IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000764
[2015] NZHC 1161

BETWEEN	CAN BUILD LIMITED Plaintiff
AND	GARY FRANCIS KIRKPATRICK AND JOHN LESLIE PURVIS AS TRUSTEES OF THE LAURA KIRKPATRICK FAMILY TRUST Defendants

Hearing: 20 May 2015

Appearances: L M Taylor for Plaintiff
P J Shamy for Defendants

Judgment: 27 May 2015

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Introduction

[1] On 7 August 2013 the trustees of the Laura Kirkpatrick Family Trust (LKFT) signed a written building contract with South Steel Construction Limited (South Steel) to build a building in Hillsborough, Christchurch. The contract price was $1,978,450 plus GST. In March 2014, when construction was well advanced, South Steel was placed into receivership. On 8 April 2014 the receiver advised LKFT that South Steel could not complete the building.

[2] Mr R M Forde, a director of Can Build Limited (CBL) says in his affidavit that the receivers of South Steel assigned the contract to CBL on or about 17 March 2014. CBL then started working on the site of LKFT's new building.

[3] CBL claims from LKFT two sums which are specified in two documents described as payment claim 9 and payment claim 10, respectively. The former is for $99,933.68. The latter is for $160,896.67. Both sums are exclusive of GST.

[4] The case presented to the Court by CBL essentially follows, step by step, the well-worn path set out in the Construction Contracts Act 2002. CBL says that it issued two valid payment claims under s 20, that LKFT did not respond to either by providing a payment schedule under s 21 and, as a result, LKFT is liable for paying the claimed amounts under s 22. If that is so, CBL is entitled to recover the amounts of the payment claims, together with its actual and reasonable costs, under s 23.

[5] LKFT, however, does not accept that its contract with South Steel was assigned to CBL, or to any other company. Further, it says that the documents described as payment claims 9 and 10 are not payment claims that meet the requirements of s 20 and that, should it be found that they do, it issued satisfactory payment schedules in response.

[6] There are, therefore, three issues for determination in this case:

(a) Was the contract between South Steel and LKFT assigned to CBL?

(b) Did either or both of the purported payment claims 9 and 10 comply with s 20?

(c) If so, did LKFT issue a payment schedule in respect of either or both, under s 21?

Law on summary judgment

[7] CBL applies for summary judgment on its claim. Rule 12.2 of the High Court Rules provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.
>
> (2) ...

[8] The principles the Court is to apply on an application for summary judgment are summarised in *Krukziener v Hanover Finance Ltd*:[1]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[9] In *Auckett v Falvey*, Eichelbaum J said:[2]

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[10] I take from these authorities that the correct approach of the Court to analysis of the case is:

(a) Does the evidence for the plaintiff establish a position which, on its face, would entitle them to the remedies they now seek?

(b) If so, has the defendant demonstrated a tenable defence?

(c) The onus, which shifts to the defendant, is an evidential one only; the burden of proving that the defendant does not have a defence rests throughout with the plaintiff.

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1 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 (*Krukziener*).

2 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986.

[11] If this case were to proceed to trial, the Court would consider whether the plaintiff had established the requisite elements of its claim on the balance of probabilities, the civil standard of proof. It will be immediately apparent from r 12.2 and from the passages quoted from *Krukziener v Hanover Finance Ltd* and *Auckett v Falvey* that the onus on the plaintiff, on an application for judgment on a summary basis, is substantially greater. The reason is also self evident. Entering judgment on a summary basis deprives those against whom allegations are made of a full trial at which both the plaintiff's and the defendant's versions of events would be fully aired in oral evidence, including cross-examination.

First issue: was the contract between South Steel and LKFT assigned to CBL?

[12] Section 20 of the Construction Contracts Act enables "a payee" to serve a payment claim for a progress payment. The word "payee" is defined in s 19 to mean "the party to a construction contract who is entitled to a progress payment". It is therefore necessary for CBL to establish that it is a party to a construction contract with LKFT.

[13] The evidence given by Mr Forde on this issue in his first affidavit is brief. He says, "On or about 17 March 2014 the receivers assigned the contract to the plaintiff". The contract is defined as the construction contract between South Steel and LKFT. Mr Forde did not elaborate on that statement, nor produce any document to support it.

