

#110

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

CIV-2010-488-000319

BETWEEN

DONOVAN DRAINAGE &
EARTHMOVING LTD
Plaintiff

AND

KAIPARA DISTRICT COUNCIL
Defendant

Hearing: 18 August 2010

Appearances: R Bowden for Plaintiff
D Neutze for Defendant

Judgment: 18 August 2010

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors/Counsel:

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[1] In this summary judgment application, the plaintiff seeks judgment on a payment claim for \$943,583.32 under the Construction Contracts Act 2002.

[2] Its case is that on 16 April 2010, it served payment claim No. 14 on the defendant. It says that under the contract terms the defendant had 12 working days in which to provide a payment schedule. It acknowledges that the last day for providing a payment schedule was 4 May 2010. It did receive a payment schedule from the defendant but it was sent by post on 4 May 2010 and did not arrive until 5 May 2010. The plaintiff says that that is too late. It says that, because the payment schedule was not provided in time, the defendant becomes liable to pay the amount it has claimed under s 22 of the Construction Contracts Act and the consequences in s 23 of the Act follow, including the plaintiff's right to recover the unpaid part of the claimed amount, plus its actual and reasonable recovery costs.

[3] The contract in question in this case is the Kaipara District Council Roading Contract 566, Stage 2, for the sealing of Baldrock Road near Kaiwaka. It is common ground between the parties that the work carried out under that contract was construction work under the Construction Contracts Act. The plaintiff was the successful tenderer. Its tender was accepted in December 2008. Contract works started in January 2009, although contract documents were not signed until March 2009.

[4] Gavin Gribben of CPG New Zealand Ltd is the engineer under the contract and, as is standard, he had a dual role:

- a) To act as expert adviser to the Council, giving directions to the Council, and issuing payment schedules on the Council's behalf; and
- b) Independently of the contracting parties, to make decisions under the contract to value work and issue certificates.

[5] The conditions of contract included, as general conditions of contract, NZS 3910:2003, except where they were expressly modified by other terms of the contract. Under s 12, clauses 12.1 and 12.2 are relevant:

12.1 Contractor's payment claims

12.1.1 The Contractor may submit to the Engineer payment claims under the contract. Unless otherwise provided in the Contract Documents such payment claims shall be submitted in respect of work carried out during periods of not less than one Month. The Contractor shall send a duplicate copy of each payment claim to the Principal.

12.1.2 Advances for Plant or Materials not yet incorporated into the works shall not be made to the Contractor.

The Contractor's payment claims shall:

- (a) Identify the construction contract and the relevant period to which the payment claim relates;
- (b) Identify the Contract works to which the payment claim relates, the claimed amount in respect of those Contract Works and the manner in which the claimed amount has been calculated, in particular:
 - (i) The estimated extent and value of the Contract Works, excluding Variations, which have been carried out;
 - (ii) The estimated extent and value of all work done or other Cost which is claimed in respect of Variations;
 - (iii) The estimated extent and value of Materials delivered to the Site which are intended to be incorporated in the Contract Works but have not yet been so incorporated;
 - (iv) Any advances for Temporary Works or Plant or for Materials not yet on Site for which payment is provided in the Special Conditions;
 - (v) The estimated value of Cost fluctuations for which payment is provided under 12.8;
 - (vi) The estimated amount of any bonus to which the Contractor claims to be entitled under 10.6.
- (c) Indicate the due date for payment which shall be 17 Working Days after the date of service of the payment claim;
- (d) Where the payment claim is intended to be a payment claim under the Construction Contracts Act 2002, state that it is made under this Act; and
- (e) Where the payment claim is intended to be a payment claim under the Construction Contracts Act 2002, and the Principal is a "residential occupier" under this Act, include the information set out in Schedule 1, Form 1 of the Construction Contracts Regulations 2003;
- (f) Claims are to indicate the amount of works completed for each scheduled item listed in the Schedule of Prices for the periods:

- Current contract to date
- Previous contract to date amount
- Current period

The claim format shall match that of the Schedule of Prices.

12.2 Progress Payment Schedules

12.2.1 Within seven Working Days after the receipt of the Contractor's payment claim the Engineer shall issue a certificate in the form of a provisional Progress Payment Schedule to the Principal and a duplicate copy to the Contractor which shall:

- (a) Identify the Contractor's payment claim to which it relates;
- (b) Show the sum certified by the Engineer which shall comprise the value of the Contractor's payment claim amended as necessary under 12.1.4 and 12.3, less previous payments certified, and less any other deductions which are required by the terms of the contract or by law;
- (c) Show the manner in which the sum under 12.2.1(b) has been calculated; and
- (d) Set out the reason or reasons for any difference between the sum certified by the Engineer under 12.2.1(b) and the claimed amount.

