#64

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2834

BETWEEN	INVENT SOLUTIONS LIMITED Plaintiff
AND	CHAN DEVELOPMENTS TRUSTEE LIMITED First Defendant
AND	B R H TRUSTEE LIMITED Second Defendant

Hearing: 16 March 2009

Appearances: K.R. Smith for the plaintiff
R. Wynne-Griffiths for the defendant

Judgment: 1 April 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 1 April 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

Solicitors: Peter C Gilbert, Solicitor, PO Box 2420, Wellington
Hazelton Law, PO Box 5639, Wellington

Introduction

[1] Before the Court is an application by the plaintiff for summary judgment against the defendants seeking an amended sum of $205,167.27 said to be owing under a construction contract.

[2] The application is opposed by the defendants.

Background Facts

[3] The plaintiff company carries on business as a building contractor. The first defendant is a property development company. The first and second defendants are the registered proprietors as joint tenants of a property at 25 Daniell Street, Newtown, Wellington ("the property").

[4] On 14 September 2008, the plaintiff and first defendant entered into a construction contract ("the construction contract") under which the first defendant would pay the plaintiff to undertake and manage construction work at the property known as the Potala Villas development project.

[5] Under the construction contract, the plaintiff issued three invoices to the first defendant, numbered 1222, 1223 and 1224. Invoice 1222 was issued on 5 November 2008 for $28,894.50. Invoice 1223 was issued on 6 November 2008 for $25,312.50. Invoice 1224 was issued on 5 and 6 November 2008 for $83,135.27, but the plaintiff acknowledges now that it contained an error relating to a scaffolding disbursement and it is the sum of $77,162.47 which is due under this invoice. It is not disputed that the amount claimed in these invoices remains unpaid by the first defendant.

[6] On 14 November 2008, Mr. Raymond Chan ("Mr. Chan"), director of the first defendant company, wrote to the plaintiff informing it that the first defendant was dissatisfied with the work the plaintiff had carried out at the property and that the defendant would not be paying the amount claimed in the invoices.

[7] On 7 November 2008, the parties entered into an Exit Agreement ("the exit agreement"), which provided for the termination of the construction contract.

[8] Following the entry into the exit agreement, the plaintiff served a further two invoices on the first defendant, numbered 1226 and 1227, which it is agreed remain unpaid by the first defendant. Invoice 1226 was issued on 18 November 2008 for $15,187.50. Invoice 1227 was issued on 25 November 2008 for $58,610.30. The plaintiff seeks payment for the amounts claimed in invoices 1222, 1223, 1224, 1226 and 1227.

Summary Judgment

[9] Rule 12.2(1) of the High Court Rules states:

> "**12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action."

[10] The principles of summary judgment have been recently restated by the Court of Appeal in *Krukziener v Hanover Finance Limited* [2008] NZCA 187, para 26:

> "The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)."

The Construction Contracts Act 2002 ("The Act")

[11] It is acknowledged that the construction contract here is a contract under the Act and this case involves a consideration of certain provisions of the Act. The purpose and intent of the Act was addressed in the Court of Appeal in *Laywood & Rees v Holmes Construction Wellington Ltd* [2009] NZCA 35 at [11] and [12] in the following way:

> "[11] The CCA was intended to address problems that had arisen in the construction industry particularly in relation to payments and dispute resolution. Its purpose is set out in s. 3:
>
> **3 Purpose**
>
> The purpose of this Act is to reform the law relating to construction contracts and, in particular,-
>
> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.
>
> As Mr Ren says, "the CCA is aimed at solving the cash flow problems common in the construction industry by facilitating quick payments": "Enforcing Payment Obligations under the Construction Contracts Act 2002" [2006] NZBLQ 336 at 337.
>
> [12] The CCA seeks to achieve its purpose through two processes, one relating to payment claims and the other to adjudication. ...."

