

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

**CIV-2013-404-3026
[2013] NZHC 3202**

BETWEEN

**FINESSE RESIDENTIAL LTD
Plaintiff**

AND

**SIVA PACKIANATHAN VASANTHAN
and SEETHA VASANTHAN
Defendants**

Hearing: 7 October 2013

Counsel: D-M Cross for Plaintiff
CS Henry for Defendants

Judgment: 3 December 2013

JUDGMENT OF BREWER J

*This judgment was delivered by me on 3 December 2013 at 11:30 am
pursuant to Rule 11.5 High Court Rules.*

Registrar/Deputy Registrar

Solicitors: Minter Ellison Rudd Watts (Auckland) for Plaintiff
Barter and Company Ltd (Albany) for Defendants
FINESSE RESIDENTIAL LTD v VASANTHAN [2013] NZHC 3202 [3 December 2013]

Introduction

[1] The plaintiff is a residential construction company. It carried out building renovation work on the home of the defendants. The plaintiff pleads that the defendants have refused to pay \$16,036.13 due and owing for work done by it. Summary judgment is sought for that amount plus interest and costs.

Background

[2] The plaintiff pleads that it has a written contract with the defendants which constitutes a construction contract for the purposes of the Construction Contracts Act 2002 (“the Act”). The plaintiff pleads further that it has complied with all of the relevant provisions of the Act, including those relating to invoicing for work done. The plaintiff pleads, and the defendants accept, that the defendants have never issued a payment schedule in relation to any of the plaintiff’s invoices (or “payment claims” as they are defined in the Act).

[3] The plaintiff’s case is that, by operation of s 22 of the Act, the defendants became liable to pay the claimed amounts and, owing to their failure to do so in full, s 23 of the Act deems the unpaid portion to be a debt due to the plaintiff.

[4] The defendants’ amended notice of opposition goes solely to the plaintiff’s pleading that the contract between the parties is a construction contract governed by the Act:¹

The ground on which the respondent/defendants oppose the making of the orders is that they have a good defence to the plaintiff’s claim:

- i. The plaintiff has not yet commenced doing the Works specified in the construction contract between the parties dated 3 November 2010;
- ii. None of the “payment claims” issued by the plaintiff were issued pursuant to the construction contract between the parties dated 3 November 2010;
- iii. The respondent/defendants do not owe to the plaintiff a debt on which interest amounting to \$2,305.28, or to any other sum, has

¹ Amended notice of opposition to plaintiff’s interlocutory application for summary judgment,

accumulated, in relation to the construction contract between the parties dated 3 November 2010;

- iv. The respondent/defendants do not owe to the plaintiff a statutory debt of \$16,036.13 in relation to the construction contract between the parties dated 3 November 2010; and
- v. The further matters set out in the affidavit in support of this Notice.

[5] Dr Siva Vasanthan, in his affidavit filed in support of the notice of opposition, deposes that the work done by the plaintiff was done pursuant to an oral contract separate from the signed contract on which the plaintiff relies.²

- 4. A few months after we signed the Contract with the plaintiff, I asked the plaintiff whether it would undertake some separate renovation work for us at the Property, and they agreed to do it. That renovation work was not part of the “works” which the plaintiff undertook to do in the Contract, but was done purely by way of an oral contract between the plaintiff and me.
- 5. None of the “payment claims” issued by the plaintiff relate to any of the “works” that the plaintiff is to do under the Contract. They relate to the separate renovation work on the Property which I orally asked the plaintiff to do.

[6] Before discussing the legal issues raised by these competing contentions, it is relevant to note that the plaintiff pleads:³

By email dated 27 March 2013, the defendants wrote to the plaintiff advising that the balance would be paid on 21 April 2013.

[7] Dr Vasanthan, in his affidavit, responds:⁴

On 27 March 2013, I sent to the plaintiff an email stating that I would pay the balance it was claiming by 21 April 2013. When I sent that email it was with the expectation that the outstanding information sought by the Auckland Council from the plaintiff’s selected designer, in order to process the pending building consent application, would have been given to the Council before that date. To date, that information has not been provided which is the reason I have not paid that balance as stated in my email.

