on the 20 August 2007 with the requisite notice to Residential Occupier to PO Box 24243, Eastgate, Christchurch. Unfortunately Mr Bills appears to have been overseas at that time. Whilst he was absent it appears mail was being cleared from his residential address (and by inference opened), but was being cleared from the post office box but not opened. That seems to me to be a risk that Mr Bills ran. By the time he returned to New Zealand and cleared the mail from the post office box, the time for disputing the payment claim made by the plaintiff had expired. Notwithstanding that, Cavell Leitch lodged a payment schedule on the 5 November which seems to comply with the requirements of the Construction

Contracts Act in all matters but as to the timing of it. Both Cavell Leitch's letter of 6 June and the payment schedule raise the issue of whether Mr Bills is contracting in his personal capacity.

### Summary Judgment Principles

[18] The general principles underlying Summary Judgments have been discussed in numerous cases and are helpfully summarised in *Jowada Holdings Ltd v Cullen Investments Ltd* (CA 248/02 5 June 2003 per McGrath J at para [28]):

[28] In order to obtain summary judgment under r 136 of the High Court Rules a plaintiff must satisfy the court that the defendant has no defence to its claim. In essence, the court must be persuaded that on the material before the court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the court, to the extent that the court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the court has been satisfied there is no defence r 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and unexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the court including *Pemberton v Chappell* (1987) NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.

[19] The onus is on the party seeking the Summary Judgment to establish on the balance of probabilities that there is no arguable or bona fide defence or, to put it another way, that there is no reasonable ground of defence.

[20] While there are numerous arguments raised on the papers and while there are clear factual disputes, for reasons that will be given below they are not material to the central issues in this case. Given the scheme of the Construction Contracts Act 2002 which I will turn to shortly, many of the issues raised are in fact irrelevant to the essential enquiries required under the Act in respect of payment claims. For the reasons given below if the payment claim has been appropriately made and not met with an appropriate response within the statutory time-frame the plaintiff will be

entitled to Summary Judgment. I therefore turn to the Construction Contracts Act 2002 as the principles under that Act are, to my mind, determinative of this claim.

### **Construction Contracts Act 2002**

[21] Consideration of the facts and issues has to be viewed against the background of the statutory regime provided by the Construction Contracts Act 2002. The general philosophy underlying the statute and relevant principles are admirably set out in the judgment of Asher J in *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 and I would not presume to improve upon it, in particular the discussion between para [9] and [18] of the judgment and I adopt those principles, in particular paragraphs [16] and [17].

[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 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, the principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cash flow.

[22] The underlying philosophy is that prompt payment should be the norm in contracts of this type as His Honour observed at para [12]:

"In *Gilbert-Ash (Northern Ltd) v Modern Engineering (Bristol) Ltd* [1974] AC 689, 716 the House of Lords quoted Lord Denning in the Court below:

“there must be a cash flow “in the building trade”. It is the very life blood of the enterprise.” This was quoted with approval by the New Zealand Court of Appeal in *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 at para 41”.

[23] An elaborate structure is set up by the Act to resolve any disputes. Payment pursuant to a payment claim does not override any disputes that the parties may have or rights the payer may have (and which may subsequently be upheld). It simply means that they have to be dealt with at another time if no proper response is made to a payment claim. Payment is therefore effectively without prejudice to the rights of the parties in any ultimate reconciliation of outstanding amounts and issues.

[24] In this case, once a payment claim was sent and the time for response elapsed, there was an obligation on the defendants to make the payment regardless of whether there were outstanding issues as to performance.

#### **Identity of Defendant**

[25] The next issue is the identity of the contracting parties. Effectively the allegation is that Mr Bills incurred no personal liability but was the agent of the Trust. He was not a trustee (one assumes he is a beneficiary) but that does not matter. He must either be contracting in his own name or on behalf of some other entity which is the principal. As there is no issue of him being a trustee this is not a case of a trustee having personal liability regardless of whether or not he is acting on behalf of the Trust or in his own interests. If Mr Bills is not acting on his own behalf he would have to be an agent.

[26] It is clear that the payment claims were sent to Mr Bills as the Residential Occupier. Although it is not expressed in the Act it seems clear from the scheme of the legislation that the Residential Occupier can be the payer notwithstanding the contractual niceties that may exist. As the person or persons obtaining the benefit of the construction work obviously it is fair and reasonable that Residential Occupier should be required to make payment. It is clearly a further protection for the contractor to ensure that the contractor receives the money and avoids the likelihood of the contractor being trapped by any grey areas that may be caused by corporate liability.