12.2.2 If any item of the Contractor's progress payment claim cannot be verified within the prescribed time, the Engineer shall within that time certify under 12.2.1 a reasonable estimate of the amount due.

12.2.3 Within three Working Days after the receipt of the Engineer's certificate under 12.2.1 the Principal may notify the Engineer of any amendments or deductions that the Principal requires to be made to or from the sum certified by the Engineer. Such notice shall show the manner in which any such amendments or deductions have been calculated, and the reasons for any such amendments or deductions.

12.2.4 Within two Working Days of receiving any notice from the Principal under 12.2.3, and in any event no later than 12 Working days after the receipt of the Contractor's payment claim, the Engineer (for this purpose acting as agent of the Principal) shall issue a Progress Payment Schedule, which shall contain the information stated under 12.2.1 and shall also show:

- (a) Any amendments or deductions which the Principal has notified under 12.2.3, but which are not included in the sum certified by the Engineer under 12.2.1(b) (and shall not be deemed to be amounts certified by the Engineer), including the manner in which any such amendments or deductions have been calculated, and the reasons for any such amendments or deductions; and

(b) The scheduled amount which shall be the sum certified by the Engineer under 12.2.1(b) as amended by any amendments or deductions shown under 12.2.4(a).

12.2.5 The Engineer shall send the original of each Progress Payment Schedule to the Principal and a duplicate copy of each Progress Payment Schedule to the Contractor.

12.2.6 Every scheduled amount under Clause 12.2.4(b) as shown in a Progress Payment Schedule, together with the amount of Goods and Services Tax payable, shall be paid by the Principal to the Contractor within ten (10) Working Days of the date of the Progress Payment Schedule.

12.2.7 Failure by the Principal to notify the Engineer under 12.2.3 that it requires any amendments or deductions, or failure to deduct any such sums from the amount paid to the Contractor under 12.2.6, shall not prevent the Principal from requiring any such amendments or deductions to be included in subsequent Payment Schedules, or prejudice any other method of recovery of such sums or the Principal's right to dispute the sum certified by the Engineer.

[6] The plaintiff says that there was practical completion of the contract in January 2010. During 2009 there had already been one adjudication under the Construction Contracts Act with the decision of the adjudicator being given in December 2009.

[7] On 16 April 2010, the plaintiff served payment claim 15 on the defendant. It faxed the claim to Mr Gribben, the engineer, and it also delivered the claim to Mr Gribben's office on the same day. The plaintiff also faxed a copy of the plaintiff's claim to the District Council itself. The Council does not dispute that the payment claim was validly served. The covering letter to the engineer asked for the claim to be processed in accordance with NZS 3910:2003. The letter pointed out that a provisional payment schedule was due no later than 27 April 2010 and a payment certificate was due no later than 4 May 2010. The claim said that payment was due on or before 11 May 2010. The amount claimed under the demand was \$1,029,476.44, excluding GST. The reference to the provisional payment schedule is the document to be issued by the engineer under clause 12.2.1. 27 April 2010 was seven working days after 16 April 2010. The reference to a payment certificate is the progress payment schedule to be issued under clause 12.2.4. 4 May 2010 was 12 working days after 16 April 2010. The reference to payment on or before 11 May 2010 is the 17 working days under clause 12.1.1(c) but the date claimed for payment

is mistaken because 12.2.6 says that payment should be a further 10 working days, that is, on 18 May 2010.

[8] The amount set out in the payment claim is more than the amount claimed in this proceeding. That is because the plaintiff has made deductions from the sums sought in the payment claim. It acknowledges that the items it has now deducted are not for construction work under the Construction Contracts Act.

[9] Mr Gribben says that he issued the plaintiff with a provisional payment schedule under clause 12.2.2.1 on 27 April 2010. This schedule recorded that the amount certified as being due was nil. The schedule was sent by fax to the plaintiff on 27 April 2010 at 5:12 pm. On the same day but later that evening, Mr Gribben also e-mailed the plaintiff's representative, Mr Potter, a Notice to Contractor 48, giving a detailed explanation for the nil figure in the provisional payment schedule in the payment claim 14. In this application, I am not required to review or consider Mr Gribben's reasons for finding that nothing was payable to the plaintiff. Likewise, I am not required to give any decision on the merits of the plaintiff's payment claim.

[10] There was a meeting between representatives of the plaintiff and representatives of the Council on 3 May 2010. The accounts in the affidavits about what was said in that meeting do differ somewhat. I am not required to make any decision about what was said. Nothing that transpired at the meeting is material to the present matters in issue, but Mr Gribben says that after that meeting, he reviewed all the documentation. He does not say that he had received any notices from the Council under clause 12.2.3. He says that he finalised and issued a progress payment schedule in response to Payment Claim 14 on 4 May 2010. He says he reissued the Notice to Contractor 48 with an amendment.

