

IN THE DISTRICT COURT
AT KAIKOHE

CIV-2009-027-000035

BETWEEN

DONOVAN DRAINAGE AND
EARTHMOVING LTD A DULY
INCORPORATED COMPANY HAVING
ITS REGISTERED OFFICE AT CORNER
STATE HIGHWAY ONE AND APOTU
ROAD, KAURI, WHANGAREI AND
CARRYING ON BUSINESS AS
CONTRACTORS
Plaintiff

AND

KARL STEININGER, KURAPARI
ROAD, RANGTANGI, KERIKERI,
COMPANY DIRECTOR
Defendant

Hearing: 8 May 2009

Appearances: R Bowden for the Plaintiff
D James for the Defendant

Judgment: 27 October 2009

JUDGMENT OF JUDGE K B de RIDDER

Introduction

[1] The plaintiff ("Donovan's") carried out construction work on a subdivision at Waipapa Road, Kerikeri. Donovan's issued payment claims pursuant to s 20 of the Construction Contracts Act 2002, totalling \$53,949.25 which the defendant has failed to pay. Accordingly, the plaintiff now seeks summary judgment.

Background

[2] Donovan's was invited to tender for the construction of subdivision access to be carried out at Waipapa Road, Kerikeri and submitted its tender documents to Haigh Workman, who had been appointed by the defendant as engineers to the contract. On 22 February 2008, Haigh Workman accepted Donovan's tender on behalf of the defendant and a formal agreement was signed on 16 April 2008 by the general manager of Donovan's and by Mr Steininger for the S & V Trading Trust Ltd.

[3] Haigh Workman certified that the work had been completed and the maintenance period in the contract commenced on 3 October 2008.

[4] Thereafter, Haigh Workman certified four separate progress payment certificates dated 19 October, 21 November, 25 November and 12 December 2008, totalling \$53,949.25. Those have not been paid, and the plaintiff seeks summary judgment.

[5] The defendant opposes the application for summary judgment. The notice of opposition filed by the defendant specifies three grounds of opposition, namely that the agreement between the parties contains a provision as to arbitration, the defendant claims a set off by way of liquidated damages for late completion of the work, and the defendant has a counterclaim against the plaintiff for failing to complete the work in accordance with the contract specifications. Although not specifically pleaded in the notice of opposition, it is clear from the affidavit of the defendant filed in support of the notice of opposition, that the defendant contends that he is not personally liable for any amount owing to the plaintiff.

Discussion

Summary judgment principles

[6] The principles to be applied in such applications are now very well established, and were restated by the Court of Appeal in *Haines v Carter*¹ at paragraph [97]. Claims under the Construction Contracts Act 2002 can clearly be the subject of summary judgment applications where the claim relies on either 23 or 24 of the Act. The purposes of the Act, and the approach to be applied in dealing with claims under the Act has been the subject of several recent decisions including the case of *Marsden Villas Ltd v Wooding Construction Ltd*².

The claim

[7] There is no dispute that the Act applies to this contract. It is also not disputed that the contract was subject to the provisions of the New Zealand Standard Conditions of Contract for Building and Civil Engineering Construction General Conditions of Contract, known as NZS3910:2003 ("NZ standard conditions"). Although relevant portions of that document are exhibited in the affidavit evidence, by agreement between counsel I received from Mr Bowden during the course of the hearing a copy of the complete document.

[8] It is also not in dispute that those general terms clearly provide for progress payments and, accordingly, the parties are bound by subpart 3 of Part 2 of the Act.

[9] The defendant submits that the plaintiff did not file any payment claims. Alternatively, if documents provided by the plaintiff were payment claims then they were not properly served on the defendant, and they did not properly notify the defendant that they were payment claims under the Act.

[10] As to whether or not the plaintiff provided payment claims the documents attached to the plaintiffs affidavit in reply on which the plaintiff relies are clearly payment claims. They are described as claims, they refer to the NZ standard

¹ [2001] NZLR 167

² [2007] 1 NZLR 807

conditions, and they refer to the requirement for a payment schedule, payment certificate, and the due date for payment. The only sensible construction is that they are payment claims in the sense that term is defined in the Act.

[11] The second issue raised by the defendant is whether or not the payment claims have been properly served on the defendant. In this regard, the defendant points to Clause 15 of NZ standard conditions and, in particular, 15.1.2 which says that any document shall be sufficiently served on the principal if handed to or delivered to the engineer "except for payment claims ... or any notice under the Construction Contracts Act 2002". However, that submission ignores the specific provisions of s 12 of NZ standard conditions which make specific provision for both payment claims and payment schedules. These are detailed and specific provisions which clearly override the provisions of Clause 15 of the general conditions. Clause 12.1.1 provides:

"The contractor may submit to the engineer payment claims under the contract".

Clause 12.1.3 provides:

"The contractor shall send the original of each payment claim to the principal and a duplicate copy to the engineer".

[12] The affidavit evidence filed in support of the application makes it clear that the payment claims were sent by the plaintiff to both the engineer and to the defendant, thus complying with the requirements of Clause 12.

[13] The plaintiff makes a bald assertion in his affidavit sworn 21 April 2009 that he never received payment claims, but does not provide any further explanation or evidence to back up that assertion. In any event, the claims were clearly forwarded to the engineer in accordance with the requirements of s 12 of NZ standard conditions. It is also clear from the initial affidavit filed by the defendant that no dispute was taken with any issue surrounding the issue of payment claims and payment schedules, but rather relied upon the fact that he disputed any liability for payment based on setoff and counterclaim, and that these issues were subject to arbitration. The claim that the defendant did not receive any payment claims only

arose in the further affidavit of the defendant sworn on 13 April 2009 over a month after the filing of his first affidavit in support of his notice of opposition. On any view of it, the defendant's assertion that he never received payment claims comes very late in the piece, and is to be treated with considerable suspicion in accordance with principle 4 stated by the Court of Appeal in *Haines v Carter* at paragraph [97]. Given the fact that the defendant paid the first five payment claims which followed exactly the same procedure as the four claims which have been not been paid, the Court infers that the defendant did receive the payment claims.

