

#103

**IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY**

**CIV 2010-454-000103**

UNDER the Construction Contracts Act 2002  
BETWEEN CENTRAL HOUSE MOVERS LIMITED  
Plaintiff  
AND DAVID RENNIE RUSSELL AND  
KAREN LEANNE RUSSELL  
Defendants

Hearing: 20 May 2010

Appearances: G Mason for the Plaintiff  
GWD Manktelow for the Defendants

Judgment: 20 May 2010

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**ORAL JUDGMENT OF  
ASSOCIATE JUDGE CHRISTIANSEN**

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*Solicitors/Counsel:*  
*G Mason, Barrister, Palmerston North – glenn@glennmason.co.nz*  
*GWD Manktelow, Lower Hutt – guy.manktelow@xtra.co.nz*

[1] The plaintiff filed its claim and summary judgment application on 11 February 2010. It seeks recovery of its contract costs to relocate a villa from Broadway Avenue, Palmerston North to Brandon Hall Road, Bulls, for the defendants in February 2007.

[2] There is no dispute but that the contract between the parties was for construction work within the Construction Contracts Act 2002 (the Act).

[3] On 17 December 2009 the plaintiff served the defendants with a payment claim pursuant to section 22 of the Act, in the required form claiming \$124,857.76 being the outstanding principal, interest, costs and expenses claimed to be owed. The defendants did not, within 20 working days allowed, provide a payment schedule and in consequence were deemed by the Act to become liable for the payment. Moreover by section 79 of the Act the defendants were not entitled to raise any counterclaim set-off or cross demand unless they already held a judgment for same.

[4] The defendants notice of opposition raises six grounds. In brief they are:

1. They have an arguable and/or bona fida defence or counterclaim.
2. They have prepared a notice of adjudication pursuant to the Act and will shortly commence adjudication regarding substantive issues in dispute.
3. They believe the adjudicator's determination will reduce the amount owing.
4. The Act provides for the adjudicator's determination to be enforced in a Court, that a Court must have regard to that determination.
5. The failure to file a payment schedule was due to:

- (a) Ongoing settlement negotiations.
  - (b) There were proceedings in the District Court to resolve the same matters brought by the plaintiff's summary judgment application in this Court.
6. It would be unfair and inequitable for judgment to be entered against them whilst an adjudicator's determination was still pending.

### **Background**

[5] The parties' dispute was the subject of District Court proceedings filed by the plaintiff in 2008. In their defence of the summary judgment application in the District Court Mr Russell filed an affidavit. He raised issues regarding:

1. Claims that payment would not be due until a Code of Compliance had been obtained.
2. Damage occurred whilst the villa was being stored pending relocation.
3. Reconstruction work was uncompleted or unsatisfactory.

[6] Mr Russell denies claims he refused to attend a scheduled judicial settlement conference on 22 April 2009. He said the fault was his former lawyer who did not advise him that it was scheduled to proceed. He says that the delay in finalising the draft agreement "was due to failure by my former lawyer to act promptly and respond to the plaintiff's lawyers. I will be taking this matter up with him".

[7] Mr Russell acknowledges "that technically there is now a debt due by operation of the statutory provisions in the CCA". He says he is now advised by his current lawyers to utilise the adjudication process under the Act. By his second affidavit, dated 17 May 2010, he advises that the adjudication claim was served on the plaintiff's lawyers on 27 April 2010; that he has applied to the Building Disputes

Tribunal for the nomination of an adjudicator, and he has paid \$5,000 in security of costs being a half share of the security sought by the Building Disputes Tribunal.

[8] Mr Russell believes the plaintiff is delaying the adjudication process. He acknowledges a responsibility to pay outstanding security so the adjudication may proceed. He is trying to raise the finance necessary to do this.

[9] Mr Russell advises that his financial position "is grim". He owns three properties but each is heavily mortgaged. Two of those are on the market for sale but he has received no offers yet. He wants this proceeding adjourned pending the outcome of the adjudicator's determination. Alternatively, if judgment is to be entered he wants execution stayed pending the outcome of the adjudicator's determination.