[11] An administrative assistant in his office, Hayley Maypamela Stewart, has said in affidavit that she posted the progress payment schedule with a revised version of the Notice to Contractor 48 in a pre-paid envelope addressed to the plaintiff at PO Box 8117, Kensington, Whangarei. That envelope was collected by courier at approximately 4:30 pm on 4 May 2010. I comment that the defendant has followed good practice with proving the posting of the envelope by retaining copies of the

envelope and what was sent. When questions arise whether documents have been properly sent by post, it is certainly good practice if the person sending has kept copies so that they can be produced.

[12] The plaintiff acknowledges that it received that progress payment schedule the next day, on 5 May 2010.

[13] In its notice of opposition, the Council says that the contract does not contain any express requirement when the progress payment schedule is to be served or sent to the applicant. It therefore says that the time period under s 22(b)(ii) of the Construction Contracts Act applies by default, giving a 20 working day timeframe. Next, it says that if there is a contractual term that the progress payment schedule is to be sent within 12 working days after receipt of the payment claim, then the Council complied with that by sending the progress payment schedule by post in a correctly addressed envelope within the 12 working day period. For that, it relies on s 80(c) of the Construction Contracts Act.

[14] It also says that the payment claim is invalid because it does not comply with certain requirements under clauses 12.1.2(c) and 12.1.2(f) of the contract, but this last point was not developed in submissions and was not a live issue.

[15] Section 22 of the Construction Contracts Act says:

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) a payer does not provide a payment schedule to the payee within—
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[16] Under s 22(b)(i), in a construction contract the parties may fix the time for the payer to provide a payment schedule and where they have fixed it, that prevails over the Act. The Council says that the contract does not fix any time for a progress

payment schedule to be sent to the contractor. Here, it draws a distinction between clause 12.2.1, on the one hand, and clauses 12.2.4 and 12.2.5, on the other. 12.2.1 says:

Within seven working days after the receipt of the contractor's payment claim the engineer shall issue a certificate in the form of a provisional progress payment schedule to the principal and a duplicate copy to the contractor ...

[17] The Council makes the point that this provision is for the issue of a certificate to the contractor within a stated period of time. It says that the position is different with a progress payment schedule under clauses 12.2.4 and 12.2.5. It acknowledges that there is a requirement to issue a progress payment schedule no later than 12 working days after receipt of the contractor's payment claim under 12.2.4, but says that there is a separate obligation under 12.2.5 to send the copy of the progress payment schedule to the contractor under 12.2.5. It says that, while there is a time specified for the issue of a progress payment schedule in 12.2.4, there is a separate obligation under 12.2.5 and 12.2.5 is silent as to time. It says accordingly that there is no time for sending the progress payment schedule under 12.2.5. In other words, it says that issuing a progress payment schedule under 12.2.4 is a different step from sending it under 12.2.5. It claims that these differences arising from the drafting of 12.2.1, on the one hand, and 12.2.4 and 12.2.5, on the other, are significant and clearly intentional.

[18] I do not accept this argument. It ignores the readership of general conditions in NZS 3910:2003. That readership comprises contractors, engineers, architects, principals, and sometimes local authority officials. In fact, members of those occupations had a part in drawing up NZS 3910. People in the contracting and building industries would not see a difference between "issuing" a progress payment schedule and "sending" a progress payment schedule. As I read these conditions, issuing a schedule and sending a schedule are used inter-changeably.

[19] As a matter of drafting, the provisions of clause 12.2.5 could have been incorporated into 12.2.4 so as to make it clear that "issue a progress payment schedule" meant sending a schedule to the people named in 12.2.5. That would have added to the length of that clause and would have risked clumsiness. 12.2.5 has been

added below 12.2.4 simply to clarify who the progress payment schedule is to be issued to by identifying the people, but it does not involve a separate step from 12.2.4. In my view, this is consistent with modern trends in drafting, which is not to have long sentences in which numerous provisions are incorporated, but to express matters in shorter sentences containing fewer words.

[20] On the basis that 12.2.4 is to be read as comprising one step also involving 12.2.5, then there has been a time requirement incorporated in sending a progress payment schedule under 12.2.5. That is, time has been fixed for the purpose of s 22(b)(i). That means that the time provision under the contract applies and it is not appropriate to have recourse back to the Construction Contracts Act. That means that, for s 22(b)(i), the progress payment schedule, which is a payment schedule under the Act, had to be provided by 4 May 2010.

[21] The next point is whether the posting of the progress payment schedule on 4 May 2010 was timely provision of the schedule under s 22(b)(i). Here, the Council relies on s 80 of the Construction Contracts Act:

80 Service of notices

Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if—

- (a) the notice or document is delivered to that person; or
- (b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
- (c) the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or
- (d) the notice or document is sent in the prescribed manner (if any).

