IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-003421

BETWEEN	BEVAN CHARLES BERG Appellant
AND	FRANIX CONSTRUCTION LIMITED Respondent

Hearing: 24 September 2008

Appearances: F Deliu and S Barron for the Appellant
J Ropati for the Respondent

Judgment: 24 September 2008

[ORAL] JUDGMENT OF WYLIE J

Solicitors:

Equity Law, P O Box 8333, Symonds Street, Auckland 1150
J Ropati, P O Box 37 396, Parnell, Auckland

[1] This is an appeal from a reserved judgment of Judge G V Hubble in the District Court at Auckland delivered on 22 May 2008.

Factual background

[2] On or about 30 October 2007, the respondent submitted a written quote to the appellant to remove existing decking and hand rails, rebuild a deck and recycle existing structural timbers where possible, and finish the deck with a hard wood of the appellant's choice on a property situated at Bean Place, Mt Wellington. The respondent was also to reinstate the hand-rail to the deck, and supply and fit new hand-rail capping. The quote was in the sum of $13,000. The quote signalled that once the existing decking had been removed, the respondent would assess deterioration of existing waterproof membranes, and replace those membranes. The respondent was also to assess the full extent of repairs required to a water damaged ceiling, and an estimate of $9,000 was given in relation to these aspects of the work.

[3] It was noted in the quotation that invoices would be submitted weekly, that they would be issued in compliance with the Construction Contracts Act 2002 ("the Act"), and that they were payable on receipt.

[4] The appellant accepted this quote on or about 12 November 2007.

[5] Over the next few weeks building work was undertaken, and the appellant made three payments to the respondent totalling some $12,400.

[6] On 11 December 2007, the respondent sent a payment claim to the appellant seeking payment in the sum of $13,712.96. The claim – tax invoice 7162 – was for some unexplained reason dated 15 November 2007. In any event, it is common ground that the invoice was served on the appellant on 11 December 2007.

[7] No payment was made by the appellant, and the respondent issued summary judgment proceedings in the District Court at Auckland on 7 February 2008 to recover the amount it claimed was owing to it. The proceedings were served on the

appellant on or about 13 February 2008. They asserted that the amount claimed by the respondent was a debt due and owing by the appellant to the respondent.

[8] The appellant paid the respondent the sum of $6,546.46 on 5 March 2008. On 7 May 2008, the appellant filed a notice of opposition and a supporting affidavit in relation to the balance of the plaintiff's claim.

[9] The matter came on for hearing before Judge Hubble on 21 May 2008.

District Court's decision

[10] The appellant represented himself before the District Court.

[11] Judge Hubble concluded that the payment claim complied with s 20 of the Construction Contracts Act 2002. The Judge referred to s 18 in his judgment. This was in error as it is clear from the terms of the judgment that he intended to refer to s 20. The Judge noted that in terms of the Act, the appellant was required to respond with a payment schedule either within the time specified in the contract, or within a period of 20 days after the payment claim was served. He considered a letter which the appellant had written to the respondent dated 12 December 2007. By inference, it seems that he considered that that letter did not amount to a payment schedule. He held that an earlier letter the appellant sent to the respondent dated 8 December 2007 pre-dated the payment claim and that in any event it did not comply with the requirements of a payment schedule. As a result, he held that the respondent was entitled to summary judgment. An order was made requiring the appellant to pay to the respondent the sum of $7,366.50 together with interest, and reasonable solicitor/client costs.

The appeal

[12] By notice of appeal dated 11 June 2008, the appellant appealed against the judgment in the District Court. The notice of appeal was filed by the appellant personally and it is difficult to ascertain the precise basis for it. It asserts that the

District Court's judgment was wrong in fact and in law, and that the respondent's application was not able to establish "in law a liability pursuant to subpart 3 of the Act sufficient to justify a judgment" in its favour.

[13] The matter was called before Venning J on 8 July 2008. The appellant failed to appear, and after waiting for him, the Court proceeded to deal with the matter in his absence. *Inter alia*, His Honour required the appellant to file and serve detailed points on appeal by 1 August 2008.