[8] The expectation to which Dr Vasanthan refers relates to the works which are the subject of the contract of 3 November 2010.

² Affidavit of Siva Vasanthan in support of notice of opposition to interlocutory application for summary judgment, dated 3 July 2013.

³ Statement of claim dated 29 May 2013, at para 18.

⁴ Affidavit of Siva Vasanthan in support of notice of opposition to interlocutory application for summary judgment, dated 3 July 2013, at para 18.

[9] Dr Vasanthan also refers to six emails he sent to the plaintiff disputing invoices.⁵ These emails show discontent with aspects of the work done. However, on 14 January 2013, the plaintiff sent an email to Dr Vasanthan saying that, due to non-payment, work was suspended. Dr Vasanthan's reply was:⁶

Dear Geoff

I have not said your account will not be paid but you promised that the consent will proceed before x'mas but has failed to keep your promise. I have paid \$20k last month. If you submit the answers to the council as you have promised by end of this week, your balance minus deposit will be paid by end of this week. Otherwise, I am prepared to face the legal action and sue you for damages.

[10] The promises to which Dr Vasanthan refers relate to the works which are the subject of the contract of 3 November 2010.

[11] On 27 February 2013, the plaintiff sent Dr Vasanthan another email:⁷

Dear Siva,

We have received a second request from council for more information, you will receive a copy if you have not already.

This is normal for a consent like yours, there will probably be one or two more.

As per my previous emails, work under the contract remains suspended until the account is up to date, and you are no longer in breach.

I will instruct our lawyers to commence debt recovery proceedings today.

[12] On 13 March 2013, Dr Vasanthan replied:⁸

Hi Geoff & Murray

If Grant submits his final report to the council by this week, I am ready to make the payment next week. Otherwise, I will engage another architect to deal with the council's further request for information, hence, I will withhold the balance of your claim.

I hope for an amicable settlement.

⁵ "7. As the plaintiff has not yet started the 'works' called for in the Contract, I did not provide any 'payment schedule' to the plaintiff when it sent me its 'payment claims', but I did dispute the invoices that it was presenting, as shown in my email messages dated 10 December 2012, 13 December 2012, 14 December 2012, 14 January 2013, 26 February 2013 and 13 March 2013, copies of which I exhibit marked 'SV-1' to 'SV-6' respectively."

⁶ Ibid, exhibit SV-4.

⁷ Ibid, exhibit SV-5.

⁸ Ibid, exhibit SV-6.

[13] On 20 March 2013, the defendants paid to the plaintiff a sum of \$20,000. The plaintiff emailed Dr Vasanthan on 26 March 2013:

Dear Siva,

Thank you for your payment of \$20,000 on 20th March.

In accordance with our demand for payment of 19th March a further \$17,241.26 remains outstanding, plus \$500 of legal costs incurred to date, plus \$265.28 of interest accrued since we instructed our solicitors. We look forward to received your payment totalling \$18,006.54, following which we will cease legal action, and proceed to complete work to obtain your consent.

Please advise your intentions.

[14] The reply on 27 March 2013 from Dr Vasanthan reads simply:

Dear Geoff

I will pay the balance on 21st April.

Discussion

[15] There is a written contract between the parties dated 3 November 2010. It is described as a “residential building contract”. Relevant provisions are:

1

- a) Finesse Residential Limited will construct and carry out the works more particularly shown and described in the drawings and specifications (together “the Works”) on the property of the owner known as

1 Del Mar Court

and being Lot No on deposited plan No

- b) The works shall be carried out in a proper and workmanlike manner and in conformity with the drawings and specifications referred to in clause 1a, and in accordance with the Building Act 2004, any associated regulations and the requirements of the relevant local government authority.

...