[22] The Council relies in particular on clause (c). Its argument is that, by posting the letter on 4 May 2010, that satisfied s 80(c) and it does not need to prove that the document was actually delivered to the plaintiff on the same day. Its case is that sufficient service is shown by any one of the matters in s 80(a), (b), (c) and (d). For (c), it is the act of posting which constitutes sufficient service.

[23] The plaintiff's argument focuses on the wording of s 22. The plaintiff says that what is foremost is that the payer must provide a payment schedule within time and the plaintiff says that a payment schedule is not provided to the payee until the payee receives it. Here, the plaintiff is trying to draw a distinction between providing a payment schedule under s 22 and service of notices under s 80. The wording of s 80 encompasses not only service of notices but also giving of notices. The Act uses the language of a "service" for payment claims to be given by a payee, but talks about "provision" of payment schedules when given by payers.

[24] In my view, when a payment schedule is "given" under s 80, it is "provided" under s 22. In other words, I equate "providing a schedule" with "giving a schedule". A payment schedule is sufficiently given if one of the steps available under s 80 are used. Section 80 provides for a range of steps that may be taken. On any one of those steps being taken, the document required to be given is regarded as sufficiently served. It is not an exclusive code for the service of documents and it is not a mandatory code for the service of documents. But it does provide a means available for giving notices, including payment schedules required to be provided under s 22 of the Construction Contracts Act.

[25] Accordingly, the defendant in this case has shown that it posted the progress payment to the plaintiff at its place of business in Whangarei. The address for service was the address for the purpose of the contract. The act of posting is sufficient service. If s 80 had been intended to provide that some time would be allowed between the act of posting and the time of deemed receipt, Parliament would have used the provisions that are found in other statutes where documents are deemed to be received in the ordinary course of post. See, for example, s 352(5) of the Resource Management Act 1991.¹ Parliament has not used that on this occasion. It has simply focused on the act of posting and it is that act, when complete, that constitutes sufficient service. The posting and receipt of the document under s 80(c) can straddle the lapse of time for the provision of a payment schedule under s 22.

[26] For the plaintiff, it was protested that this would create uncertainty and that it would affect the purpose of the act of providing for regular and timely payments

¹ See, for example, s 352(5) of the Resource Management Act 1991.

between the parties to the construction contract and for the speedy resolution of disputes arising under the construction contracts. The plaintiff says that even one day late in giving a payment schedule is fatal.

[27] I do not accept those protests. It is necessary to reflect back on the purpose of the legislation. The contracting industry will be aware that in the past delaying tactics could be rife when contractors pressed for payment. Payers could simply ignore phone calls, not answer correspondence, not be available at site meetings to discuss these matters. When the contractor pressed harder, excuses would be made, promises would be made. When pressure was applied even further, then fault would be found with what the contractor had done, there would be more plays for time. The remedies available were unhelpful to contractors. A wily principal could always raise a dispute of fact which would be sufficient to ward off an application for summary judgment or a statutory demand.

[28] Parliament has addressed that problem by requiring principals to face up to claims. It has prescribed a process for contractors to put payment claims in a form which principals can respond to constructively. It has required a principal to respond in a timely fashion. The response required of a principal is to consider the payment claim; consider how much it accepts and how much it rejects; if it rejects any parts of it, to give reasons why in the payment schedule; and also to record in the schedule how much it accepts as payable and cannot be disputed. It must take steps to ensure that it communicates its response to the contractor. It is the considered and deliberate response from the principal that is required to be communicated to the contractor. However, while the principal is required to take those steps within the statutory framework, the actual time of receipt by the contractor is not so critical. I do not see that there is any impact on the policy of the legislation if, as happened in this case, a payment schedule is received the day after the principal is required to consider the payment claim, prepare its response, and get its response communicated. That is, the lapse of time is not fatal to the policy of the Act.

[29] Accordingly, I find that the defendant has an arguable defence because the posting of the progress payment schedule on 4 May 2010 is arguable compliance

with s 80(c) and there is accordingly a defence available to it. I dismiss the application for summary judgment.

[30] There has been brief discussion about costs. Mr Bowden is considering his client's position. It is possible that his client may discontinue but no immediate decision has been given about that. If the plaintiff were to continue the proceeding, I would reserve costs. It is not a case where costs ought to be ordered against the plaintiff on the failure of a summary judgment application. However, if the plaintiff later elects to discontinue, it may face costs then. For that purpose I indicate that, if I were to fix costs today against the plaintiff, I would fix them on a 2B scale.

[31] If the parties do not sooner resolve matters, the case is to be called in the next summary judgment list for directions to be given.

R M Bell
Associate Judge