#81

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-000605

BETWEEN	COLIN FRANCIS FOGGO MARJORIE JEAN FOGGO DANIEL ROBERT FOGGO Appellants
AND	R J MERRIFIELD LIMITED Respondent

Hearing: 2 September 2009

Appearances: G M Brodie for Appellants
J H Hunter for Respondent

Judgment: 21 September 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] Sections 20 to 23 of the Construction Contracts Act 2002 create a special mandatory payment procedure for the benefit of building contractors seeking progress payments from their principal.

[2] In order to be able to invoke the special procedure, the builder must provide requests for payment in a certain form called a "payment claim". On receipt of a payment claim, the principal is required to respond in writing. The written response called a "payment schedule" must be provided to the builder within a specified time frame, failing which the amount claimed by the builder will become due for payment and can be enforced in the Courts as a debt. If the procedure has been followed and the principal has failed to provide a payment schedule in time, the payment claimed must be made. The fact there may be substantive issues relating to the payment is no

defence. These can, however, still be argued at a later date and adjustments made if it is shown there was a set-off or other basis for reducing the contractor's claim: see *Marsden Villas Limited v Wooding Construction Limited* [2007] 1 NZLR 807.

[3] The builder in this case, R J Merrifield Limited, successfully invoked the procedure to obtain summary judgment in the District Court against the building owner, the Foggos. The Foggos now appeal that decision.

[4] The Foggos and Merrifield had entered into a written building contract for the construction of a dwelling house. The contract was a cost reimbursement contract and provided for progress payments to be made on a fortnightly or monthly basis.

[5] Construction commenced in October 2006.

[6] The dispute centres on four payment claims issued by Merrifield for the following amounts and at the following times:

- Payment claim 12, served 13 December 2007 $110,242.84
- Payment claim 13, served 15 January 2008 $51,030.12
- Payment claim 14, served 22 February 2008 $6004.91
- Payment claim 15, served 14 April 2008 $10,104.75

[7] On 27 December 2007 (after receipt of payment claim 12) the Foggos paid Merrifield the sum of $70,000.00.

[8] Under the Act, the last day for the Foggos to provide a payment schedule in response to payment claim 12 was 24 January 2008.

[9] On 16 January 2008, Mr Foggo sent Merrifield an email raising a number of concerns about costs.

[10] Following the email, there were further discussions and correspondence. The Foggos did not make any more payments, and on 16 April 2008 Merrifield's

solicitors advised the Foggos of the builder's intention to issue proceedings unless it received payment in full.

[11] The District Court Judge found the Foggos had no arguable defence and entered summary judgment for Merrifield in the sum of $107,382.62 (being the total of the four payment claims less the $70,000 paid in December 2007) together with interest and costs.

[12] It is common ground that the proper focus of the summary judgment proceedings was a procedural one i.e. whether there was compliance with the statutory payment process. Entry of summary judgment did not extinguish any substantive claims the Foggos may have had in respect of the alleged cost over-runs. What it did determine was who had the use of the money pending resolution of the substantive dispute and of course who bore the risk of the other party becoming insolvent in the meantime.

[13] On appeal, the Foggos raise the following issues:

i) do errors in the payment claims issued by Merrifield render them invalid for the purposes of the Act ?

ii) did Mr Foggo's email amount to a sufficient payment schedule in response to payment claim 12?

iii) is Merrifield estopped from relying on the statutory procedure?

[14] Ironically, because the documents of both parties contained deficiencies, each urged a strict approach when dealing with the opponent's document but a liberal approach when it came to their own.

[15] I turn now to consider each of the issues.

Do errors in the payment claims issued by Merrifield render them invalid for the purposes of the Act and so provide the Foggos with a defence?

[16] In his reserved decision, the District Court Judge stated there appeared to be no dispute about the validity of the four documents relied upon by Merrifield as constituting payment claims under the Act. Unfortunately, that is incorrect. Both counsel confirm the validity of the payment claims was put in issue at the District Court hearing. What may have misled the Judge when he came to write his decision is that the statement of defence admits the validity of the notices. However counsel for the Foggos, Mr Brodie, explained he only noticed the existence of defects in the payment claims at a late stage. I accept that under the principles relating to summary judgment, the possibility of the pleadings being amended is able to be taken into account.

