IN THE DISTRICT COURT
AT BLENHEIM

CIV-2009-006-000034

BETWEEN	BLENHEIM BUILDING CENTRE LIMITED Plaintiff
AND	DALLAS HEMPHILL Defendant

Hearing: 24 April 2009

Appearances: Q A M Davies for the Plaintiff
S Gaines for the Defendant

Judgment: 7 August 2009

RESERVED JUDGMENT OF JUDGE A A ZOHRAB
[as to application for summary judgment]

Introduction

[1] Blenheim Building Centre Limited ("the plaintiff") makes application for summary judgment under the Construction Contracts Act 2002 ("the CCA") against Dallas Hemphill ("the defendant"), who is a home owner in Havelock.

[2] The defendant opposes the application for summary judgment.

Background

[3] On or about 30 April 2007 the defendant entered into a construction contract ("the contract") with the plaintiff for the manufacture of beech stairs, a kitchen and associated joinery.

[4] The terms of the contract were set out in quotations dated 12 December 2006 and 30 April 2007 and included:

a) Interest at a rate of 1.5% per month on overdue accounts; and

b) All collection costs were payable by the defendant.

[5] During the period 1 May 2007 to 7 June 2007 the plaintiff performed services and provided materials to the defendant pursuant to the contract.

[6] Various invoices ("the original invoices") were issued by the plaintiff for the services, but they did not comply with the CCA.

[7] Subsequent to the issuing of the original invoices, various issues arose regarding installation of the plaintiff's joinery involving alleged design issues and alleged weathertightness issues.

[8] From February 2007 to April 2008 the parties were in discussion as to the various issues that had arisen. During this period the defendant commissioned two building consultants to provide reports regarding the issues and identify where fault lay and what remedial work was required.

[9] The defendant's position is that he gave the plaintiff the opportunity to remedy what he says were the defects caused by the plaintiff, but that it failed to do the remedial work.

[10] The defendant's position is that he then engaged various third parties to complete the necessary remedial work and advised the plaintiff that he would seek a contribution from the plaintiff for the costs of the remedial work attributable to the plaintiff's failures.

[11] According to the defendant the original invoices were issued by the plaintiff in June 2007, with a third being issued in late September 2007. The defendant confirmed that he advised the plaintiff that the payment was disputed and the costs of

remedial works would be accounted for either by the plaintiff remedying the works or by a financial contribution.

[12] On 12 November 2008 the plaintiff provided the defendant with what it contends is a payment claim in the sum of $5,158.08 in terms of s 20 of the CCA.

[13] The defendant provided the plaintiff with the document which he contends is a payment schedule relating to the payment claim in terms of s 21 of the CCA.

[14] On or after 12 November 2008 the plaintiff provided the defendant with what it contends is a payment claim in the sum of $21,000 in terms of s 20 of the CCA.

[15] Subsequent to the payment claim the defendant provided the plaintiff with a document which he contends is a payment schedule relating to the payment claim in terms of s 21 of the CCA.

[16] On 12 November 2008 the plaintiff provided the defendant with what it contends is a payment claim in the sum of $7,179.93 in terms of s 20 of the CCA.

[17] Subsequent to the payment claim the defendant provided the plaintiff with a document which he contends is a payment schedule relating to the payment claim in terms of s 21 of the CCA.

[18] The actual cost of remedial work incurred at the time of receipt of the payment claims was $29,605.57.

[19] The defendant's position is that he was surprised when he received the payment claims because he had given the plaintiff an opportunity to assess the remedial work and an opportunity to undertake that work. Further, he had also made it clear that he would be seeking the plaintiff's contribution to the full cost of the remedial work.

[20] Moreover, the defendant's position is that he was uncertain as to the purpose of what appeared to him to be a sudden arrival of a collection of invoices which had previously been issued in June and September 2007.

[21] The plaintiff's position is that the issues raised as to design and weathertightness having nothing to do with the stairs and kitchen and that it is those quotations and invoices which form the basis of the claim under the CCA.

