#57

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-001349

BETWEEN	TREVOR JAMES BILLS First Appellant
AND	WILLIAM GARY FOSTER, JOHN NEVILLE CREIGHTON, MALCOLM FINLAYSON HOLLY AS TRUSTEES OF THE BILLS FAMILY TRUST Second Appellants
AND	ARNOLD JENSEN (2005) LIMITED Respondent

Hearing: 27 August 2008

Appearances: S Dwight for Appellants
A Marsh for Respondent

Judgment: 10 October 2008

JUDGMENT OF FOGARTY J

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[1] Mr Trevor Bills and his family are constructing an expensive residential property in Christchurch. The property is owned by trustees for their family trust. The electrical work was estimated at the outset to cost well over $100,000. There is now dispute as to the total cost.

[2] Originally Mr Bills dealt with Mr Tony Robinson who was employed by a company not party to these proceedings, Christchurch Electrical. He obtained a quote from that company. After Christchurch Electrical had done a lot of work rendering invoices totalling $88,000 odd plus GST, Mr Robinson left Christchurch Electrical and joined the plaintiff, Arnold Jensen. At that time Mr Bills said Mr Robinson estimated that the cost to complete the electrical work would be a

further $30,000 approximately, but would not exceed $40,000. Arnold Jensen then began working on the property and invoiced monthly on a time and materials basis. Came the account for work carried out in October, Mr Bills jibbed at the amount that he was paying. He made a payment of $30,000 on account of the invoice dated 31 October but he says disputed the invoice on the basis that the costs he was paying exceeded the agreed maximum of $40,000.

[3] Work continued and there was another invoice for $38,000 odd plus GST sent in January of 2007. On 7 February Mr Bills wrote to Mr Robinson disputing both the October and the January invoices. He appointed Mr Andrew Clarke to review the whole job with a further authority to Mr Clarke to, if necessary, instruct Cavell Leitch Law. He advised that Mr Clarke would be in touch with Mr Robinson/Arnold Jensen to arrange a meeting.

[4] Mr Robinson replied on 8 February offering to meet either Mr Bills or Mr Clarke. There then followed correspondence between Mr Robinson and Mr Clarke which did not resolve the dispute.

[5] On 23 March Mr Clarke advised Mr Robinson that no further payments were going to be made, that in fact $30,000 had been overpaid and that his client did not wish to deal with the matter any more and any communication from Arnold Jensen was to come directly to him.

[6] Arnold Jensen then put the matter in the hands of Baycorp to make demand. After some telephone conversation Baycorp wrote to Mr Bills demanding payment. Cavell Leitch, solicitors for Mr Bills and the trust, wrote to Baycorp on 6 June advising them that the claim was disputed.

[7] Cavell Leitch Law's letter to Baycorp on 6 June ended:

> Could you please ensure any further correspondence is addressed to this office and not to our client direct?

[8] On 19 June Cavell Leitch wrote to Arnold Jensen advising they acted for Mr Bills, referring to the correspondence, including the letter from Baycorp, and protesting that it was inappropriate that the matter be referred to a debt collection

agency. This letter omitted to request that any further correspondence be addressed to Cavell Leitch.

[9] In August Mr Bills went overseas. At some unknown time, probably after June, Arnold Jensen instructed Saunders Robinson Brown. Plainly, those solicitors considered taking advantage of the dispute resolution processes of the Construction Contracts Act 2002, as an alternative to lengthy and costly Court action. The monthly accounts from Arnold Jensen had been accompanied by a payment claim drawn under that statute. But they had omitted to also be accompanied by an explanation of the processes of that Act, this being a requirement in the case of residential contracts, by s 20(3) of the Act.

[10] So, on 20 August Arnold Jensen resent to Mr Bills the last two invoices of October 2006 and January 2007, this time with the complete documentation complying with the Construction Contracts Act. They were sent to his P O Box address. They were not sent to Cavell Leitch or to Mr Clarke.

[11] In late October Mr Bills returned to New Zealand, discovered these payments, provided them to his solicitors, who issued a payment schedule out of time.

