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

**CIV-2009-409-000605**

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| BETWEEN | COLIN FRANCIS FOGGO<br>MARJORIE JEAN FOGGO<br>MARJORIE JEAN FOGGO<br>Appellants |
| AND | R J MERRIFIELD LIMITED<br>Respondent |

Hearing: 4 February 2010 (by telephone)

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

Judgment: 8 February 2010

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**RESERVED JUDGMENT OF HON. JUSTICE FRENCH**

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**Introduction**

[1] R J Merrifield Limited seeks leave to appeal my judgment of 21 September 2009, which was itself an appeal from the District Court involving a contested summary judgment application.

[2] The decision concerned the mandatory payment procedure under the Construction Contracts Act 2002. In the District Court, the Judge granted Merrifield summary judgment in the sum of $107,382.62, being the outstanding balance allegedly owing under four payment claims.

[3] It was common ground the payment claims issued by Merrifield contained errors (notably, the erroneous insertion of the word "not" in two sections) and therefore did not comply with the mandatory form of payment claim prescribed under the Act.

[4] The issues before me on appeal were:

i) Did the errors in the payment claims render them invalid for the purposes of the Act, thereby preventing Merrifield from invoking the special statutory procedure?

ii) Did an email sent by Mr Foggo to Merrifield amount to a sufficient payment schedule in response to one of the payment claims?

iii) Was Merrifield estopped from relying on the special statutory procedure?

[5] I held, applying the Court of Appeal decision in *George Developments Limited v Canam Constructions Limited* [2006] 1 NZLR 177, that the defects in Merrifield's payment claims were more than technical quibbles and rendered the document potentially confusing and misleading. Accordingly, in my view, that rendered the payment claims invalid for the purposes of the Act, and so provided the Foggos with a defence to the summary judgment application.

[6] In reaching that conclusion, I stated at [28]:

> 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.

[7] My decision that the four payment claims were invalid meant the special payments procedure could not apply. My decision was therefore sufficient to dispose of the appeal. However, in deference to counsels' argument, I considered the other two issues.

[8] I held the email did not constitute a valid payment schedule, on the grounds it did not indicate a scheduled amount as required by the legislation. As regards the estoppel argument, I held that in law a promise not to insist on strict compliance with the statutory time limits was capable of giving rise to an estoppel, but that on the

facts there was no clear and unequivocal representation or promise. In the absence of such evidence, I considered estoppel was not a tenable defence.

[9] For their part, the Foggos oppose the application for leave to appeal. However, in the event that leave is granted, they themselves seek leave to cross-appeal on the estoppel point. Merrifield does not oppose the Foggos' application.

**The grounds of Merrifield's application for leave**

[10] The principles applicable to the granting of leave are well established: see *Cuff v Broadlands Finance Limited* [1987] 2 NZLR 343; *Waller v Hider* [1998] 1 NZLR 412; and *Snee v Snee* (1999) 13 PRNZ 609.

[11] As stated in those authorities, the intention of the legislature is that one appeal is normally to be sufficient. In order to justify a second appeal, the appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, or sufficient importance to outweigh the cost and delay of the further appeal. Ultimately, the guiding principle must be the requirements of justice.

[12] The proposed appeal raises what is said to be an important question of law, namely whether or not a defect in a payment claim is capable of constituting substantial non compliance with the Act if the evidence shows the recipient understood the requirement to make a payment schedule. Or, to put it another way as formulated by Ms Hunter, the question for the Court of Appeal would be: 'to what extent must there be evidence of confusion, as to the requirements of the statutory regime in determining if an error in the required notice is a technical error?'

[13] In support of the contention that this issue is a matter of both public and substantial private importance, Ms Hunter submitted:

i) The form in question is a standard form published by the certified Builders Association of New Zealand Inc. The form is available for purchase by the Association's 2000-plus

members, and there may be many such forms currently in circulation.

ii) There are conflicting High Court authorities.

iii) The effect of my decision will be to undermine the purpose of the Act by allowing recipients to avoid the statutory procedure, even when they themselves claim to have applied it.

**Discussion**

[14] I have carefully considered the submissions made on behalf of Merrifield. They were made well. However, in my view, the application fails to satisfy the test postulated in *Cuff* and *Snee*.

[15] I have reached that conclusion for the following reasons.

[16] First, the legal principles I purported to apply are in my view well settled. There are no conflicting High Court authorities on issues about the significance of actual confusion, while the decision cited to me by Ms Hunter (namely *Spark It Up Limited v Dimac Contractors Limited & Anor* HC Wellington CIV-2008-485-001706, 12 June 2009, Dobson J) does not in my view point to any conflict of relevance to this case.

[17] The Court of Appeal in *George Developments Limited* drew a distinction between an error which is only a technical quibble and an error which is more than technical and which renders the document substantively non compliant. The view I took was that the errors in this case were in the latter category.

[18] Correctly analysed, my decision was thus merely the application of established legal principles to the particular facts. As Mr Brodie submitted, whether my application of the Court of Appeal's "technical quibble/substantive compliance" distinction was correct or not, is not of wider significance because it is of no precedent value in any other situation other than a notice which is framed in exactly the same terms as this particular notice.

[19] Secondly, the notice in question has now been withdrawn from circulation. It will have been used in the past by other builders. However the practical effect of my decision will of necessity be very limited. There was no evidence of any other case involving the same notice while any builder affected by my decision is always able to issue an amended payment claim.

[20] I also agree with Mr Brodie that as a matter of principle, it cannot be correct that the absence of confusion could save a substantively non complying document given the mandatory nature of the form.

[21] Finally, I have been influenced by the fact that the proposed appeal will not be determinative of the building dispute between these parties. There are substantive issues which have been brought by way of a counter claim and which still require to be resolved. Discovery has now been completed. In my view, it would be unjust in all the circumstances to put the Foggos to the further expense and delay of a second appeal.

**Conclusion**

[22] The respective applications for leave to appeal and cross-appeal are dismissed.

[23] Costs are awarded to the Foggos on a 2B basis.

*Solicitors:*
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*(Counsel: G M Brodie, Christchurch)*
*Madison Hardy Solicitors, Auckland*
*(Counsel: J H Hunter, Auckland)*