[12] The objectives of the Act and the procedure which lies at its heart were more fully described in a judgment of Asher J in *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 at [14]-[17]:

> "[14] The effect of the Act, was to strongly confirm that such a regime, which protected and encouraged cash flows was right for cases between the principal and contractor. The intention was to improve the head contractor's ability to obtain payment, by setting up a quick and mandatory payment process. In enacting such legislation, the legislature set aside the long-established conservative contractual approach to construction contracts which emphasised freedom of contract. The history of these cases is described in Hon R Smellie CNZM QC, *Progress Payments and Adjudication*, paras 1-15. The Act has "emphatically vindicat[ed] Lord Denning's approach" (Smellie, para 31).
>
> [15] Consistent with the Law Commission paper, the general policy statement which was set out at the beginning of the explanatory note, construction contracts accompanying the Bill reads as follows:
>
> The Bill is intended to facilitate prompt and regular payments within the construction industry.
>
> [16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain timeframe and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed

must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.

[17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of that procedure, and the quick resolution of disputes. The processes that it sets up are designed to side step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cash flow.

(These comments received favourable endorsement from Allan J. in *Welsh v Gunac South Auckland Ltd*, High Court, Auckland, 11 February 2008, CIV 2006-404-7877) and from Wylie J. in *Suaniu v Hi Qual Builders Ltd*, High Court, Auckland, 26 June 2008, CIV 2008-404-1576 at [35])."

[13] Turning now to the specific provisions of the Act itself, s. 20 relevantly provides:

"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."

[14] Clause 23.1 of the construction contract states:

"Claims for Payment / invoices will be issued for progress payment covering work done and costs incurred including variations up to the end of each month, on or before the 10th day of the following month, delay in submitting the claim shall incur a delay in payment for the same time period of the delay."

[15] Section 21 of the Act provides:

> "21 **Payment schedules**
>
> (1) A payer may respond to a payment claim by providing a payment schedule to the payee.
>
> (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."

[16] If the payer does not respond to a payment claim in accordance with section 21, they are liable for the amount claimed in accordance with section 22:

> "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) the 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."

[17] The construction contract provided further in clause 23:

> "3. If CDT (the first defendant) disagree for any reason with the claimed amount, CDT will respond to us (the plaintiff) in writing with a payment schedule within 10 days of receiving the payment claim, detailing a scheduled amount (the amount that CDT propose to pay) and the reasons and basis of calculation for any item in the payment claim that CDT do not propose to pay in full.
>
> 4. CDT will pay the scheduled amount by the due date."

[18] The plaintiff claims that five payment claims, numbered 1222, 1223, 1224, 1226 and 1227, were properly served on the first defendant in accordance with section 20 of the Act and clause 23.1 of the construction contract. The plaintiff contends that no payment schedule was provided by the defendants, and that the defendants are therefore liable to pay the claimed

amount. The defendants dispute the validity of the payment claims, and argue also that payment schedules have been provided in response to some of the payment claims.

The issues

[19] The issues raised before me are as follows:

a) Whether invoices 1222, 1223 and 1224 are valid payment claims in compliance with section 20 of the Act;

b) Whether a valid payment schedule under section 21 was provided in response to invoices 1222, 1223 and 1224;

c) Whether invoices 1226 and 1227 constituted payment claims under the Act;

d) Whether invoice 1227 was provided by the date required in the exit agreement;

e) Whether a valid payment schedule under section 21 was provided in response to either invoice 1226 or invoice 1227;

f) Whether the defendants have a valid counterclaim.

Are all the invoices valid payment claims?

[20] Invoices 1222, 1223 and 1224 erroneously refer to the *"construction contracts act 2003"*, rather than the correct title of the Act which is the Construction Contracts Act 2002. The defendants argued that those payment claims therefore do not comply with section 20(2)(f) of the Act and are invalid.

