#122

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2010-419-909

	BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Plaintiff
	AND	INFRAMAX CONSTRUCTION LIMITED Defendant

Hearing: By memoranda

Appearances: Mr K A Badcock for plaintiff
Mr M Talbot and Ms L Farquhar for defendant

Judgment: 17 December 2010 at 3 pm

SUPPLEMENTARY JUDGMENT OF LANG J
[as to quantum]

This judgment was delivered by me on 17 December 2010 at 3 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Lance Lawson, Rotorua
McCaw Lewis Chapman, Hamilton

[1] On 9 November 2010 I entered judgment in relation to the issue of liability on the application by Concrete Structures (NZ) Limited ("Concrete Structures") for summary judgment against Inframax. I left open the issue of quantum so that counsel could endeavour to reach agreement regarding that issue. That has not been possible. As a result, I am required to determine that issue on the basis of submissions that counsel have filed following the hearing. I apologise for the delay in delivery of this judgment, but I did not receive the file back from the Hamilton Registry until 16 December 2010.

[2] In its statement of claim Concrete Structures seeks judgment in the sum of $415,676.15. That is the amount that it claimed in Payment Claim 17 ("PC 17"). In my earlier judgment I determined that Inframax did not serve a valid payment schedule on Concrete Structures in response to PC 17. As a result, Inframax is required to pay Concrete Structures the full amount claimed in PC 17.

[3] As I noted in my judgment at [46], however, s 27(2)(a) of the Construction Contracts Act 2002 ("the Act") requires the Court to make allowance for any payments that a party has made as a result of any adjudication under Part 3 of the Act. The section provides as follows:

> **27 Effect of Part on civil proceedings**
>
> (1) Except as provided in this section and section 61(2), nothing done under, or for the purposes of, this Part affects any civil proceedings arising under a construction contract.
>
> (2) In any proceedings before a court or tribunal, or before [a member] under the Weathertight Homes Resolution Services Act [2006], in relation to any matter arising under a construction contract, the court or tribunal [or member]—
>
> (a) must allow for any amount paid to a party to the contract under, or for the purposes of, this Part in any order or award the court, tribunal, [or member] makes in those proceedings; and
>
> (b) may make any orders that the court, tribunal, [or member] considers appropriate, having regard to any steps taken by a party to the contract in good faith and in reliance on an adjudicator's determination under this Part (including an order requiring a party to the contract to pay for goods and services

> supplied by another party to that contract in good faith and in reliance on an adjudicator's determination).

[4] Counsel agreed that s 27(2)(a) requires me to make allowance for the sum of $281,732.09, being the amount that Inframax paid pursuant to an adjudicator's determination issued on 22 July 2010. That adjudication settled the amount that Inframax was required to pay under an earlier payment claim, Payment Claim 16 ("PC 16"). Since PC 17 did no more than re-work the calculations of the amount owing (including the amounts claimed under PC 16) as at the point when Concrete Structures left the site in December 2009, counsel agreed that I should logically make allowance for the payment of that sum.

[5] The issue that prevented me from fixing quantum in my earlier judgement related to whether s 27(2)(a) also requires me to make allowance for a payment that Concrete Structures made to Inframax in compliance with another determination by the same adjudicator issued on 15 October 2010.

[6] That determination did not relate to claims arising out of a payment claim or payment schedule. Rather, it determined a claim by Inframax that it had overpaid Concrete Structures in the sum of $108,957.07. The adjudicator upheld this claim. He did so by comparing the payments that Inframax had made up until 15 October 2010 with the total amount for which he found Concrete Structures was entitled to charge Inframax under the contract as at that point. Concrete Structures paid the sum of $108,957.07 to Inframax shortly after the adjudicator issued his decision. The issue that I am now required to determine is whether s 27(2)(a) requires me to make allowance for that payment in fixing the quantum payable by Inframax in the present proceeding.

[7] When I issued my judgment, I was under the impression that the adjudicator's determination dated 15 October 2010 resolved a dispute that had arisen well before Concrete Structures issued PC 16 and PC 17. For that reason I did not see how, as a matter of logic, the payment that Concrete Structures made pursuant to that determination could be taken into account pursuant to s 27(2)(a). That impression was incorrect. The adjudicator's determination considered the respective obligations of the parties under the contract as at 15 October 2010, and did not relate

to a dispute that had arisen prior to the point at which Concrete Structures issued PC 16 and PC 17.

[8] For that reason the determination dated 15 October 2010 took into account the payment of $281,732.09 that Concrete Structures made in compliance with the adjudicator's earlier determination dated 22 July 2010. The adjudicator determined that Concrete Structures was required to pay Inframax the sum of $108,957.07 because, taking into account all payments that Inframax had made up to 15 October 2010, Concrete Structures had received $108,957.07 more than it was entitled to charge Inframax under the contract as at that date.

