IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001268
[2015] NZHC 2421

BETWEEN	C.J. PARKER CONSTRUCTION LTD Plaintiff
AND	WASIM SARWAR KETAN, FARKAH KETAN AND WASIM KETAN TRUSTEE COMPANY LIMITED AS TRUSTEES OF THE WASIM KETAN FAMILY TRUST First Defendant
	WASIM SARWAR KETAN Second Defendant

Hearing:	21 September 2015
Appearances:	D Hughes and J Hanning for Plaintiff J McBride for Defendants
Judgment:	5 October 2015

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Monday, 5 October 2015 at 4:00 p.m. pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors / Counsel:
D Hughes, Anthony Harper, Auckland
J Hanning, Anthony Harper, Auckland
J McBride, Auckland

Introduction

[1] The plaintiff, C J Parker Construction Ltd (the plaintiff) applies for summary judgment against the trustees of the Wasim Ketan Family Trust (the Trust) and/or Wasim Ketan (Mr Ketan) (together the defendants). The plaintiff seeks judgment in the sum of $240,542.10 which it says is a debt due under s 23 of the Construction Contracts Act 2002 (the Act).

[2] The Act sets out a procedure for making and responding to payment claims in order to facilitate regular and timely payments between the parties to a construction contract. The plaintiff submits that a tax invoice addressed to the Trust dated 15 July 2013 is a valid payment claim in terms of s 20, but that an email in response from Mr Ketan dated 15 July 2013 does not comply with s 21. Because the email is not a valid payment schedule and the Trust failed to pay the claimed amount within seven working days, the plaintiff submits that s 23 enables it to recover the unpaid claim from the Trust and/or Mr Ketan as a debt due to it.

[3] The defendants respond by submitting that there are a number of contested issues between the parties which cannot be determined on the papers in an application for summary judgment but that, in any event, the plaintiff's tax invoice does not comply with s 20, while Mr Ketan's email in response of 15 July 2013 is a valid payment schedule in terms of s 21, which therefore disentitles the plaintiff from relying on the fast track procedure under s 23 for payment.

Building contract

[4] The plaintiff submits that a Proposal dated 19 January 2013, a Schedule of Materials and Work also dated 19 January 2013 and a draft Registered Master Builders Federation Residential Building Contract sent by the plaintiff to Mr Ketan by email on 15 May 2013, together with oral variations, formed the agreement between the parties.

[5] There are, however, a number of difficulties with this documentation. Firstly, the Proposal is said to be an estimate only and states that a final price would be provided only after the plaintiff had a copy of the consented drawings from the

Council. There is no evidence that a final price was provided. The total estimated cost is said to be $789,729, plus GST. Counsel for the plaintiff referred to this sum as the contract price, but by its own terms it is merely a provisional estimate. In a letter dated 12 July 2013 from the plaintiff's solicitors to the Trust, just after the dispute arose between the parties and before the tax invoice was issued, the solicitors claimed that the contract sum was $833,729 plus GST "plus the cost of air conditioning and weatherboard as detailed in item 26 if instructed; the additional items and agreed costs list of 30 April 2013 arising from the amended consent plans of 10 April 2013 and the direction to resequence the contract work into stages 1 and 2." It is interesting that, notwithstanding this assertion by the plaintiff's solicitor that the contract price was $833,729 plus GST plus un-numerated extras, when the plaintiff issued its tax invoice three days later it referred to the original quotes set out in the Schedule of Materials and Work dated 19 January 2013.

[6] The Schedule of Materials and Work breaks down the estimated cost of $789,729 plus GST into eleven different components ranging from preliminary and general through to floor coverings. It excluded any Council fees, consultant fees, or any utility service provider fees. It also excluded any items not specified or any incomplete or omitted items on the plans as well as errors or defects.

[7] The Schedule of Materials and Work also stated that, since the work involved renovations and alterations, it was highly recommended that the owners allow for a prudent level of contingency funding. It was stated that there were always items that could not be priced or known until actual construction work began. The Schedule also specified that any changes or unforeseen circumstances would be charged as variations. Finally, it was stated that the final contract was to be a Master Builder Contract. The Schedule of Materials and Work had provision for the signature of both parties, but it was not signed or executed as an agreement.