[21] There was no suggestion that these errors misled the defendants. As such, the plaintiff argues that these errors are minor and do not invalidate the invoices as payment claims under the Act, referring to the judgment of Asher J in *Marsden Villas Limited v Wooding Construction Ltd* [2007] 1 NZLR 807:

> "[32] ...A failure to calculate a month's instalment over a whole calendar month period does not invalidate the payment claim itself. The payment claims may contain all sorts of errors. The structure of the Act is to give the principal the opportunity to respond to those errors by providing a payment schedule within the mandatory time.
>
> [34] There is no obvious reason why the legislature should have made it mandatory that progress payment claims be for certain specific periods, or

> indeed that they must comply with whatever periods are specified in the construction contract. Such a requirement would be technical and oppressive, and is contrary to the purpose of the Act of ensuring prompt cash flows. This particular complaint is in the nature of a "quibble". There is no suggestion that there is any substantive problem caused for a principal as a consequence of the period of the claim being for less than that stipulated in the contract. There is nothing in the Act to indicate that a failure to observe the contract in calculating a progress payment is fatal to a claim. For these reasons I do not consider that this objection is valid."

[22] Counsel for the defendants argue that these errors are not merely technical "quibble", but are invalidating. Counsel relied on *Welsh v Gunac South Auckland Ltd* HC AK 11 February 2008 CIV-2006-404-7877. In that case, the first payment claim issued made no reference at all to the Act. There, Allan J stated at paragraph 22:

> "In my view, the requirements of s 20(2)(f) are mandatory, and not subject to the substantial compliance considerations discussed by the Court of Appeal in respect of other aspects of s 20. It may be that in a given case a Court might properly conclude that an omission to comply with s 20(2)(f) is not determinative. An example might be the case of a major construction project in which a single payment claim appearing in the middle of a series of similar documents, happens to omit the necessary reference to the Act. In those circumstances, it could not properly be said that the principal has been misled, or is in any doubt as to what is intended. A Court might well then hold that the document ought to be read along with all previous payment claims in the series. But I express no firm view as to that. It is a matter for another Court at another time. This case is quite different. The first invoice is defective because it does not comply with s 20(2)(f). The respondent was therefore unable to rely upon it for the purposes of making a claim pursuant to the provisions of the Act. This aspect of the appeal accordingly succeeds."

[23] In my view, the present case is one where a failure to properly comply with s 20(2)(f) is not determinative. In this case, the Act was referred to, but with the incorrect year. On these facts there can be no argument that the defendants were unaware of the existence and application of the Act and the regime which applied. *Welsh v Gunac South Auckland Ltd* does not support the proposition that referring to the Construction Contracts Act 2003 rather than the Construction Contracts Act 2002 is more than mere technical quibble. The reasoning in *Marsden Villas Limited v Wooding Construction Ltd* continues to apply.

[24] In addition, the defendants argued before me that invoices 1222, 1223, 1224 do not comply with section 20(2)(d) of the Act as they failed to state the correct due date for payment. The correct date pursuant to the construction contract was the 10th day of the following month. Invoice 1222

stated *"due on receipt"*; invoice 1223 stated *"17/10/2008"*; and invoice 1224 stated *"strictlly* [sic] *7 days from date of invoice"*.

[25] The plaintiff accepts these errors, but argues that they are trivial and not invalidating. On this, the plaintiff refers to *Suaniu v Hi-Qual Builders Ltd.* In that case, the construction contract did not provide a workable provision detailing when payments would be due. The disputed payment claim stated that payment was due five days from receipt. The Court found that this was in error, and that in the absence of a workable contractual provision, the default provisions of the Act applied. At para 55 Wylie J stated that the minor difficulty of the erroneous payment date did not invalidate the payment claim.

[26] There is no suggestion in the present case that these acknowledged errors misled the defendants. In my view, the errors are minor technical quibbles and do not invalidate the payment claims: *Marsden Villas Limited v Wooding Construction; George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177, para 42.