[12] Based on non-compliance with the Act the plaintiff moved for summary judgment in the District Court, which was granted, after a hearing, by a reserved judgment of Judge Neave on 5 June 2008. He relied on s 80(b) of the Act. Section 80 provides:

> **80 Service of notices**
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> 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
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> (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
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> (d) the notice or document is sent in the prescribed manner (if any).

[13] The Post Office box had been the regular address for the purpose of sending invoices when the plaintiff and Mr Bills were conducting business in the normal way. He concluded there was no arguable defence to the claim that a valid payment schedule had been sent to Mr Bills, that no response had been received in the time prescribed and so accordingly the plaintiff was entitled to judgment.

[14] Judge Neave's reasoning was driven by the general philosophy underlying the Construction Contracts Act 2002. I set out paragraphs [21]-[24] of his reasoning:

> [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:
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> "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.

[15] It was an oversight or ignorance of the law on the part of Arnold Jensen not to send the explanatory memorandum required in the case of residential contracts. Section 20(3) of the Act provides:

> **20 Payment claims**
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> ...
>
> (3) If a payment claim is served on a residential occupier, it 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)

[16] There is an obvious reason why the processes of the Act are required to be explained to residential homeowners for such persons cannot be expected to know,

as a matter of course, how the statutory regime works under the Construction Contracts Act. They need to know at the time they receive the invoices that there is a "sudden death" regime so that they can be obliged to pay in the interim what is claimed, whatever the merits. Its absence is not a technicality.

[17] The purpose of the Act is set out in s 3 which provides:

> **3 Purpose**
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> The purpose of this Act is to reform the law relating to construction contracts and, in particular,—
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> (a) to facilitate regular and timely payments between the parties to a construction contract; and
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> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.

[18] Section 4 contains an overview which provides:

> **4 Overview**
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> In this Act, -
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> (a) preliminary matters (for example, the interpretation and application of the Act) are set out in sections 5 to 12:
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> (b) provisions invalidating any contractual clause that makes payment to any party to a construction contract conditional on the payer first receiving payment from someone else are set out in section 13:
>
> (c) provisions confirming that parties are free to agree on a mechanism for determining progress payments are set out in section 14:
>
> (d) default provisions granting an entitlement to progress payments, and setting out a statutory mechanism for determining the amount of, and the due date for, those payments, in circumstances where the relevant construction contract is silent on any of those matters are set out in sections 15 to 18:
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> (e) provisions establishing a procedure that allows a party to a construction contract to recover a progress payment by making a payment claim, and the party who is liable for that payment to respond by means of a payment schedule, are set out in sections 19 to 24:

(f) provisions relating to the adjudication of disputes are set out in sections 25 to 71:

(g) provisions granting a party to a construction contract who is owed money under the contract a statutory right to suspend the carrying out of construction work until payment is made are set out in section 72:

(h) provisions enabling an adjudicator's determination to be enforced by entry as a judgment on application to a District Court are set out in sections 73 to 78:

(i) miscellaneous matters (for example, the method of service of notices) are set out in sections 79 to 82.

[19] It may be noted that part of the scheme of the Act is that the parties are free to contract out of this regime.

[20] Mr Marsh for Arnold Jensen submitted that there is no prejudice to the appellants by the fact that the due date for payment of the October and January invoices had passed or by the fact that the s 20 process was initiated late and after the dispute was continuing on 20 August 2007. He submitted that on service of the payment claims (by posting to the Post Office box) the appellants still had 20 working days within which to serve a payment schedule.

[21] Section 21 provides:

21 Payment schedules

(1) A payer may respond to a payment claim by providing a payment schedule to the payee.

(2) A payment schedule must—

(a) be in writing; and

(b) identify the payment claim to which it relates; and

(c) indicate a scheduled amount.

(3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—

(a) the manner in which the payer calculated the scheduled amount; and

(b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and

> (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

[22] Where a payment schedule is sent the obligation is on the principal then to pay the amount specified in the payment schedule that the principal proposes to pay in response to a payment claim. In other words, if the payment claim is for $100 and the principal disputes $30 of the $100 the principal must nonetheless pay $70. See s 24. However, if a payment schedule is not filed within the 20 days then the principal becomes liable to pay the whole of the amount in the invoice. See ss 22 and 23.