[8] The Residential Building Contract was sent by the plaintiff to Mr Ketan by email on 15 May 2013. In the email the only reference to the contract was as follows:

> Normal contract paper was provided by Master Builder federation association. It was written by a lawyer.

[9] The draft contract was not completed. The owner was not specified. The contract price was blank. There was no margin specified which was to be added to provisional sums, prime cost sums, additional works and variations. The sections on progress payments, staged payments and charge-up were left blank. The contract was not signed or executed as an agreement.

[10] Finally, there has been no evidence provided of any oral variations although the letter from the plaintiff's solicitors dated 12 July 2013 does refer to additional pricing agreed in or around mid-February 2013 and an agreed costs list of 30 April 2013.

[11] The plaintiff submits that in or around January 2013 Mr Ketan verbally accepted the Proposal dated 19 January 2013, and asked it to begin work. Work was undoubtedly begun, but the plaintiff has not proven the contract price to a standard of balance of probabilities for the purposes of this summary judgment application. The only matter which can be said to be established on the balance of probabilities is that any invoices would be paid seven working days from their date of issue.

Progress payments

[12] The plaintiff is also unable to point to agreement as to the number of progress payments,[1] the interval between those payments and the amounts of each of those payments. In those circumstances, the Act provides that the relevant provisions of ss 16 to 18 apply, to the extent that those provisions relate to any matter for which a mechanism has not been agreed upon between the parties.[2]

[13] Section 17(1) provides that the amount of a progress payment must be calculated by reference to the relevant period for that payment, the value of the construction work carried out during that period and any relevant provisions in the construction contract. Section 17(3) of the Act goes on to provide that the value of the construction work must be calculated with regard to:

(a) The contract price for the work; and

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1 Progress payments are defined in the Act as including any final payment under the contract.
2 Construction Contracts Act 2002, s 15.

(b) Any other rates or prices set out in the contract; and

(c) Any variation to the construction work authorised under the contract; and

(d) If any work is defective, the estimated cost of rectifying the defect.

[14] I am of the view that, however, there is no proven contract price for the work, nor are there any rates or prices set out in the contract. Furthermore, no variations were proved.

[15] In those circumstances, s 17(4) of the Act provides that if the contract does not expressly provide for the contract price and any other rates or prices set out in a contract, the value of the construction work must be calculated with regard to:

(a) The reasonable value of the work; and

(b) The reasonable value of any variation to the construction work authorised under the contract; and

(c) If any work is defective, the estimated cost of rectifying the defects.

Payment claim

[16] Section 20 of the Act provides that a payee may serve a payment claim on the payer for each progress payment, if the contract does not provide for the matter, at the end of the relevant period referred to in s 17(2). The relevant period in s 17(2) is defined as the period commencing on the day of the month on which construction work was first carried out under the contract and ending on the last day of that month (the first period) and each month after the first period.

[17] Section 20(2) goes on to provide that a payment claim must:

(a) Be in writing; and

(b) Contain sufficient details to identify the construction contract to which the progress payment relates; and

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

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

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

(f) State that it is made under this Act.

[18] The defendants submit that the tax invoice dated 15 July 2013 does not meet the requirements of s 20(2)(c) because it does not identify the relevant period to which it relates. The invoice does, however, state that it is for work done from 7 May 2013 to 10 July 2013. Nonetheless, the defendants submit that a payment claim can only be for a calendar month ending on the last day of a month because of the definition of relevant period in s 17(2)(a) of the Act.

[19] I am of the view that this submission is technical and unduly legalistic. Section 17(2) is in my view directory only and not mandatory. The tax invoice clearly states the period in which the construction work was carried out. No one is in any doubt. A single tax invoice is also easier to comprehend and respond to, rather than three invoices for 7 May 2013 to 31 May 2013, 1 June 2013 to 30 June 2013 and 1 July 2013 to 10 July 2013.

[20] The defendants are, however, on stronger ground when they submit that the tax invoice does not meet the requirements of s 20(2)(e) because it does not indicate the manner in which the payee calculated the claimed amount. The difficulty for the plaintiff is that it has not proved the contract sum, nor has it proved any other rates or prices set out in the contract. For instance, one line item in the tax invoice reads:

> Preliminary and General Costs for 2 stages $57,179.00 + GST, currently 70% work done in stage 1 including Extra works requested for stage 1 as per amended plans and council requirements.

in respect of which the sum of $11,435.80 plus GST is charged.