[14] The defendant asserts that the plaintiff did not comply with the requirement of s 20(2)(f) of the Act that the payment claim state that it is a claim made under the Act. The payment claims consisted of schedules specifying various work carried out and at the end of those schedules contained the words "This claim is made under the Construction Contracts Act 2002". The defendant submits that this reference to the Act is "hidden" and unfair. There are two short points which answer that submission. Firstly, the wording is there plainly on the face of the document for the defendant to see. Secondly, the Act does not prescribe where in the document or in what manner should it be stated that the claim is made under the Act. The plaintiff has plainly complied with its obligations to specify that the document is a payment claim being made under the Act.

[15] On receipt of the payment claims from the plaintiff the engineer issued the appropriate certificates in accordance with Clause 12.2.1 of NZ standard conditions. Clearly these amounted to payment schedules as required by s 21 of the Act. The defendant does not dispute that the engineer, as the defendant's agent, has complied with the provisions of Clause 12.2. Under Clause 12.2.6 the amount certified by the engineer was payable within five working days. Again, the defendant does not dispute that he did not make payment.

[16] On the face of it, the plaintiff is entitled to rely upon the provisions of s 24 of the Act and seek judgment on the basis of the defendant's failure to pay the scheduled amount specified in the payment schedules issued by the engineer.

Any defence to the claim

[17] The defendant's opposition to summary judgment being entered on the basis the he has a set-off or counterclaim is clearly met by the provisions of s 79 of the Act. Put simply, if he has such claims then he is entitled to pursue those, but they do not amount to a defence to a claim under s 24 of the Act.

[18] Similarly, the fact that the contract between the parties contains provisions providing for arbitration does not override the provisions of the Act. That is clearly provided by s 12 of the Act which provides that the Act applies "despite any provision to the contrary in any agreement or contract". Furthermore, the defendant is still entitled to bring proceedings in respect of any claim he considers he has, and that could be referred to arbitration.

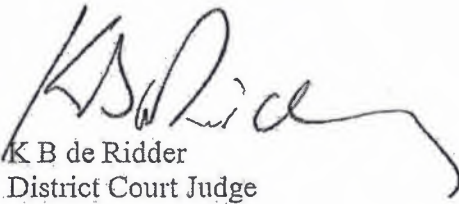
[19] The defendant also asserts that he has a defence to the claim in that he is not personally liable. He says that the land on which the construction work was carried out is owned by a company of which he is a director, being Monka Ltd, and says that that company is the "trustee owner of the land, and the trustee developer of the land operating under the name S & B Trading Trusts". He further says that the trust is the principal of the construction contract agreement. Nowhere in any of the documentation provided by the plaintiff or the defendant is there any reference whatsoever to Monka Ltd. The agreement purports to be between the plaintiff and S & B Trading Trusts Ltd. The defendant does not dispute the plaintiff's assertion that there is no such company in existence. The plaintiff says that all its dealings were with the defendant personally who also signed the agreement. In those circumstances, I am satisfied that the defendant is clearly personally liable. If he was acting as an agent of Monka Ltd then that agency clearly was not disclosed to the plaintiff and the plaintiff is entitled to pursue the defendant personally. No doubt, the defendant may have the right to seek relief from the company, but that does not affect the defendant's personal liability to the plaintiff.

Conclusion

[20] I am satisfied that the plaintiff has established that it has a valid claim pursuant to s 24 of the Act, and has further established that the defendant has no defence to its claim.

Result

[21] There will be summary judgment for the plaintiff in the sum of \$53,949.25, together with interest calculated in the usual way and costs on a 2B basis and disbursements as fixed by the Registrar.



K B de Ridder
District Court Judge

Solicitors: R Bowden, Whangarei
Palmer Macauley, Kerikeri

IN THE DISTRICT COURT
HELD AT KAIKOHE

CIV -2009-027-35

BETWEEN

DONOVAN DRAINAGE AND EARTHMOVING LIMITED

a duly incorporated Company having its registered
office at Corner State Highway One and Apotu Road,
Kauri, Whangarei and carrying on business as contractors

Plaintiff

AND

KARL STEININGER of Kurapari Road, Rangitane, Kerikeri,
Company Director

Defendant

JUDGMENT AFTER HEARING

Dated: 27 OCT 2009

Ulrich McNab Kilpatrick
Solicitors
1 James Street
PO Box 633/DX AP 24535
Whangarei
Ph (09) 4387938 Fax (09) 4388467
Solicitor Acting: Tony John Savage
tony@umklaw.co.nz

THIS proceeding coming on for a hearing on 8 May 2009 before Judge KB de Ridder at Kaikohe after hearing R Bowden, Counsel for the Plaintiff and D James, Counsel for the Defendant, and the evidence then adduced, it is adjudged that:

There will be summary judgment for the Plaintiff in the sum of \$53,949.25 together with interest pursuant to Section 62B of the District Courts Act from 29 January 2009 to 8 May 2009 being \$1,229.16 and solicitor costs on a 2B basis being \$4,352.00 and disbursements:


(a) Department for Courts filing and sealing fees:	\$365.00
(b) Service fee	\$216.28

TOTAL \$60,111.69

Date: 27 October 2009



Sealed:
Date: - 3 NOV 2009


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(Deputy) Registrar