[23] The appellant on appeal contended that the payment provisions of the Contracts Construction Act did not apply because there was no provision in the contract entitling Arnold Jensen to progress payments and in the case of a residential construction contract there is no implied right to issue progress claim payments. I agree with Mr Marsh that that argument cannot be sustained.

[24] A progress payment is defined in s 5 of the Act as being:

> **5 Interpretation**
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> In this Act, unless the context otherwise requires, -
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> ...
>
> **progress payment -**
>
> (a) means a payment for construction work carried out under a construction contract that is in the nature of an instalment (whether or not of equal value) of the contract price for the contract (other than an amount that is, or is in the nature of, a deposit under the contract); and
>
> (b) includes any final payment under the contract

[25] If the Act is to work then this provision should be construed liberally. In the circumstances the invoices that were being sent by Arnold Jensen, with the agreement of Mr Bills and his trustees, were in the nature of instalments, even though there was no written contract. The dispute arose not because bills were being rendered but because of the size of the bills.

[26] The second argument raised on appeal was that the payment claims were not validly served by being posted to the Post Office box address. Ms Dwight argued that the alternatives in s 80 (b) and (c) did not include a Post Office box address. Before Judge Neave, Arnold Jensen had relied on the decision of Baragwanath J in *Hieber and Ors v Commissioner of Inland Revenue* (2002) 20 NZTC 17,774 where the High Court held that a notice under the Tax Administration Act 1994 had been validly sent to the taxpayers "*usual or last known place of abode or business*" when it was sent to the taxpayer's tax agent's post box. Baragwanath J said at 17,781:

> … I am satisfied that *for the particular purpose of receiving mail* which is of current relevance, the post box is the place of business where, as here, that is the only address supplied.
>
> (Emphasis in original)

[27] This is in contra-distinction to a decision of the High Court in *Associated Group Holdings Ltd v Auckland City Council* [1980] 2 NZLR 635 Pritchard J. He was dealing with the service of rate notices to a box number and held that was not the act of sending it to a ratepayer's last known place of abode or business.

[28] Post Office box addresses are very prevalent in New Zealand. In the case of businesses, in many instances the New Zealand Postal Service is reluctant to deliver mail to commercial premises unless to a letter box right on the road. Many commercial premises, for that practical reason, have no choice but to use Post Office box addresses. I think that Baragwanath J's reasoning is in tune with current circumstances, and although addressing a different statutory regime his reasoning can be applied consistently with s 80.

[29] At the end of the oral arguments I raised, however, whether or not s 80 could be taken advantage of by Arnold Jensen in this case; given the correspondence that had passed from Cavell Leitch Pringle and Boyle to Baycorp and then to Arnold Jensen. That correspondence seemed to me to raise an issue as to whether or not the conduct of the Bills family and trustees by instructing solicitors had amounted to a prescribed manner of service pursuant to s 80(d).

[30] Mr Marsh submitted that the reference to "prescribed manner (if any)" either means:

(a) As prescribed in any other legislative enactment, or

(b) As agreed between the parties themselves.

[31] He submitted the use of the word "prescribed" would clearly imply a written contractual agreement in relation to service addresses.

[32] He cited *Halls Earthworks Ltd (In liquidation) v Donovan Drainage and Earthmoving Ltd* High Court Whangarei CIV 2007-488-144 18 July 2007, Associate Judge Faire, where the Judge considered that "prescribed manner" could refer to the additional means of service set out in rr 9 and 10 of the Construction Contract Regulations 2003.

[33] Turning to the letter of Baycorp, Mr Marsh pointed out that at best the letter to Baycorp states that any further **correspondence** from Baycorp should be directed to Cavell Leitch. He submitted that it does not purport in any way, shape or form to state that service of any **proceedings or other notices** should be served on Cavell Leitch. It does not even state that Cavell Leitch is authorised to accept service of any proceedings and so cannot amount to a "prescribed manner" as set out in s 80(d) of the Act.