[14] Mr B F Kirkpatrick, one of the trustees of LKFT, sets out a very different position in his affidavit. He says that at some time in March 2014 he was told by a Mr Paul Lynch, who he believed was the owner of South Steel, that the company had gone into receivership. He was subsequently told that Mr Forde's company, Ranger Construction Limited, was going to purchase South Steel and would complete the contract works.

[15] Mr Kirkpatrick was introduced to Mr Forde by Mr Lynch. According to Mr Kirkpatrick, Mr Forde told him that his company, Ranger Construction Limited, would complete the job for $400,000. This aligned with Mr Kirkpatrick's estimate that there was approximately $400,000 worth of work left to complete.

[16] I pause to record that the final payment claim issued by South Steel, payment claim 8, recorded a total sum claimed to date of approximately $1.633,000. The contract price was approximately $1,978,000 plus extras at that time of just under $57,000 (all figures exclusive of GST), so Mr Kirkpatrick's estimate ties in with that position.

[17] Mr Kirkpatrick then says in his affidavit that as far as he was aware there was no assignment of the South Steel contract to Ranger Construction Limited, let alone to CBL. He thought there was a new contract which was entered verbally by him, on behalf of LKFT, with Ranger Construction Limited. It was not until this proceeding was issued that he learned that it was alleged that the South Steel contract had been assigned to CBL, or indeed assigned at all.

[18] In his affidavit in reply, Mr Forde says that CBL paid the receivers of South Steel approximately $247,000 for some of the assets of South Steel and for the assignment of several South Steel contracts, including the contract with LKFT. He also says that Mr Kirkpatrick attended a meeting on site with him and with Mr Lynch and during that meeting he discussed with Mr Kirkpatrick the process of the assignment of the South Steel contract to CBL and the involvement of the receiver in that process. He says the purpose of the assignment was to ensure the continuity of the works then being undertaken by South Steel, and Can Build was to employ South Steel employees who were already involved in the contract.

[19] Payment claims 9 and 10 are both issued in the name of CBL. Payment claim 8 was issued in the name of South Steel. On payment claim 8, the sum shown as the total claimed to date is $1,633,042.24. This figure is shown on payment claim 9 as the previous net claimed amount. In a similar vein, progress claim 9 shows a total sum claimed to date of $1,732,975.92, and this is shown as the previous net claimed amount on payment claim 10.

[20] It appears from this sequence of entries that CBL considered at the time that it was carrying on work under the original South Steel contract. LKFT received these payment claims on 1 May 2014 and 1 October 2014 respectively. It may be inferred from this that on those dates LKFT could see that CBL was making payment

claims which picked up from the last position established by South Steel in payment claim 8, and carried it on. This is consistent with the South Steel contract having been assigned.

[21] That is not to say that other very real criticisms cannot be levelled at the contents of these payment claims, a separate issue which arises directly in relation to the second issue to be decided, and is discussed below.

[22] Payment claims 9 and 10 are also inconsistent with the proposition that a separate oral contract was entered with Ranger Construction Limited to complete the building for $400,000. By 1 May 2014, LKFT had in its hand a payment claim issued by CBL. There is no evidence that LKFT took issue, at that time, with payment claim 9 being issued by a payee who, on Mr Kirkpatrick's evidence, did not have anything to do with the building project. Likewise, when payment claim 10 was served on 1 October 2014 by CBL, no exception seems to have been taken to the involvement of that company in the project. Neither claim makes any reference to a contract to carry out the necessary works to complete the project for $400,000.

[23] Email exchanges in relation to payment claims 9 and 10 include emails from Mr Forde on each of which is appended a descriptive email signature, indicating that Mr Forde is sending an email for CBL, and that he is the managing director of "Ranger Group". This ties in CBL with the name Ranger, that being the name of the company that Mr Kirkpatrick believes was to contract with LKFT to complete the building, for $400,000. As well, it casts doubt on the evidence of Mr Kirkpatrick that it was not until the proceedings had been issued that he learned that CBL alleged that it had taken an assignment of the South Steel contract and was carrying on work on the site pursuant to it.