[27] The issue is whether Mr Bills entered the contract as the client or on behalf of someone else. It is clear the majority of the dealings are with Mr Bills. The cheques, although on the Trust's bank account, were in response to invoices sent to Mr Bills without query. Notwithstanding he is not a trustee, Mr Bills is clearly a signatory of the Trust account as he seems to have signed the cheques. The letter of 7 February raises a number of issues from him which do not purport to be on behalf of the Trust. He is the Residential Occupier.

[28] The first mention of the allegation that he is not contracting in any personal sense but on behalf of the Trust occurs on 6 June 2007 when his solicitors wrote to Baycorp.

[29] Moreover, I note a letter from Teltrac, another contractor on the building project, which was annexed to Mr Bills' affidavit of 27 February 2008 as Exhibit M (the letter being to show difficulties allegedly the result of the plaintiff's work). The contractor in that case equally describes dealing with Mr Bills personally, in spite of reference to the Bills Family Trust residence. Clearly the Trust doesn't reside there, Mr Bills does as noted above. The letter also refers to all variations and discussions and approval by Mr Bills or his agent, Mr Major. It refers to a direct relationship between Mr Bills and not with the family trust. At no stage prior to the letter of 6 June does there ever appear a suggestion that Mr Bills is contracting as an agent rather than as a principal.

[30] Further there is no evidence that he ever made the plaintiff aware of the existence of his alleged principal at the time he entered into the contract. I have already noted that the contract is signed by Mr Bills as the architect/client and the contract appears to be personal to him.

[31] Mr Bills in his affidavit says somewhat blandly that it was the Trust that engaged CEL to carry out the electrical work. There is no evidence of any mention of the Trust until the cheques are signed and CEL's payment claims are directed to Mr Bills personally, not on behalf of the Trust, and are paid without objection by Mr Bills.

[32] Even if the Trust were the contracting party on the evidence it seems to have been an undisclosed principal at the time of the entry into the contract. Mr Bills is therefore equally personally liable (see Bowstead & Reynolds on Agency, 18<sup>th</sup> Edition, para 9-006 et seq and the cases referred to therein). However, I am satisfied on the evidence there is no arguable case that Mr Bills was contracting other than on his own behalf.

#### **Service of the Payment Claim**

[33] The next issue was: regardless of who the contracting parties are, was the payment claim sent to a valid address for the purposes of notice?

[34] The contract appears to make no provision for an address for service. On the other hand s 80 of the Construction Contracts Act 2002 provides:

##### 80 Service of notices

Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if—

- (a) the notice or document is delivered to that person; or
- (b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
- (c) the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or
- (d) the notice or document is sent in the prescribed manner (if any).

It should be noted that the section is not prescriptive but rather is illustrative of the method of service. In effect what is required is service which is likely to be effective. In any event if Mr Bills is the contracting party the document has been clearly sent to his usual or last known place of business. The absence of any suggestion of a suitable address for the Trust is perhaps a further indication as to who the contacting parties are. Furthermore the notices that were sent were delivered to the address which had previously been effective to elicit payments. The plaintiff says the address was where it was requested to send the documents, even though Mr Bills denies this is the case. That address had always been effective in the past. Furthermore there is no evidence of him ever having objected to the use of that address for that purpose.

On his own admission at paragraph 26 of his affidavit they were sent to his office. He made no arrangements for mail to be cleared and opened notwithstanding his absence from the country at the material time. That is simply a risk which he assumed.

[35] The payment claim was therefore sent with the correct attachments on 20 August 2007. In accordance with the Act either payment or a payment schedule needed to be provided within 20 working days of service. By my calculations this would have expired no later than 18 September 2007. The payment schedule was not received until 5 November 2007 and is therefore out of time.

### **Conclusion**

[36] It therefore seems to me there is no arguable defence to the claim that a valid payment schedule was sent to Mr Bills. No response was received in the time prescribed in the legislation. The plaintiff must therefore be entitled to judgment against Mr Bills personally in respect of that payment claim. Given the scheme of the Act the fact that there may be disputes as to quantum does not effect Mr Bills primary liability to make the payment. Not only is this Court not currently in a position to resolve the disputed issues under legislation, it is not necessarily the forum to do so. I do not propose to dismiss the claim against the second defendants or to deal with the counter-claim issue because they all need to be determined under the Disputes Resolution clauses in the legislation and the matter may be referred to the Court. Any issues arising out of the performance questions and the like must all await the Dispute Resolution powers under the Act.

[37] There will be judgment for the plaintiff against the first defendant in the sum of \$52,579.75 together with interest at the District Courts Act rate from the date of expiry of the invoices. As interest at the rate specified in the invoices was not agreed in the contract between the parties it is not awarded. The plaintiff is entitled to the actual and reasonable costs of recovery (see s 23(2)(a)(ii) Construction Contracts Act 2002). The plaintiff is to provide a schedule of costs for approval.

R E Neave  
District Court Judge