[14] Points on appeal were filed and served on 30 July 2008 by counsel then retained by the appellant. They referred to various aspects of the District Court Judge's decision, and asserted that the Judge erred in law in various respects.

[15] The points on appeal are also not particularly easy to understand. They appear to focus on the District Court Judge's mistaken reference to s 18 of the Act, and on the provisions of s 10A. It was also asserted that the District Court Judge erred in his finding that the letter sent by the appellant to the respondent on 8 December 2007 could not be construed as a payment schedule. Somewhat obliquely, it was suggested that the District Court Judge failed to acknowledge that the appellant was under no obligation or requirement to provide a payment schedule.

[16] Pursuant to Venning J's Minute, the appellant was required to file and serve his submissions by 22 August 2008, and the respondent was required to file and serve its submissions by 29 August 2008.

[17] On the face of it, the appellant initially complied. Detailed submissions were filed by counsel then retained on 22 August 2008. However, the appellant then changed his counsel, and belatedly on 23 September 2008, the day before the hearing, some 76 pages of supplementary submissions and materials were filed by Mr Deliu on behalf of the appellant. Further, when the hearing commenced this morning, a further set of supplementary submissions was filed by Mr Deliu.

[18] Justifiably, Mr Ropati for the respondent protested against the late filing of these submissions, but did not seek an adjournment to address the same.

[19] In the event, I have concluded that in very large part, the supplementary submissions filed by Mr Deliu were irrelevant, and that they contained material of little, if any, assistance to the Court.

The issues

[20] Notwithstanding the wide ranging submissions presented by Mr Deliu, in my view this case be approached on a relatively straightforward basis.

[21] The respondent is seeking to take advantage of the fast track procedure for the payment of debts due under construction contracts provided by the Act. It is entitled to do so. If it wishes to do so, however, it must comply with the requirements imposed by the Act, and in particular with the requirements imposed by s 20. That section deals with payment claims.

[22] It is apparent from the construction contract itself, and it was acknowledged by Mr Ropati, that this case concerns a residential construction contract as defined in the Act. This case throws up for consideration the provisions of s 20(3) of the Act.

[23] The payment claim on which the respondent relies was annexed to an affidavit filed by a Mr Davies in the District Court. Mr Davies is one of the respondent's directors. The payment claim sought $13,912.96, and set out in some detail various items which had been supplied to the respondent. It also referred to labour as per an attached schedule. It seems from Mr Davies' affidavit that the schedule was not annexed to the payment claim when it was served on the appellant on or about 11 December 2007. Nor was a schedule setting out the process for responding to the claim, and explaining the consequences of either not responding, or not paying the claimed amount, as required by s 20(3) of the Act.

[24] The appellant responded promptly to the invoice by letter dated 12 December 2007. It seems this letter was emailed to the respondent and it prompted a return email from the respondent to the appellant, also sent on 12 December 2007. That email referred to the invoice, and it had attached to it the notice required by s 20(3)

outlining the process, and explaining to the appellant the consequences of either not responding to the payment claim or not paying the claimed amount.

[25] Despite submissions I received from Mr Deliu to the contrary, I am not satisfied that there was a failure to supply a labour schedule. Mr Deliu pointed out that the payment claim attached to the affidavit filed in support of the notice for summary judgment did not have attached to it the labour schedule. However, the appellant immediately prior to the hearing in the District Court filed an affidavit which contained all of the materials he said were sent to him, including a payment claim, which did have attached to it the required schedule. Although the copy of this affidavit appearing in the agreed bundle was not sworn, Mr Ropati appeared in the District Court and he confirmed that the affidavit had in fact been sworn and that it had been before the District Court Judge. I assume that it is the document referred to in paragraph [5] of his Honour's decision. For some reason the payment claim contained in this affidavit was in the sum of $14,912.96. That discrepancy cannot be explained on the papers. In any event, it is clear that the appellant did have the labour schedule.

[26] The position in regard to the information required to be provided by s 20(3) is not so clear. It is apparent from the papers filed that it was not provided with the payment on 11 December 2007. Rather it was supplied with the separate email sent on 12 December 2007. The sequence of events was acknowledged by Mr Ropati.