[17] Merrifield's ability to invoke the payments procedure and so obtain summary judgment is dependent on it having rendered a valid payment claim within the meaning of the Act.

[18] The statutory requirements for a payment claim are set out at s 20:

> **20 Payment claims**
>
> (1) A payee may serve a payment claim on the payer for each progress payment,—
>
> (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
>
> (b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).
>
> (2) A payment claim must—
>
> (a) be in writing; and
>
> (b) contain sufficient details to identify the construction contract to which the progress payment relates; and
>
> (c) identify the construction work and the relevant period to which the progress payment relates; and
>
> (d) indicate a claimed amount and the due date for payment; and

(e) indicate the manner in which the payee calculated the claimed amount; and

(f) state that it is made under this Act.

(3) If a payment claim is served on a residential occupier, it must be accompanied by—

(a) an outline of the process for responding to that claim; and

(b) an explanation of the consequences of—

(i) not responding to a payment claim; and

(ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

(4) The matters referred to in subsection (3)(a) and (b) must—

(a) be in writing; and

(b) be in the prescribed form (if any).

[19] The Foggos are residential occupiers and accordingly s 20(3) required the payment claim to be accompanied by an explanation of the consequences of not responding to a payment claim and the consequences of not paying the claimed amount or the amount nominated in the payment schedule, whichever was applicable.

[20] Section 20(4) stipulates that the accompanying explanation must be in writing and must be in the prescribed form if any.

[21] There is a prescribed form, and what is argued is that the explanation Merrifield provided to the Foggos did not comply with the form.

[22] The prescribed form is to be found in Schedule One of the Construction Contracts Regulations 2003. It is in the following terms:

Information that must accompany payment claim served on residential occupier

Important notice

You have been served with a payment claim under section 20 of the Construction Contracts Act 2002 (the **Act**). Under the Act, the person who has served the payment claim is called the **payee**.

If you do not respond to the payment claim promptly, you may lose your right to object to the payment claim.

You may choose to respond to the payment claim in either of the following 2 ways:

- you may pay the payee the amount claimed in the payment claim in full on or before the due date:

or

- if you object to the payment claim, you may provide a written payment schedule to the payee, which must identify the payment claim to which it relates and indicate what you are prepared to pay (which can be nothing). The amount you so indicate is called the **scheduled amount**. If the scheduled amount is less than the claimed amount, the payment schedule must indicate—

  (a) how you calculated the scheduled amount; and

  (b) your reason or reasons for the difference between the scheduled amount and the claimed amount; and

  (c) in a case where the difference is because you are withholding payment on any basis, your reason or reasons for withholding payment.

You must provide the payment schedule to the payee within the time required by the construction contract or, if the construction contract does not set out a time for responding to the payment claim, then within 20 working days after the payment claim is served on you. If you provide a payment schedule in this way, then you must pay the scheduled amount in full on or before the due date for the progress payment to which the payment claim relates.

Consequences of not responding to payment claim

If you do not respond to the payment claim by paying the claimed amount in full or providing a payment schedule that sets out the amount you are prepared to pay, then you will become liable to pay the claimed amount and the payee may recover from you, as a debt due, in the appropriate court, the unpaid portion of the claimed amount and the actual and reasonable costs of recovery awarded against you by the court.

Consequences of indicating that you will pay nothing or less than claimed amount

If you do respond to the payment claim by providing a payment schedule but indicate in the schedule that you are prepared to pay nothing or an amount less than the claimed amount, the payee may take issue with you doing so. The payee may bring court proceedings against you and refer the matter as a dispute for adjudication under the Act.

Consequences of not paying scheduled amount in manner indicated by payment schedule

If you do respond to the payment claim by providing a payment schedule but do not pay the scheduled amount on or before the due date for the progress payment to which the payment claim relates, the payee may recover from you, as a debt due, in the appropriate court, the unpaid portion of the scheduled amount and the actual and reasonable costs of recovery awarded against you by the court.

Advice to residential occupier

Important: If you do not understand this information or if you want advice about how best to respond to the payment claim, you should consider getting legal advice immediately.