[34] Alternatively, he argued that even if the Court were to hold that Cavell Leitch had stated that their office was the place for service and that this was the prescribed manner this does not prevent service being completed pursuant to other avenues as set out in s 80. He relied on the decision of *West City Construction Ltd v Edney* 17 PRNZ 947 where Venning J said that the provisions of s 80 are not mandatory nor exclusionary (see paras [33]-[35]). However, Venning J was considering a different point. On the facts before him there was evidence of service not falling within s 80. He found service upon a duly authorised agent was sufficient.

[35] I agree with the submissions of Ms Dwight that a more substantive analysis should be taken to the correspondence from Cavell Leitch. In my view Arnold Jensen and their debt collector, Baycorp, could be under no illusions that the Bills family had instructed solicitors. The omission of the customary sentence in the second letter from Cavell Leitch as to service was simply that, an obvious omission. Had Arnold Jensen intended to proceed with further alternative dispute resolution or standard Court proceedings they would inevitably have written to Cavell Leitch, rather than to Mr Bills.

[36] Section 80(a), (b) and (c) of the Act are a set of alternatives. However, depending on the factual context the prescribed manner of service may displace these. The term "prescribed" can include a prescription that this will be the only mode of service. A "prescription" is not usually just another alternative. This must be the case when the parties have agreed a particular manner of service.

[37] The question directly posed by Mr Marsh's submissions is whether prescribed manner in s 80(d) has to be by contract. There may be good reasons why the recipient considers that modes (a), (b) and (c) are not appropriate. In my judgment the prescription can be imposed by the intended recipient, if it is reasonable. By contrast, if one said unilaterally that all documents were to be sent to Iceland that would patently not be given any recognition by the Court. It would not be a prescribed manner contemplated by Parliament in s 80(d). On the other hand, where a person has reasonably requested correspondence be through her or his solicitors, that will be the prescribed manner and will displace the other alternatives in s 80, unless that prescribed manner becomes redundant later. In my view that reading of s 80 gives effect to the purposes of the Act and is allowed by the text.

[38] For these reasons I hold that in the circumstances the prescribed manner for further notices or communication was to Cavell Leitch and displaced s 80(b) and (c). I agree with Ms Dwight that there is no merit on the facts in drawing the distinction Mr Marsh invited between further correspondence and communication and further proceedings. Proceedings are themselves another form of communication.

[39] That is sufficient to decide this case but I turn to address the argument that it was too late by August 2007 for Arnold Jensen to resend the invoices, this time with the correct documentation.

[40] The Court of Appeal in *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177, was a case in which the Court of Appeal were dealing with a series of technical arguments as to strict compliance with the Act. The Court emphasised the need to give a purposive construction to the statute. They were not interested in technical quibbles. In particular, at paragraph [44] they said:

> [44] We accept the respondent's submission that to adopt George's contentions would mean that a contractor would have to present a somewhat artificial claim for work done just in that particular month, without reference to work previously done or the overall completion. Further it would be arbitrary to prevent a subcontractor from including amounts overlooked in an earlier month, or a late claim. We do not accept the appellant's contention that a contractor could never re-present a previously declined or ignored claim even if it wished to resubmit the claim or support it with further information. As noted by the Associate Judge at para [68] there is nothing in the Act that restricted payment claims in this way.
>
> (at 186)

[41] The facts of *George Developments* are not particularly relevant to the facts before me. Ms Dwight was submitting that on these facts it was inappropriate now for Arnold Jensen to have reissued the fifth and sixth payment claims as they knew that they were the subject of an ongoing dispute and for Arnold Jensen to do so was not in accordance with the spirit of the Act. I agree there is some force in this proposition. However, it is not necessary to decide the point in order to dispose of this case.

Result

[42] The decision of the District Court is reversed on the grounds that the appellants were not properly served notice in accordance with s 80(d), being the provision which applied to the parties at the time. The reissued invoices and accompanying documentation should have been sent to Cavell Leitch, their solicitors. The judgment is set aside. Leave is reserved to apply for further directions.

[43] The appellants are entitled to costs calculated on a 2B basis. If the parties cannot agree costs I will receive submissions limited to five pages to be filed by 10 November.

Solicitors:
Cavell Leitch, Christchurch, for Appellants
Saunders Robinson Brown, Christchurch, for Respondent