[27] Before considering the provisions of s 20(3), I deal with the general purpose of the Act. It is relevant in considering how the words "it must be accompanied by" contained in s 20(3) should be construed.

Purpose of the Act

[28] The overall scheme of the Act, and in particular the payment and response process, has been considered by the Courts on a number of occasions. I refer to the Court of Appeal's decision in *George Developments Limited v Canam Construction Limited* [2006] 1 NZLR 177, particularly at [41] and [55] which reads as follows:

> [41] We are satisfied that the necessary analysis must be undertaken with the purpose of the Act in mind. The purpose provision of the Act includes the fact that the Act was "to facilitate regular and timely payments between the parties to a construction contract". The importance of such regular and timely payments is well recognised. Lord Denning MR (quoted in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] 3 All ER 195 (HL) at p 214 per Lord Diplock) said: "There must be a 'cash flow' in the building trade. It is the very life blood of the enterprise."
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> ...
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> [55] ... As long as the construction contract provides for the payee to be paid the claimed amount in consideration for its performance of construction work (whether or not the entitlement is contingent on a factor such as an extension of time being granted), the payee is entitled to make a claim for payment in a payment claim. If the payer's stance is vindicated, the particular amount will not have to be paid, but that will not prejudice the entitlement of the payee to be paid the other amounts claimed in the payment claim or invalidate the payment claim as a whole. It is not necessary that every amount claimed in the payment claim can be directly linked to a physical task involved in the construction of the building or structure. The Act was specifically intended to avoid artificial distinctions. Cash flow was intended to be protected by the Act and it is to be interpreted so as to achieve its object of speeding up payments.

[29] I also refer to the judgments of Gendall AJ in *10 Gilmer Limited v Tracer Interiors and Construction Limited* HC Wellington CIV 2005-485-002009, 6 December 2005; Asher J in *Marsden Villas Limited v Building Construction Limited* [2007] 1 NZLR 807 at [16] and [17]; Allan J in *Welsh v Gunac South Auckland Limited* HC AK CIV 2006-404-7877, 11 February 2008 at [11] to [12], and to my own judgment in *Suaniu v Hi-Qual Builders Limited* HC AK CIV 2008-404-001576, 26 June 2008 at [33] to [35].

Section 20(3)

[30] Section 20(3) provides as follows:

> (3) If a payment claim is served on a residential occupier, it must be accompanied by—
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> (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).

[31] As noted, it was common ground that the appellant was a residential occupier. The payment claim served by the respondent was not accompanied by the required outline and explanation. Rather, they followed on the next day. The primary issue in the present case seems to me to be whether or not the failure to comply with s 20(3) by forwarding the required outline and explanation on 12 December 2007 rather than with the payment claim served on 11 December 2007 amounts to more than a "technical quibble" to use the language used by the Court of Appeal in [43] of its decision in *George Developments Limited.*

[32] In that case the Court noted as follows:

> [42] As is noted in Smellie at p 31, "Although [the s 20(2)] requirements are mandatory, technical quibbles that they have not been complied with will probably receive scant attention". The learned author notes the New South Wales case of Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd (2001) 163 FLR 18 where Windeyer J considered the validity of a payment claim under legislation equivalent to the New Zealand Act and said at para 8:
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> > [Counsel] contended that the payment claims served on the plaintiff . . . were ineffective because they did not comply with s 13(2)(a) and (c) of the Act. The arguments were that they contained the incorrect contract number and abbreviated the name of the Act under which the claim was made . . . As to the first, while the contract number may have been wrong in some cases, the claims did identify the work done. The second argument was that because the payment claims abbreviated the name of the Act, they did not fulfil the statutory requirement to name the Act. This argument might have had some weight in 1800. In 2001, an argument based on the absence of the word 'and' and the letters 'ustry' has no merit. It should not have been put."
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> [43] We acknowledge that the approach of this appellant was not as pedantic as those confronting Windeyer J, but the general observation that technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act is critical and needs to be weighed alongside the "technocratic" interpretation advanced by George.