[21] The price of $57,179, as set out in the line item is contained in the Schedule of Materials and Work dated 19 January 2013 as the estimate for "preliminary and general" work. The "extra works required for stage 1" as stated in the invoice, are not specified, nor are the "amended plans and council requirements" explained any further. The sum of $11,435.80 is 20 per cent of the original estimate of $57,179, but the amounts previously charged for "preliminary and general" are not set out.

[22] The tax invoice then goes on to list six items under the heading "Stage 1 Motel Renovation variation", one of which is "Extra concrete floor materials and preparation" in respect of which the sum of $4,000 plus GST is charged. Again there is no detail of what extra floor materials and preparation were required or any breakdown between materials and preparation, whatever the latter may be. Then after the six items listed is a general item "Labour costs for all above" in respect of which the sum of $23,497.61 plus GST is charged. Again, there is no breakdown of hourly rates or time spent on any particular work.

[23] Then there is a line item which reads:

> Material moved from Parking to behind building plus materials cannot return due to condition.

in respect of the which the sum of $2,000 plus GST is charged. The materials are not identified and there is no breakdown between materials and labour expended to move the material, whatever it may be.

[24] I am therefore of the view that the tax invoice does not meet the requirements of s 20 of the Act, so as to enable the defendants to respond effectively and in detail to the claim. In effect, because the plaintiff has not proved the contract price for the work and any other rates or prices set out in the contract, the Act requires the value of the construction work to be calculated with regard to the reasonable value of the work and the reasonable value of any variation to the construction work authorised

under the contract.[3] The tax invoice is not structured in such a way as to address the reasonable value of the work.

[25] On the other hand, the defendants had already addressed the reasonable value of the work carried out by the plaintiff. Before receiving the tax invoice, the defendants had received a report from a quantity surveyor dated 24 June 2013 in which the estimated cost of completing Stage 1 of the building works was $462,063 inclusive of GST. The work completed at the time of the quantity surveyor's report was valued at $420,305 inclusive of GST. At that time, the defendants had paid the plaintiff approximately $505,000 inclusive of GST.

[26] The defendants forwarded the quantity surveyor's report to the plaintiff by email on 7 July 2013 and asked the plaintiff to split up his costs as the quantity surveyor had done. The plaintiff responded directly to the quantity surveyor with a copy to the defendants asking a number of questions relating to how he had come to his valuation. Without waiting for a response from the quantity surveyor, on 9 July 2013, the first defendants, the Trust, terminated its contract with the plaintiff effectively immediately. It advised the plaintiff that Stage 2 of the contract had been awarded to another construction company.

[27] It was against this background the plaintiff issued the tax invoice dated 15 July 2013 claiming the sum of $240,542.10.

Payment schedule

[28] I am of the view that Mr Ketan responded in the only way he could. He immediately emailed the plaintiff and said:

> Hi Philip, also attached your home's documents you bought on 1/3/2013 under your wife's name. Have a look QS report and prepare your invoice in view of that, and follow quantity surveyor outlined, and then send me final invoice if I owe you? or you have to refund. You have taken $500,500.00 more than QS report of first stage. You no longer involved for second stage of the building, as I remind you many times of your noncapability as a builder/contractor and using unskilled builders for the job and taking long time to breach the contract. When I engaged Quantity Surveyor, you and

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3 Construction Contracts Act 2002, s 17(4).

> your team were very well aware of the cause and eventually you lost the contract for second stage.
>
> To my calculation with the report of QS, we overpaid you for the first stage of motel work. You have to refund $45,000 as soon as possible.
>
> Dr Ketan

[29] The plaintiff submits that this email is not a valid payment schedule as it does not meet the requirements of s 21. Section 21(2) provides that a payment schedule must:

(a) Be in writing; and

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

(c) Indicated a scheduled amount.

[30] Section 21(3) goes on to provide that 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 differences 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 the payment.

[31] The plaintiff submits that the quantity surveyor's report cannot be included as part of the payment schedule because it came into existence prior to the payment claim. Even if it is to be considered together with the email of 15 July 2013, the plaintiff submits that the documents together do not indicate a scheduled amount, nor do the documents indicate the manner in which the figures were calculated or the reasons for the difference between the claimed amount and what the defendants proposed to pay.