The **due date** for a progress payment is the date agreed for payment of the progress payment between you and the payee as parties to the construction contract. The due date should be set out in the payment claim.

Working day does not include Saturdays, Sundays, any day during 24 December to 5 January inclusive, national holidays, or the anniversary of the relevant province. If the last day for making a payment or providing a payment schedule falls on a day that is not a working day, you may do so on the next working day after that day.

[23] The form that was served on the Foggos deviates from the prescribed form in the following respects:

i) The word "not" has been erroneously included in the first line of text under the heading "Consequences of indicating that you will pay nothing or less than claimed amount". The first line under the heading in the Merrifield form thus reads, "If you do *not* respond to the payment claim by providing a payment schedule, but indicate in the…" [emphasis added]

ii) The word "not" has also been erroneously included in the first line of the text under the heading "Consequences of not paying scheduled amount in manner indicated by payment schedule". The first line under that heading in the Merrifield form reads, "If you do *not* respond to the payment claim by providing a payment schedule but do not pay the…" [emphasis added]

iii) The third heading in bold type in the Merrifield form erroneously refers to "payment of schedule" instead of

"payment schedule" (this third error was not relied upon by Mr Brodie).

[24] The requirements of s 20 are mandatory. The language is "must".

[25] However, despite the mandatory language, it is clear from the Court of Appeal decision in *George Developments Limited v Canam Constructions Limited* [2006] 1 NZLR 177 that not every breach of the s 20 requirements will automatically render a payment claim invalid. The Court held that a purposive interpretation must be adopted and that technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act. This is because one of the key purposes of the Act is to facilitate regular and timely payments between the parties to construction contracts. As Lord Denning once graphically said, cash flow is the very life blood of the building industry: *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162.

[26] Applying that approach to the facts of this case, the mistake in the heading ("payment of schedule" instead of "payment schedule") clearly falls into the category of a technical quibble. It is self-evidently a typographical error.

[27] However, in my view, the same cannot be said of the other two errors. They render the document confusing and potentially misleading. The requirement of a special explanatory notice for residential occupiers was obviously designed as a measure of consumer protection given the "sudden death" nature of the special payment procedure. In my view, it is particularly important the document should be, as Parliament intended, a clear and unequivocal statement of the consumer's rights and obligations. The document provided by Merrifield was not such a statement.

[28] In coming to this conclusion, I have not overlooked the absence of any evidence the Foggos were in fact misled by the errors. However, following the decision of *Welsh & Anor v Gunac South Auckland Ltd* HC Auckland CIV-2006-404-007877, 11 February 2008, Allan J, that is not conclusive.

[29] All of Merrifield's purported payment claims are vitiated by the same errors, which means the special payments procedure cannot apply to any of them. Accordingly, my decision on this point is sufficient to dispose of the appeal. However, in deference to counsels' argument, I have considered the other two issues.

Did the email amount to a sufficient payment schedule?

[30] The requirements of a payment schedule under the Act are set out in s 21(2) and (3):

> **21 Payment schedules**
>
> ...
>
> (2) A payment schedule must—
>
> (a) be in writing; and
>
> (b) identify the payment claim to which it relates; and
>
> (c) indicate a scheduled amount.
>
> (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
>
> (a) the manner in which the payer calculated the scheduled amount; and
>
> (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and
>
> (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

[31] "Scheduled amount" is defined in s 19 as "an amount of progress payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim."

[32] The Foggos rely on the email dated 16 January 2008 as constituting a sufficient payment schedule in response to payment claim 12. As mentioned earlier, payment claim 12 was for the sum of $110,242.84. It is common ground that if the email does qualify as a payment schedule under the Act, it was sent in time. It is

also common ground, no payment schedule was ever sent in response to any of the other payment claims.