Legal Principles

General Approach

[22] Elias CJ in *Westpac Banking Corporation* v *M M Kembla New Zealand Limited* [2001] 2 NZLR 298 (CA) 313 set out the general approach to be adopted in summary judgment applications. Although that case involved an application by a Defendant for summary judgment which, as Elias CJ pointed out, is not directly equivalent to a plaintiff's application, the following passage is equally applicable to either type –

> Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton* v *Chappell*) [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

Onus of Proof

[23] Rule 152 of the District Court Rules 1992 requires the plaintiff to satisfy the Court that the Defendants have no defence to the claim. In *Pemberton* v *Chappell* [1987] 1 NZLR 1 Somers J said at p3 –

> … in this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence … On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

Balancing Exercise

[24] Summary judgment proceedings are designed for cases where there is clearly no defence. Defendants should not be deprived of their right to trial unless the plaintiff clearly demonstrates that there is no reasonable possibility of the defence succeeding. The following passage from Tipping J in *Lindale Financial Services Ltd* v *Colonial Mutual Life Assurance Society Ltd* (1997) 12 PRNZ 320 at p322 demonstrates the balance required in assessing a summary judgment application:

> Summary judgment proceedings are designed for cases where it is clear there is no defence to the plaintiff's claim. While it is entirely proper for the Court to take a robust approach when ascertaining whether the proffered defences have any arguable validity or are simply a smokescreen, there are limits. Defendants should not be deprived of the opportunity of a full trial, unless the plaintiff clearly demonstrates that there is no reasonable possibility of the defence succeeding. While summary judgment proceedings are a valuable and desirable short cut in clear cases, care must be taken not to allow excessive robustness to work an injustice to the defendant.

Factual Disputes

[25] Where the defence raises questions of fact upon which the outcome of the case might turn, it will not be appropriate to enter summary judgment unless the Court can be satisfied that the Defendants' statements as to matters of fact are baseless: *Attorney-General* v *Rakiura Holdings Ltd* (1986) 1 PRNZ 12.

[26] The Defendants must particularise the defence relied upon. Vague and fanciful allegations in an affidavit in opposition will not suffice. There is need, therefore, to scrutinise the affidavits to see if they pass the threshold of credibility.

[27] On an issue of credibility, summary judgment will not generally be a useful vehicle since conflicts of evidence and the plausibility of evidence should be resolved at trial.

[28] Where, however, statements in an affidavit are equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements

by the same deponent, or are inherently improbable, such statements may be looked at critically.

Grounds of Opposition

[29] The defendant opposes the application for summary judgment on the following grounds:

a) The payment claims were defective in that they did not comply with the mandatory requirements of the CCA and were therefore invalid.

b) If the payment claims were held to be valid, then valid payment schedules were filed by the defendant and which included a valid set-off which exceeds the plaintiff's claim.

The CCA

[30] The plaintiff relies upon the provisions of the CCA.

[31] The CCA came into force on 1 April 2003. The purpose of the CCA is stated to be:

a) To facilitate regular and timely payments;

b) To provide for a speedy resolution of disputes; and

c) To provide remedies for recovery of payments due under construction contracts.

[32] The CCA enables a contractor to serve a payment claim for progress payments (defined to include one-off or final payments) in accordance with s 20 of the CCA.

[33] A progress payment is due and payable 20 working days after the payment claim is served in the absence of other agreement between the parties – s 18. The payment claim must:

a) Be in writing;

b) Contain sufficient details to identify the construction contract to which it relates;

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

d) Indicate a claimed amount and the due date for payment;

e) Indicate the manner in which the payee calculated the claimed amount; and

f) State that it is made under the CCA.

[34] Section 20(3) of the CCA provides:

> **20 Payment claims**
>
> …
>
> (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).

[35] If a payer wishes to challenge the payment claim or take issue with it then a payment schedule must be issued: s 21. The payment schedule must:

a) Be in writing;

b) Identify the payment claim to which it relates; and

c) Indicate the scheduled amount.

[36] The scheduled amount is the amount of the progress payment that the payer proposes to pay to the payee in response to the payment claim.