[24] The evidence put forward by CBL in relation to it taking an assignment of the South Steel contract is sparse indeed. Mr Forde does not produce any document recording the assignment, showing whether CBL gave valuable consideration for it, or proving whether notice of the assignment was given to LKFT. As well, the evidence of Mr Kirkpatrick conflicts with Mr Forde's version of what occurred. These factors suggest summary judgment should be refused: the established

principle recorded in *Krukziener*, that the Court will not normally resolve a material conflict of evidence or assess the credibility of witnesses where evidence is given by affidavit, would suggest this issue should be resolved at trial.[3]

[25] However, the passage quoted from *Krukziener* also records another established principle. The Court need not accept uncritically evidence which is inconsistent with undisputed contemporary documents. Leaving aside the criticisms levelled at the contents of the documents described as payment claims 9 and 10, they are contemporary documents and on their face they support the evidence of Mr Forde that the contract was assigned to CBL, and are inconsistent with the evidence of Mr Kirkpatrick.

[26] Having considered the evidence on this point as a whole, I am satisfied that, on this issue, there is no real question to be tried.[4] I find, therefore, that the contract between South Steel and LKFT was assigned to CBL.

Second issue: did either or both of the purported payment claims 9 and 10 comply with s 20?

[27] Section 20 of the Construction Contracts Act 2002 provides, to the extent relevant:

> **20 Payment claims**
>
> (1) A payee may serve a payment claim on the payer for each progress payment, -
>
> (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
>
> (b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).
>
> (2) 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

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3 *Krukziener*, above n 1.

4 *Pemberton v Chappell* [1987] 1 NZLR 1.

(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.

...

(4) The matters referred to in subsection (3)(a) and (b) must –

(a) be in writing; and

(b) be in the prescribed form (if any).

[28] The contract between LKFT and South Steel does not prescribe a form for a payment claim. It provides, however, that monthly progress claims may be made, with invoices to be issued in accordance with the Construction Contracts Act 2002. Payments thus invoiced are to be paid within 10 working days after service of a payment claim. In paragraph 4.5, the contract sets out the procedure for payment claims and payment schedules provided for in the Construction Contracts Act.

[29] LKFT says that payment claims 9 and 10 do not comply with s 20 because they fail to adequately conform to the requirements of paragraphs (c) and (d) in s 20(2). Mr Shamy submits that it is particularly important in the case of the contract in question that these paragraphs be fully complied with because of the change of contractor during the course of the contract being completed, and other problems with the contract that are identified in his affidavit by Mr Kirkpatrick.

[30] When South Steel went into receivership there were unpaid subcontractors, including the companies attending to the earthworks and the cladding of the building. Some removed materials from the site. Mr Kirkpatrick says that Ranger Construction Limited (as he saw it, contrary to the finding on the first issue above) did not, as far as he is aware, take any steps to try and re-engage existing subcontractors and it was left to him to engage subcontractors as a result. It became unclear what work was being carried out on site by the builder. Mr Kirkpatrick found that there was a large number of workmen on the site. They had been taken over from South Steel, who had previously worked on six building sites, but now on

only two. LKFT has incurred a cost of around $700,000 engaging subcontractors and dealing with the outgoing subcontractors.

[31] Mr Kirkpatrick says that in these circumstances it was particularly important that any payment claims made by CBL accurately and fully identified the construction work which it had undertaken and for which it was charging. Mr Forde does not take issue with this evidence in his affidavit in reply.

[32] Against this background I consider, first, payment claim 9. A payment claim need only substantively comply with the requirements of the Construction Contracts Act. Technical quibbles are not to be allowed to vitiate a payment claim which does so.[5] It is necessary, therefore, to determine whether payment claim 9 complies substantively with the requirements of s 20, bearing in mind the onus on CBL on an application for summary judgment.

[33] Payment claim 9 is set out on one page. The only material identifying the construction work to which it relates,[6] and the manner in which the amount claimed is being calculated,[7] is set out under two items. The first, labour, has the figure 1184.75 under the heading "quantity", $55 under the heading "rate", and $65,161.31 under the heading "total". The item "material" shows only a total of $34,772.37.