[33] The email, which followed a payment of $70,000.00 made in December, stated:

> Further to our discussion last Wednesday regarding the increases over the estimates originally provided, I have set out in the following the comparisons for the trades, accepting that there have been changes made.
>
> **Painter**: $16,232 Estimate: $12,788 +27%
>
> - Very straight forward with no change likely to affect price. Sealing of blocks cheaper, sealing of ceiling panels, littler difference in material cost or labour.
>
> **Plumber/Drain Layer**: $23,890 Estimate: $14,085 +65%
>
> - The sump pump etc and a few extra lines could not make this difference.
>
> **Tiler:**
>
> The architect and QS said the drawings show 80sq meters, a very straightforward job with no issues. Industry standard is $50 per square meter in Nelson. This should obviously be under $5,000 not $13,203.
>
> **Electrician**:
>
> The invoices total: $21,098 Estimate: $12,916 (without extras such as lighting, extra lines and TV) +60%
>
> The items I have supplied are a credit against the estimate as you agreed and a broad-brush figure if totaled as shown in the following:
>
> **Supplied**
>
> | | |
> |---|---|
> | Light Fittings | $3,000 |
> | Basalt to Fire | $3,460 credit |
> | Oven + Cook top | $2,000 |
> | Range Hood | $500 |
> | Waste Master | $450 |
> | Toilet Basins | $2,000 |
> | Taps | $1,800 |
> | Bathroom Fittings | $1,500 |
> | Heaters | $600 |
> | Towel Rails | $1,800 |
> | Gas Fitter Fire | $7,500 |
>
> **Supplied**:
>
> | | |
> |---|---|
> | Exterior Cladding | $2,625 credit |
> | Kitchen & Bathroom Joinery | $43,000 credit |

Ceiling & Suffit Tiles

Total: $70,185

Your invoices to date total $531,108, add $70,185 and the total = $601,293. 30% over your estimate??

You obviously have another invoice pending which will amplify this. As I said last week this situation has only just become obvious since your last invoices and has left us in shock. There is no doubt we would not have proceeded if you had not reassured us that you could achieve something close to your estimate and the fact that you are closer to your original quotation suggests an element of misrepresentation.

A condition of ours and the Abbots was that any likely increases over the estimates would be advised in advance. This obviously has not happened and your acceptance of the ridiculous charges from the tiler suggests to us that you have not managed the whole process correctly.
We need to follow a process now which begins with the justification of the increases so we look forward to receiving your invoices etc. from you shortly.

Marjorie and Colin Foggo

[34] Merrifield accepts the email states the reasons why the Foggos are dissatisfied, but contends it fails to comply with the requirement that it indicate a scheduled amount (the amount the payer proposes to pay).

[35] For their part, the Foggos contend the email "indicates" they are not prepared to pay any more i.e. that the scheduled amount is nil. Counsel Mr Brodie submitted, relying on *George Developments*, that the email should not be construed in isolation but that I was entitled to have regard to the context, including the receipt of payment claim 12, the payment of the $70,000 and the evidence of verbal discussions which are mentioned in the opening lines of the email.

[36] However, there is actually no evidence of what was said at the discussions mentioned in the email. The only evidence regarding the content of any conversations relates to discussions that Mr Foggo says in his affidavit took place *after* the email was sent.

[37] I accept that Parliament's use of the word "indicate" as distinct from "specify" or "state" must have been deliberate and denotes that a degree of flexibility should be allowed. There is no prescribed form for a payment schedule and I also

accept that if in substance the document complies with the mandatory requirements, the fact for example that it is not headed "payment schedule" must be irrelevant.

[38] However, in my view, *George Developments* only sanctions reliance on previous written communications between the parties. It is not authority for the more far-reaching proposition that the Court can have regard to evidence of verbal discussions so as to fill any gaps in the documentation. That would be to create uncertainty and generate factual disputes about alleged conversations, thereby undermining the effectiveness of the fast track special payments procedure. The legislative requirement that the payment claims and schedules must be in writing is there for a good reason.

[39] Mr Brodie also referred me to the decision of *Westnorth Labour Hire Ltd v SB Properties Limited* HC Auckland CIV-2006-404-001858, 19 December 2006, Rodney Hansen J, where a reasonably liberal approach was taken to whether a letter met the requirements of a payment schedule. However, I agree with the District Court Judge that the email in this case and the letter in *Westnorth* are not comparable. The email expresses considerable dissatisfaction at the cost of the project but this is not specifically directed at payment claim 12 and it is impossible to tell what amount is being said to be properly payable. As counsel for Merrifield, Ms Hunter put it, nowhere in the email does it say "and we are not paying any more" or "$70,000 is all you are getting."