[37] By virtue of s 22 of the CCA the payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if:

a) The payee serves a payment claim on a payer; and

b) The payer does not provide a payment schedule to the payee within the time required by the contract or by default within 20 working days after the payment claim is served – s 22(b)(ii).

[38] If a payer becomes liable to pay the claimed amount under s 22 by failing to provide a payment schedule and fails to pay the whole amount in the payment claim, then the payee may recover from the payer as a debt due to it the unpaid portion of the claimed amount and the actual and reasonable costs of recovery – s 23(2).

[39] Section 79 of the CCA states:

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—
>
> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

Discussion and Decision

[40] The initial invoices issued by the plaintiff in June 2007 did not comply with the requirements of the CCA. Fresh invoices were subsequently issued with a payment claim whilst the parties were in dispute and which the plaintiff contends comply with the requirements of the CCA. I simply note at this point that there is nothing in the CCA preventing a party reissuing invoices in substitution of invoices that had failed to comply with the CCA.

[41] Because the payment claims were being served on a residential occupier, s 20(3) of the CCA provides that they must be accompanied by a Form 1 Notice to Residential Occupier (CC Regulations 2003, clause 4).

[42] The plaintiff's affidavit deposes at paragraph 9 that:

> On posting the Payment Claims I realised that I might not have included Form 1 of the Construction Contract Regulations 2003 (the Notice to Residential Occupier). Accordingly, in a separate envelope I posted to Mr Hemphill a photocopy of the Notice. I believe that Mr Hemphill would have received the Notice to Residential Occupier in the same mail as the Payment Claims detailed in this affidavit …

[43] Mr Hemphill in his affidavit states as follows:

> [56] I was surprised when I received the payment claims because I had previously given the plaintiff an opportunity to independently assess the remedial works and an opportunity to undertake those works.
>
> [57] I had made it clear to the plaintiff that I would be seeking the plaintiff's contribution to the full cost of the remedial works.
>
> [58] I was also surprised to see the claims for payment were in fact a collection of charges, some of which I had paid as outlined in this affidavit.
>
> [59] I was uncertain as to the purpose of what appeared to me to be the sudden arrival of a collection of invoices issued in June 2007 and September 2007. It seemed to me to be a repetition of the discussion between myself and the plaintiff that was now almost 1 year old.
>
> [60] I do not recall when the residential occupier notice arrived in the separate envelope posted by the plaintiff as described in the plaintiff's affidavit. I do not recall whether one or more notices were delivered in the separate envelope.

> [61] What I do recall is being somewhat confused by the receipt of the claims without any context other than a reappearance of disputed invoices from almost 1 year ago.

[44] The defendant's position is that the plaintiff's statement is equivocal as to whether the Notice to Residential Occupier was included, but it is clear that only one Notice was posted to the defendant and it was posted in a separate envelope.

[45] The plaintiff's position is that the necessary information was contained in a separate letter in the same post and Mr Hemphill has not contradicted that and cannot recall whether or not that had occurred. Furthermore, the plaintiff contends that there has been no prejudice to the defendant, more particularly given that payment schedules have been filed by the defendant.

[46] Counsel for the defendant referred me to the decision of *Bevin Charles Berg v Franix Construction Limited* (HC AK, 24 September 2008, CIV-2008-404-3421, Wylie J). In that case the information required by s 20(3) of the CCA did not accompany the payment claim, but was supplied on the following day. The submission made by the plaintiff in that case was that there had been no prejudice to the appellant in the case.

[47] Justice Wylie stated at paragraphs [39] to [43] as follows:

> [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* (HC Wellington, AP 55/95, 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.

[48] The defendant's argument here is that on the plaintiff's own evidence there is demonstrable non-compliance with the mandatory requirements of s 20(3) and that this non-compliance is not a technical quibble nor could it be regarded as trifling.

[49] Based upon the plaintiff's own evidence and that of the defendant, I cannot be satisfied on the balance of probabilities that a Form 1 Notice accompanied each and every payment claim. Given that position, and the fact that the provisions of the CCA are relatively draconian, and given the decision of *Berg v Franix Construction Limited*, I cannot be satisfied on the basis of the material before me that the

purported payment claims are in fact valid payment claims as there has not been compliance with the requirements of s 20(3) of the CCA.