[33] *George Developments* was concerned with the requirements set out in s 20(2). So was *Welsh.*

[39] I am unable to accept Mr Ropati's submissions. In my view the statutory scheme, and the consequences which result for a principal who fails to file a payment schedule, are sufficiently serious to require in mandatory terms that a payment claim is accompanied by the outline and explanation required under s 20(3). The words "accompanied by" used in s 20(3) mean that the information required has to be provided simultaneously with the invoice. While they were decided in very different contexts, I refer to judgments of Elias J (as she then was) in *Ancare New Zealand Limited v Ciba-Ceigy New Zealand Limited* HC Wgtn AP55/95 6 June 1996 and to the judgment of Fisher J in *Wielgus v Minister of Immigration & Anor* [1994] 1 NZLR 73 in this regard. I also refer to the judgment of the Court of Appeal in *Cahayag v The Removal Review Authority & Anor* [1998] 2 NZLR 72.

[40] Nor can I conclude that there has been no prejudice to the appellant. For some unexplained reason the invoice produced by the appellant is for a different, and greater amount, than the invoice in respect of which the respondent seeks summary judgment. The required outline and explanation were not given at the time the payment claim was served. The email of 12 December 2007 did not make the express reference to the outline and explanation which accompanied it. There must be the possibility that the appellant was confused.

[41] In my view, a failure to comply with s 20(3) cannot be regarded as trifling, or as amounting to no more than a technical quibble. I agree with and adopt the reasoning of Allan J in *Welsh*, and note as follows:

a) the Act provides a summary procedure pursuant to which contractors are entitled to obtain regular and timely payments – s 3(a) of the Act;

b) that objective is in large part facilitated by requiring principals, if they are in receipt of a payment claim under the Act, to respond to the claim within 20 working days after service of the payment claim, or within the time stipulated by the relevant construction contract;

c) a principal who fails to respond to a payment claim by serving a payment schedule within the stipulated time becomes liable to pay the amount of the payment claim – s 22 of the Act.

[42] The provisions of the Act are relatively draconian, and in my view it is imperative that residential occupiers have before them all relevant information, so that they can make an informed decision as to how they should respond to a payment claim. The Act uses mandatory language – "must" – in s 20(3) and in my view for good reason. A person served with what purports to be a payment claim should be able to ascertain from the document itself what steps he or she has to take, and what happens if they are not taken.

[43] Here the payment claim did not have attached to it the information required by s 20(3). In my view, it was not a valid payment claim. The invoice dated 11 December 2007 was defective, because it did not comply with s 20(3). Only if a document is a valid payment claim can the principal be obliged to serve a payment schedule in order to avoid liability to pay the amount claimed.

[44] In the event, I have determined that this appeal must be allowed, and that the District Court Judge's decision granting summary judgment to the respondent must be set aside.

[45] The conclusion I have reached makes it unnecessary to deal with the host of other arguments raised by Mr Deliu for the appellant. As I have already indicated, they were, in my view, largely irrelevant.

Costs

[46] I have heard from Mr Barron for the appellant in relation to costs. As the successful party he sought an award of costs on a 2B basis.

[47] I have also heard from Mr Ropati for the respondent. He submits that Equity Law have been the appellant's solicitors on the record since 1 August 2008, that the point on appeal and the various submissions filed by the appellant do not raise the

point on which I have decided this case, and that his client has been put to the expense of having to deal with the larger number of issues raised in the submissions lodged on behalf of the appellant. He sought either that there should be an award of costs in favour of the respondent, or alternatively the costs should lie where they fall.

[48] Normally, of course, costs follow the event and an award will be made in favour of the successful party. I have, however, decided in this case that that course is not appropriate. First, the documents filed either by or on behalf of the appellant are in many respects obtuse. They do not focus on the key issue in this case. Secondly, the submissions were filed very late, and that fact has undoubtedly put the respondent to some difficulty and expense.

[49] On balance, it seems to me that costs should lie where they fall and I so order.

Wylie J