[40] I am reinforced in this conclusion by the contradiction in the Foggos' position regarding the payment of the $70,000. At the hearing before me, Mr Brodie submitted the $70,000 was a payment in respect of payment claim 12. However, in his affidavit, Mr Foggo denies that the $70,000 was to be applied to payment claim 12. He asserts, "I had made it plain to Mr Merrifield all along that I was prepared to pay that amount on account generally, but not specifically to admit liability for his payment claim 12."

[41] For completeness, I should add that the Foggos also sought to rely on a letter written by a quantity surveyor as constituting a payment schedule. However, the letter was sent after the 20-day time period had expired in respect of payment claim

12. It was within the time period for responding to payment claim 13. However, the letter makes no reference to payment claim 13 and in any event did not indicate a specified amount.

Estoppel

[42] In his affidavit, Mr Foggo deposed:

> 10. When I sent my email on 16 January I then had discussions with Mr Merrifield within a few days by telephone, he being in Nelson and I was living in Christchurch. In that telephone conversation I explained to him my concerns about the payment claims which I had received and which were for far more than I had been expecting. I told Mr Merrifield that for the reasons which I had attempted to summarise in my email, I did not consider that it was fair and reasonable that I should be charged the amount that he now sought to recover. I told him that I proposed that he should now properly document his claim and place it in the hands of an independent quantity surveyor who should review the charges which were made by him and that the quantity surveyor would then attempt to reconcile the claims that he was to document with his own understanding of the project. Mr Merrifield agreed to go along with this process.

[43] The affidavit goes on to say that Mr Merrifield did provide some information to the quantity surveyor, but then stopped, by which time the time period for providing a payment schedule had expired.

[44] The Foggos contend that this sequence of events give rise to an estoppel preventing Merrifield from being able to invoke the statutory payments procedure.

[45] In rejecting this argument, the District Court Judge relied on two cases which have held that an estoppel cannot be invoked to override the statutory scheme: *Willis Trust Company Limited v Green* HC Auckland CIV-2006-404-000809, 25 May 2006, Harrison J; *Weatherboard Solutions Limited v Pawson* DC Auckland CIV-2004-004-002752, 24 June 2005, Judge Hubble.

[46] In both those cases, the Judges referred to s 12 of the Act which prohibits contracting out. Section 12 states "This Act has effect despite any provision to the contrary in any agreement or contract." The Judges reasoned that if it is not possible

to contract out of the Act, it is not possible for a party to waive or be estopped from enforcing its provisions.

[47] The Act does, however, permit the parties to agree a different time period for serving a payment schedule than the 20-day requirement provided in the legislation: see s 22(b)(i). Accordingly, in my view a promise not to insist on strict compliance with the statutory time limits must be capable of giving rise to an estoppel.

[48] However, in order to found an estoppel there must be a clear and unequivocal representation or promise. In this case, it is quite unclear from Mr Foggo's affidavit exactly what it was that Mr Merrifield is alleged to have promised. In particular, it is unclear whether the promise was to extend the period of time within which the Foggos could provide a payment schedule, or whether it was a representation that Mr Merrifield did not require the Foggos to comply with the payment schedule process at all.

[49] There being no evidence of an unequivocal representation or promise, I consider estoppel is not a tenable defence.

Outcome of appeal hearing

[50] I agree with the findings of the District Court on the issues of estoppel and the sufficiency of the email as a payment schedule.

[51] However, I find that Merrifield is not entitled to summary judgment under s22 of the Act because it did not serve valid payment claims on the Foggos. This was an issue the District Court judge did not consider.

[52] The appeal is allowed and the judgment entered in the District Court set aside.

[53] As regards costs, my expectation is that the parties will be able to agree on costs. If however they cannot agree and require me to make an award, then I direct that submissions of no more than five pages in length are to be filed. The appellants

are to file submissions first, with the respondent's submissions 20 working days thereafter.

Solicitors:
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