[34] This may be compared with payment claim 8 issued by South Steel, which has a detailed contract summary attached. It sets out 13 items of work, the total sum to be charged for each making up the final contract price, the percentage of work completed on each heading, the amount claimed in respect of each on payment claim 8, the previous amount claimed, and the total to date. There is then a page showing how variations claimed on payment claim 8 are calculated, in considerable detail, with every item set out under headings similar to the principal contract sum claims. There is then a detailed summary of the variation claims.

[35] Payment claim 8 has the level of detail which, in my opinion, is required to identify the construction work undertaken, and the manner in which South Steel

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5 *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 at [43].
6 Construction Contracts Act 2002, s 20(2)(c).
7 Section 20(2)(e).

calculated the claimed amount. Payment claim 9 issued by CBL does not come anywhere near providing the level of information in payment claim 8. There is a bald claim that 1184.75 hours (presumably, as there is no mention of hours) has been put into the contract, and an equally bald claim that materials in the given sum have been supplied. There is no cross reference of these to the 13 separate elements of work which made up the contract price, as on the contract summary attached to payment claim 8. There is no detail of what materials have been supplied or to which of the contract elements these related. Payment claim 9 is more akin to the kind of claim one might expect on a charge up contract, and apart from carrying forward (as I have said earlier) the total claimed sum from payment claim 8, it has little apparent or identifiable connection to the assigned contract at all. There is well less detail than is reasonably required for an informal decision to be made on whether to pay the claim or respond by issuing a payment schedule.

[36] This is far more than a technical quibble. I find that payment claim 9 falls short of complying with s 20(2)(c) and (e).

[37] After this claim was delivered there were exchanges between LKFT and CBL in which LKFT sought further details of the claim. This is unsurprising. LKFT's response obviously found traction with CBL because in August CBL provided to LKFT further details. Mr Kirkpatrick says there were ongoing difficulties in obtaining details of the claims made by CBL and this is not denied by Mr Forde in his affidavit in reply.

[38] A defect in a payment claim cannot be cured by serving a subsequent amended or substituted payment claim. In *Loveridge Ltd v Watts & Hughes Construction Ltd*, the learned Judge said:[8]

> [26] I do not accept that the claimant can cure a defect in an initial payment claim by serving subsequent amended or substituted payment claims. By using the terminology that it did in enacting ss 20 and 21, the legislature has made it clear that there will be only one payment claim relating to each progress payment and one payment schedule responding to it. I also consider that unnecessary confusion would result unless that clear position is adhered to. The Act after all is designed to assist those who are engaged in

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8 *Loveridge Ltd v Watts & Hughes Construction Ltd* HC Tauranga CIV-2011-470-275, 29 September 2011.

> the construction industry who are not lawyers. Simplicity and not undue complexity is required when approaching interpretation of the Act.

[39] Although this relates to the effect of issuing an amended or substituted payment claim, there is no reason why the later provision of information which should have been provided with the defective payment claim should be treated any differently. I agree with the observations of the learned Judge in the passage just quoted. The attempted bolstering of a defective payment claim can only cause unnecessary confusion. Apart from any other difficulty it might cause, there would be an immediate difficulty in deciding the deadline for the filing of a payment schedule. The procedure set out in this part of the Construction Contracts Act is clear and, as noted by the learned Judge in the above passage, is designed to assist those engaged in the construction industry who are not lawyers. I agree that simplicity and not undue complexity is required. I therefore find that the later provision of materials intended to provide more detailed information that should have been in payment claim 9 did not cure the defects in it.

[40] Payment claim 10 comprises 10 pages. The first page is in the same form as CBL used for payment claim 9. Under the heading "basis of claim calculation for work to date", there is reference first to the total contract price, and the total sum claimed to date, the latter figure being the total claim for work completed on payment claim 9. The next line contains the words "payment claim to date", and below that on the next line there is an item for labour. This has two figures, the second deducted from the first, being the labour included in payment claim 9. The balance between the two figures is shown under the heading "Qty", with a figure of 1458.5 being given. It seems tolerably clear from this that the first figure given in relation to labour is a total of labour expended to the date of the claim, and the figure under the heading "Qty" is the balance then claimed. There is a rate shown of 55 (without a dollar sign) and a figure in the column "Claim to Date" of $80,217.50. This seems to be a claim for labour in this sum, much as there was with payment claim 9, though in a different column. No explanation is given for this difference.