[50] I am of course conscious that in this case the facts are somewhat different than in the *Berg v Franix Construction Limited* situation because here the respondent has filed detailed, and what it claims to be, valid payment schedules. Accordingly, the issue arises as to what the prejudice to the defendant is in this case.

[51] However, my view is that the meaning and intent of the CCA is clear, as is the decision of *Berg v Franix Construction Limited.* I am not satisfied that these are valid payment claims because they did not comply with s 20(3). The requirement to comply with s 20(3) is of fundamental and critical importance. Only if a document is a valid payment claim can a principal be obliged to file a payment schedule in order to avoid liability to pay the amount claimed. Here, the defendant deposes at paragraph [61] of his affidavit:

> What I do recall is being somewhat confused by the receipt of claims without any context other than a reappearance of disputed invoices from almost 1 year ago.

[52] In my view there is a real possibility of prejudice to the defendant in this case owing to this confusion. Further, I am of the view that the subsequent actions of a payee cannot retrospectively validate an invalid payment claim when I cannot reasonably exclude that the plaintiff has failed to comply with matters which are of fundamental and critical importance.

Section 79 of the CCA

[53] However, if I am wrong on the invalidity argument, I think it useful to deal with the other arguments.

[54] The plaintiff's position with respect to the payment schedules is that on the plain and ordinary meaning of the CCA, s 79 of the CCA prevents the defendant from raising a set-off payment schedule because the plaintiff disputes liability for the defects (such as may be proved) in the windows and doors, and judgment has not been entered and there is no liquidated amount. Furthermore, the windows and

doors are unrelated to the kitchen and stairs which the plaintiff contends is what is the subject of the payment claims.

[55] The defendant's position is that the bar under s 79 of the CCA is activated on proceedings for the recovery of a debt which has arisen as a consequence of a failure to comply with the CCA as specified in ss 23, 24 and 50, with the consequence that a judgment is entered and the conditions for the "recovery of a debt" are established [s 23(2)(a)(i), (ii) and s 24(2)(a)(i) – (ii)].

[56] The defendant contends that s 79 does not preclude the setting up of the same set-off within the payment schedule as:

a) At that time there are no "proceedings for the recovery of debt"; and

b) It is not possible for there to be any "proceedings" as there is yet to be a failure to provide a payment schedule (s 23).

[57] I have been referred to *Insite Design and Development Ltd v Sadler,* (HC Auckland, 27 April 2007, CIV-2006-404-4528, Associate Judge Sargisson). In that case a judgment debtor in a bankruptcy proceeding argued that he had a genuinely triable claim which exceeded the amount of the judgment debt, but he could not set it up as a counterclaim because of s 79 of the CCA.

[58] However, Associate Judge Sargisson stated at paragraph [31] as follows:

> … There is no dispute (the defendant) could have set up his counterclaim in the summary judgment proceeding if he had simply complied with s 21 of the Construction Contracts Act and properly quantified his perceived losses under the payment schedule process. …

[59] Further, I was referred to Venning J's comments in *Top End Homes Ltd v Salem Ltd* (HC Whangarei, 19 July 2005, CIV-2005-488-000332, Venning J) which dealt with a situation where a counterclaim had not been raised in the s 21 payment schedule. At paragraph [30] Venning J commented:

> … *A fortiori* it follows that where the defence is a challenge to the quantum of the claim the appropriate way for that to be challenged is by means of the payment schedule process.

[60] The defendant also contended that the decisions referred to were consistent with s 25 of the CCA and that one could reasonably conclude that the CCA anticipates a set-off being set up within the adjudication process.

[61] The defendant therefore contends that it follows as a matter of logic that a set-off is able to be set up within a payment schedule.

[62] Counsel for the defendant conceded that a simple allegation that a counterclaim or set-off existed or failure to provide proper qualification would not comply with the requirements of s 21.