[9] It is important to remember that, unlike the determination issued on 15 October 2010, the determination dated 22 July 2010 did not determine whether the amounts that Concrete Structures had claimed in PC 16 were properly payable in terms of the contract. Rather, it determined that the payment schedule that Inframax had issued in response to PC 16 was not a valid payment schedule in terms of the Act. For this reason Inframax was required to pay the full amount claimed in PC 16 regardless of the fact that that amount might not be properly payable under the contract. It was always open to Inframax, however, to rectify the situation by claiming that it had overpaid Concrete Structures in terms of the contract. That it is what it did when it proceeded to adjudication and obtained the adjudicator's determination in its favour on 15 October 2010.

[10] It is not entirely clear whether the adjudicator expressly dealt with all the factors that caused Concrete Structures to issue PC 17 seeking payment of a different amount than it had sought in PC 16. If he did, the adjudicator may have effectively finally determined the respective liabilities of the parties under the contract. That seems unlikely, however, because in accepting Inframax's assessment of the value of the work, the adjudicator noted at [64]:

> That is not to say that the value cannot be challenged by *CSL* in terms of the dispute provisions of the contract. This simply means that, based on the information provided to me, I favour *Inframax's* assessment of the value of the work.

[11] The adjudicator's determination leaves unresolved, however, the fact that Inframax did not issue a valid payment schedule in relation to PC 17. This gives rise to a separate liability under the Act, and not under the contract. Surprising as it may seem, Inframax cannot escape liability under the Act even it may not have any underlying liability in terms of the contract. If it wishes to dispute Concrete Structures' entitlement to what it has been paid, however, it must do so using a separate process.

[12] Section 27(2)(a) is cast in mandatory terms. I consider, however, that in the present context the section only requires the Court to make allowance for the payment that Inframax made to Concrete Structures pursuant to the adjudicator's determination dated 22 July 2010. I take that view for two reasons. First, the section refers to "any amount paid to a party to the contract" and not, for example, to "any amounts paid by the parties to each other".

[13] More importantly, I consider that the section is designed to ensure that parties are not required to pay twice in respect of the same, or substantially the same, dispute. In the absence of a provision such as s 27(2)(a), there would be nothing to prevent one party to a contract from obtaining a payment from the other party using the adjudication process, and then seeking to obtain the same payment again by proceeding through the courts in respect of the same dispute. Section 27(2)(a) prevents that from occurring by requiring the court to make allowance for any payment that one party has made to another pursuant to an adjudication.

[14] I am reinforced in that conclusion by considering s 27 as a whole. Unlike s 27(2)(a), s 27(2)(b) is not cast in mandatory terms. It provides the court with a discretion to make such orders as it deems appropriate having regard to the fact that one party to the contract has taken steps in good faith and in reliance upon an adjudicator's determination. It, too, is designed to ensure that any orders that a court might make do not create an injustice in circumstances where a party has taken steps in good faith in reliance upon an adjudicator's determination.

[15] Inframax made the payment of $281,732.09 in satisfaction of the amount claimed in PC 16. The sum claimed in PC 17 comprised in large part the amount

claimed in PC 16. The present proceeding relates directly to whether Inframax is liable to pay the full amount claimed in PC 17. For that reason s 27(2)(a) operates to require the Court to deduct the payment that Inframax made in compliance with the adjudicator's determination dated 22 July 2010. If that was not the case, Inframax would effectively be required to pay the same debt twice.

[16] The position is different, however, in relation to the payment that Concrete Structures made in compliance with the adjudicator's determination dated 15 October 2010. That adjudication related to an entirely different dispute than that which the adjudicator resolved in the determination issued on 22 July 2010. It related to a dispute regarding the rights and obligations of the parties under the contract, and not to the statutory obligations that arise under the payment claims regime. For that reason I do not consider that s 27(2)(a) is engaged in relation to the payment that Concrete Structures made to Inframax pursuant to the determination issued on 15 October 2010. Concrete Structures is not at risk of being asked to pay the same debt twice.

[17] I therefore calculate the quantum payable to Concrete Structures as being $133,944.05, made up as follows:

a)	Amount for which judgment is sought	$415,676.15
b)	Less amount paid by Inframax in terms of adjudicator's determination issued on 22 July 2010 in relation to PC 16	$281,732.10
	TOTAL	$133,944.05

[18] I leave it to counsel to calculate interest on this sum at the contractual rate.

[19] It will be obvious from the foregoing that I have had regard to the two determinations of the adjudicator in reaching my conclusion. For the reasons given in my earlier judgment at [20] to [27], I do not accept that the confidentiality provisions of the Act prevent me from adopting that course. I could not have reached any sensible conclusion in relation to the issue of quantum unless I had been able to ascertain the issues that the adjudicator was required to determine. It was

therefore necessary for me to have regard to the determinations in order to resolve that issue.

Lang J