[10] In response Mr Finch, deposes that following a disagreement between the parties over whom the adjudicator should be the defendants have requested an authorised nominating body to nominate an adjudicator and this has happened. He said the adjudication is yet to be held because of a dispute over security for the adjudicator. The nominating authority has nominated an Auckland barrister and has required a security of \$10,000. Of this the defendants have paid half.

[11] As Mr Finch notes the parties are jointly and severally liable for the adjudicator's costs under the Act, although there is no requirement that the parties contribute jointly to that security. If the cost of adjudication exceeds \$10,000 the plaintiff is concerned that they will be left to pay all of the excess. They believe the overall costs could amount to \$20,000. Mr Russell's revelations concerning his financial situation, only increases the plaintiff's concern.

[12] The plaintiff is prepared to pay \$10,000 security to the Tribunal provided the defendants pay a further \$5,000. He says the defendants have refused to do this.

## **Considerations**

[13] The plaintiff has clearly met the test of satisfying the Court that the defendants do not have an arguable defence to its summary judgment application. The defendants have not availed themselves of the opportunity provided by the Act and accordingly the plaintiff's debt is due and owing. Nor is this an appropriate situation for the Court to exercise its jurisdiction to refuse to enter judgment.

[14] The debt has been outstanding since February 2007. The District Court proceedings were issued in March 2008. The defendants failed to attend a judicial settlement conference, although they blame their lawyer for this. Subsequently there were discussions which led to a draft deed of settlement being forwarded to the defendants' lawyer in September 2009. Because that was not responded to a payment claim under the Act was served. Only now have the defendants decided to engage the adjudication process under the Act. The plaintiff's concerns about the defendants' ability to provide adequate security for this process, appear reasonable.

[15] However I do have some issues with the amount of the claim for which the plaintiff seeks judgment. It has escalated from an agreed sum of \$46,027 to in excess of \$144,000, due, it appears, in respect of additional charges including administrative and legal charges together with interest and cost claims.

[16] In submissions before me Mr Manktelow submitted that the payment claim served upon the defendants did not comply with the Act because it included much more than was "due for construction work carried out" per s 19. A short response is that the payment claim was Act compliant. The summary judgment claim seeks judgment for that claim together with costs incidental and prescribed by the parties' contract. The fact the latter includes sums which may not strictly be the subject of a payment claim does not invalidate the payment claim nor penalise recourse to the summary judgment procedure to collect other contract costs as well.

[17] Had the defendants the ability to lodge a significant amount in trust for the purpose of payment in the outcome of the adjudication in due course then the Court

would have been tempted to exercise its jurisdiction to require the funds to be paid in the outcome.

[18] On the one hand the debt is long overdue for payment. On the other, it is only recently that the plaintiff has itself resorted to the Act for recovery of what is due. In that frame of things, recourse to adjudication is arguably not an overdue response.

### **Judgment**

[19] At the end of a brief hearing I discussed my conclusions with counsel and advised I was of a mind to give the defendants a limited opportunity to salvage something from the adjudication process. In our discussions counsel and I agreed to proceed upon the basis that the plaintiff be entitled to take a charging order over the defendants' residential home to secure an amount including the outstanding principal sum of \$46,026.94 calculated at 20.4 per cent per annum to 15 November 2009. In addition the charging order sum should include the cost of legal fees already rendered.

[20] After a brief break counsel returned and each signed an acknowledgement that that charging order should be for a sum total of \$76,160.68.

[21] I direct that judgment may be entered in favour of the plaintiff in that sum unless by 4:00pm 28 May 2010 the defendants have paid to the Building Disputes Tribunal Limited and it shall have received from the defendants a total sum of \$10,000 as security to engage the adjudication process.

[22] This matter will now be adjourned for call on the list 15 July 2010, by which time it is hoped the adjudicator's decision will be available to enable this Court to calculate the final sum of any judgment then due.

The costs of today's hearing are fixed on a 2B basis to be paid to the plaintiff's solicitors.

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**Associate Judge Christiansen**