[32] Because I have found that the tax invoice issued on 15 July 2013 did not meet the requirements of a payment claim under s 20 of the Act, largely because the plaintiff has not proved a contract price or any other rates and prices, it is unnecessary for me to determine whether or not Mr Ketan's email was a valid payment schedule in terms of s 21 of the Act. Case law does suggest that merely responding by saying that the claimed amount is in dispute is insufficient to constitute a payment schedule,[4] but here, Mr Ketan specifically stated that, according to his calculations, the plaintiff owed the defendants $45,000. He also made it clear that this calculation was based on a detailed quantity surveyors report recently obtained, which he had earlier forwarded to the plaintiff. In those circumstances, Mr Ketan's email would likely be a payment schedule in terms of s 21.

Subsequent events

[33] After the contract was terminated on 9 July 2013, both parties instructed solicitors. The plaintiff's solicitors did not seek to rely on the provisions in ss 19 to 24 relating to the procedure for making and responding to payment claims, but rather, on the provisions contained in part 3 of the Act relating to the adjudication of disputes. In its initial letter dated 12 July 2013, before the tax invoice was issued, the solicitors stated:

> Accordingly, the Builder C.J. Parker Ltd will now seek to enforce against the Trust its outstanding payments and loss of profits on Stage Two, arising from the Trust's wrongful repudiation of the contract, by way of the Construction Contracts Act and the fast track adjudication it provides, which claims will include for a charge on the Motel land where the builder's work has been performed, for the full amount awarded to the contractor.

[34] In a second letter dated 14 August 2013, a month after the tax invoice was issued, the solicitors stated:

> Accordingly, if payment in full as claimed is not made forthwith ($264,511.81 inclusive of GST), then an adjudication under the CCA will be commenced to obtain judgment, as well as a charging order against the land where the work was undertaken, namely the motel, and in the event of non-payment, sale of the land.

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[4] See, for example, *Mules Construction Ltd v Wedding Earthmovers Ltd* HC Auckland CIV-2006-404-4570, 20 December 2006.

> If you do not confirm payment in full of $264,511.81 will be made forthwith, can you please advice whether you are authorised to accept service of an Adjudication Notice on behalf of your client Trust, failing which we will proceed to serve the notice on your client and have the Building Disputes Tribunal appoint an adjudicator.

[35] The defendants' solicitors responded by letter dated 16 August 2013:

> I have noted that you have suggested that the Building Disputes Tribunal should appoint an adjudicator. I have no problems in John Green being appointed by the Building Disputes Tribunal.

[36] Notwithstanding the acceptance of the appointment of an adjudicator by the defendants' solicitors, an adjudication notice was apparently not served and no adjudicator appointed. Instead, according to Mr Ketan, the plaintiff engaged another quantity surveyor to assist him in responding to the quantity surveyor's report obtained by the defendants. Mr Ketan goes on to state that the balance of 2013 and into 2014 concerned various arguments and discussions between Mr Ketan, Mr Parker and their respective quantity surveyors about the correct value of the variations claimed by the plaintiff. Mr Ketan says it is his understanding that, following the exchanges between the solicitors in 2013, they had agreed to use the quantity surveyors to value the works and reach agreement if possible.

[37] Mr Ketan annexes to his affidavit the final report of his quantity surveyor, in which the quantity surveyor states that he is happy to agree to the valuation provided by the quantity surveyor instructed by the plaintiff. The plaintiff's quantity surveyor estimated the value of the work done to termination as $368,352.95 plus GST. The defendants' quantity surveyor then values the variations at $57,807.38 and calculates that the defendants have paid the plaintiff $12,517.12 more than the total value of the work done to termination and the variations.

[38] The revised quantity surveyor's report was completed by at least August 2014. There is no explanation provided for the delay before these proceedings were issued on 8 June 2015.

Result

[39] The plaintiff's application for summary judgment is dismissed. The plaintiff has failed to prove that the defendants have no defence to its claim. The defendants are entitled to costs on a 2B basis. If the parties are unable to agree, memoranda should be filed within 28 days of the date of this judgment.

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Woolford J