[63] Further, counsel for the defendant referred me to the decision of *Metalcraft Industries Ltd v Christie* (HC Whangarei, 15 February 2007, CIV-2006-488-000465, Harrison J) where Harrison J noted at paragraph [23] as follows:

> [23] Again I respectfully disagree. An assertion that remedial work is required at a cost which would exceed the payment claim could never constitute a valid reason either for the difference between the scheduled amount and the amount claimed or for withholding payment. General and unspecified allegations of defective workmanship are insufficient unless quantified within a reduction for the claimed cost of remedial work. Similarly a claim that excess materials were supplied is not enough; Ms Christie would have to identify them and their value to justify a further reduction in the scheduled amount. Delays in completing the work and consequential damage caused by leaking and water damage may give rise to a counterclaim for special damages, but even if quantified they could not be taken into account in the scheduled amount: s 79. None of the reasons given in Pegg Ayton's correspondence justified withholding payment of any part of Metalcraft's claim.

[64] Harrison J then sent on to say at paragraph [28]:

> [28] Accordingly, a principal's denial of liability for a payment claim on the ground that a right of set-off exists will be insufficient. Nevertheless, a payment schedule which properly quantifies the amount incurred by a principal in remedying allegedly defective workmanship by a contractor may, in the particular circumstances of the case, constitute a valid reason for withholding payment for that amount. It may be accepted as the financial measure of the contractor's defective workmanship or materials amounting in law to a breach of contract for which it is not entitled to recover. If such circumstances exist, the contractor may be advised to proceed to adjudication with its associated strict timeframe rather than attempting to argue that a debt is now due and enforceable in a Court of law. However, that question does not arise for determination here given my primary conclusions.

[65] Counsel for the defendant submitted that Harrison J's statement at paragraph [28] it "may constitute a valid reason for withholding payment" is a recognition that each case is to be assessed on its merits.

[66] The defendant argues that the defendant's set-off was not hidden and provides and contains the following:

a) Individually repeated statements in respect of all 3 invoices that there is a substantial dispute relating to the quality of the material supplied in that extensive remedial work is required.

b) Attaches the 3 expert reports which detail the extent of the remedial works and proposed solutions (the reports were disclosed to the plaintiff and in one case was the plaintiff's own report).

c) Summarises the plaintiff's contribution to the remedial works.

d) Summarises the remedial work (actual) costs to date $29,605.57.

e) Identifies a provisional estimate for additional work to complete $10,000.00.

f) Provides a total of the actual + estimate costs of $39,605.57.

[67] Mr Hemphill's affidavit at paragraphs 44-48 provides 3 tables:

a) A summary of the plaintiff's claim - $33,337.91 and

b) The apportioned share of the (final) remedial costs allocated by the defendant to the plaintiff (refer: spreadsheets at exhibits "E" and "F").

[68] Further at paragraph 47 of his affidavit he deposes there is:

a) A minor variance between the payment schedule actual and estimated costs, and the actual (final) cost to complete, and

b) A small variance between the final cost and the plaintiff's claim.

[69] Counsel for the defendant submits that the set-off:

a) Is a realistic statement based on a rational assessment of actual and estimated costs,

b) Is evidenced by relevant invoices,

c) Is recorded (refer: spreadsheets/defendant's affidavit exhibits "E" – "F") and

d) Allocated the remedial work to the plaintiff in a rational manner.

[70] Counsel for the defendant also submits there is sufficient particularity provided in the payment schedule for a valid set-off to have been established by the defendant.

[71] Also, counsel submits the set-off exceeds the quantum of the plaintiff's claim $2,870.43.

[72] Further, the defendant submitted that there had been compliance with the requirements of s 21(1), (2)(a), (b) and (d) and s 21(3) of the Act.

[73] On the basis of the material before me, and without the benefit of oral evidence and cross-examination, I am not satisfied that the defendant is prevented from raising a set-off in the payment schedule and or that the payment schedule is not valid.

[74] Accordingly, the application for summary judgment is declined. I invite the parties to file memoranda on costs given the indication from the defendant that costs will be sought.

A A Zohrab
District Court Judge

This is a true copy of the signed judgment which I have sighted and confirm that it has been signed.

Betsy Wynne
Deputy Registrar