5

Finesse Residential Limited shall commence the Works within a reasonable time after the execution of this agreement, and shall proceed to carry out the Works with all reasonable diligence subject to—

- a) the payment of the deposit
- b) the issue of all relevant resource & building consents
- c) proof of insurance cover in the joint names of Finesse Residential Limited and the Owner

[16] The drawings and specifications are not exhibited in the materials provided by the parties. I accept Dr Vasanthan's averment that they do not cover the work to which the invoices founding the plaintiff's claim relate.

[17] I also accept that the proposed three storey addition to which Dr Vasanthan refers in his affidavit did have drawings and specifications which were intended to be the works for the purposes of the written contract.

[18] It is clear that the plaintiff carried out the renovation work for which it invoiced the defendants as though it were covered by the written contract. For example, clause 2 of the written contract provides for it to be a Cost Plus Contract, with the works to be undertaken on a charge up basis. The rates and margins for the contract are set out in the clause and the invoiced work was charged on that basis.

[19] Not all of the invoices related to the renovation work. Mr Philson deposed that two of the payment claims "are largely comprised of specific charges" relating to the works envisaged when the 3 November 2010 contract was signed.⁹

[20] This is an application for summary judgment. The onus is on the plaintiff to satisfy the Court that the defendants have no defence to the cause of action in the statement of claim, or to a particular part of the cause of action.

[21] Here, the cause of action is breach of contract. The pleading is that the contract breached is a construction contract and thus the amount claimed is recoverable as a debt.

[22] The definition of "construction contract" in the Act¹⁰ includes a residential construction contract and any variation to it. A residential construction contract means a contract for carrying out construction work in which one of the parties is the

⁹ Affidavit of Geoffrey Peter Hope Philson in reply, dated 8 July 2013.

¹⁰ *Construction Contracts Act 1988*, s 2(1).

residential occupier of the premises that are the subject of the contract. Clearly, the written contract of 3 November 2010 is a construction contract. Equally clearly, the renovation work invoiced by the plaintiff is construction work within the meaning of s 6 of the Act. The issue is whether it was carried out pursuant to the 3 November 2010 contract and, if not, whether that matters.

[23] It is not necessary for a construction contract to be in writing. It can be written or oral, or partly written and partly oral.¹¹ If the procedure for making payment claims is complied with, and no payment schedule is provided, then the payer becomes liable to pay the claimed amount and the payee may recover the amount as a debt due.

[24] In this case I accept that the renovation work does not come within the scope of “the Works” as defined in clause 1a) of the written contract of 3 November 2010.¹² But I find that that contract was varied impliedly so that the renovation work was carried out under it. The written contract was the contract between the parties. The renovation work was treated by the parties as falling within its terms. It was charged for at the contract rates, invoiced pursuant to the contract and, for the most part, the invoices were paid. Two of the invoices related, at least partly, to work within the definition of “the Works” as set out in the written contract. Dr Vasanthan’s emails link his non-payment of invoices to other work being done under the contract.

[25] Even if this were not so, and there was a separate oral contract for the renovation work for which the parties adopted the charging, invoicing and payment provisions of the written contract, it was still a construction contract. The plaintiff’s pleadings, if this were the case, might have to be amended – but the outcome would be the same.

[26] Finally, the summary judgment procedure is meant to facilitate the speedy and (relatively) inexpensive resolution of claims to which there is no realistic defence. This is such a claim. As the email exchange I have set out above makes

¹¹ Construction Contracts Act 2002, s 9(c).

¹² Construction Contracts Act 2002, s 9(c).

clear, Dr Vasanthan, for the defendants, accepted that they were liable to pay the amounts invoiced. He attempted to tie payment to the performance by the plaintiff of other work to be done under the written contract. By 27 March 2013 he had abandoned that stance and said that he would pay the balance due on 21 April 2013. He did not.

Decision

[27] Under these circumstances, I find for the plaintiff. Judgment in the sum of \$16,036.13 is entered.

[28] I order that interest and reasonable costs pursuant to the contract as claimed by the plaintiff are to be paid also.

[29] The plaintiff is to submit legal expenses invoices and an interest calculation to the Registrar for fixing for the purpose of sealing this judgment.

Brewer J