[41] On the next line below the references to labour is the word "Materials". No quantity, rate, total or percentage is given in any of the columns so marked, but in the

column marked "Claim to date" a figure is given of $80,679.17. On the front page there is no further description of the materials.

[42] The next seven pages of payment claim 10 list, in reverse chronological order, more details in relation to labour. The names of a number of people are given, each followed with a date, and then there are three columns headed "Category Code", "Cost Quantity", and "Status". The column headed "Category Code" has different numbers against the names of the people, but there is no explanation of what this means. Under the heading "Cost Quantity" there is also a list of numbers. This column is totalled at the end, with a figure of 2,643.25. This appears to be the total hours of labour claimed, from which the labour claimed in payment claim 9 is then deducted. I take these figures, therefore, to be the hours each of the named persons is said to have spent on the job.

[43] There is no indication on the document of what each of those persons has been engaged in, and certainly no cross reference of any kind to which element of the job, as listed, clearly and correctly on payment claim 8, the work each is said to have done relates. It is simply a bald statement of hours spent by listed people on various dates. It does not, in any way, identify the construction work undertaken, as required by s 20(2)(c).

[44] The final two pages appear to relate to materials, because they list such firms as Dimond, Smith's Mitre 10, Canterbury Aluminium and others. This schedule lists dates, reference numbers, various figures described as "tax inclusive" and a column headed "Amount Alloc". There is then a column headed "Comments".

[45] There is enough in these two pages to show that materials have been supplied for a job described as job 1272 by the listed firms. There is no indication on the first page of payment claim 10 that the LKFT job is in fact job 1272. However, the word "Romanos" is completed in a column headed "Name" and the LKFT building is being built for their business as Romanos Food Group. I am satisfied, therefore, that the schedule is sufficiently identified as a relevant part of the first page of the payment claim. Beyond that, however, the detail is minimal. The name of a supplier

is given and the sum which it has charged. There is no indication of what is being supplied or the element of the contract works to which it relates.

[46] Although 10 pages of information were provided as payment claim 10, it does not, in my opinion, provide to LKFT a sufficient identification of the construction work to which it relates, as required by s 20(2)(c). In a very abbreviated way, it shows how the amount claimed has been calculated, as required by subs (e), but only in the sense that it states how many hours of labour were spent, and by whom, and the invoices for materials CBL has appropriated to this contract.

[47] Without knowing what work is said to have been done, and what is said to have been supplied on any of the invoices for materials, LKFT could not prepare a schedule in terms of s 21 which in any way meaningfully responds to the payment claim. It could not, for instance, give a reason for disputing any of the invoices, without knowing what they were for. For all LKFT was to know, the invoices might have been for materials not provided to the job at all. Further, it goes without saying that without some reference of the claimed hours to the relevant elements of the job as set out clearly in payment claim 8, LKFT was left without enough material to decide whether it considered the hours charged were appropriate. It is not possible to discern even what kind of building work the named workers did. So, for example, were they carpenters, roofers, plumbers or other tradesmen? This left LKFT unable to assess the work claimed for in any meaningful way.

[48] I find, therefore, that the document on which CBL relies as payment claim 10 is not a payment claim in terms of s 20 of the Act.

Third issue: did LKFT issue a payment schedule in respect of either payment claim 9 or payment claim 10?

[49] Given the finding I have made in relation to the second issue, the claim for summary judgment by CBL must fail. The case will therefore proceed to trial. In this circumstance it is preferable that I do not discuss this issue.

Outcome

[50] The application for summary judgment is dismissed.

[51] Costs are reserved in accordance with the principle in *NZI Bank Ltd v Philpott*.[9]

Procedural directions

[52] Counsel are now to discuss the appropriate form of discovery and the parties are to complete discovery within 20 working days. There will be a **first** (and in all probability, only) **case management conference with me on 3 June 2015 at 12 noon**.

J G Matthews
Associate Judge

Solicitors:
Anthony Harper, Christchurch.
Hatherly Loughnan, Christchurch.

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9 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403.