[27] Before me, the defendants submitted further that invoices 1223 and 1226 did not adequately identify the construction contract to which they related, and therefore did not comply with section 20(2)(b) of the Act. As I see it, this contention has little substance. There was only ever one contract between the parties, and the project to which the claims related and the address of the property where the work was being carried out were clearly indicated.

[28] Also, the defendants argued that invoice 1224 did not indicate the manner in which the claimed sum was calculated in sufficient detail to comply with paragraphs 20(2)(c) and (e) of the Act. This invoice breaks the payment claimed down into three headings: *"Materials"*, *"Hire Equipment"*, and *"Other – Contract Works Insurance."* It is said that Invoice 1227 suffers from the same deficiency. Counsel for the defendants argued that a detailed break down in payment claims is essential to the scheme of the Act, because the payer must be able to see exactly how costs have been accrued if they are to be able to dispute those costs with a valid payment schedule.

[29] In my view, ideally a payment claim would provide greater detail than that seen in invoices 1224 and 1227. However, the invoices are not so vague as to be clearly non-compliant with section 20 of the Act and as I see it, they are not so vague that the defendant was precluded from issuing a payment schedule in accordance with the statutory regime. In these circumstances, if the defendants were not satisfied with the payment claims, it was the defendants' responsibility to issue such a payment schedule. As such, liability for the amounts claimed in these two invoices comes down to the question of whether there was a valid payment schedule. The invoices are not invalidated as payment claims under section 20 of the Act.

[30] The defendants also argued that invoice 1226 did not comply with section 20(2)(e) as the amount claimed was not broken down in greater detail. However, the invoice refers to the exit agreement which sets out liability for this amount. The payment claim must be read in the context of the construction contract and the exit agreement. In this context, the requirement of section 20(2)(e) is satisfied.

Were invoices 1222, 1223 and 1224 responded to with a valid payment schedule?

[31] Counsel for the defendant has argued that a letter dated 14 November 2008 from Mr. Chan for the first defendant to Mr. Nick Herbert for the plaintiff constitutes a valid payment schedule to these three invoices. If this is found to be the case, the defendant is not liable to pay under the construction contract or section 22 of the Act. It is helpful to set out the contents of the letter in full:

> "The Chan Development Trust have been advised that much of the work carried out on site at 25 Daniell Street under the agreement between the parties dated 1st September 2008 has been carried out in a manner and to a standard that does not meet the requirements of the building consent or NZ building code and NZS 3604.
>
> Furthermore much of the materials installed are installed in a manner other than specified in the manufacturer's product literature.
>
> Chan Development Trust has had a preliminary estimate of the cost of bringing the works carried out under the direct control or management of Invent Solutions Ltd under the agreement as $380,000 exclusive of GST.
>
> Chan Development Trust currently is having prepared a comprehensive report of all areas of none [sic] compliance as at today's date.

> We regret to inform you we are not satisfied with the standard of work and therefore reject all claims currently outstanding at this time. Therefore the current amount schedule to be paid is nil.
>
> Invoices including [sic] in this schedule are invoices numbering 1222, 1223 and 1224 being for the amount of $139,342.27 including GST and will not be paid.
>
> Invent Solutions Ltd has failed to comply with but not limited to the following clauses of the agreements between the parties being 14, 15, 20 & 21.
>
> Due to the scale of this none [sic] compliance, Chan Development Trust is unable to immediately comply with the requirement of the agreement to supply detailed schedule of amount at this point and time. However this will be provided at out earliest opportunity.
>
> We are currently considering our legal options regarding your company's failure to comply with its obligations pursuant to the building Act and the agreement between the parties and also any previous agreement between the parties in relation to this construction of this project.
>
> You will be informed of our intended path of action once we have sought further legal advice.
>
> Please consider this notice pursuant to clause 11 of the agreement.
>
> This letter is issued pursuant to the contract between the parties and as payment schedule under the Construction Contract Act 2003."

[32] In my view, this letter clearly fulfils the basic requirements of a payment schedule as listed in section 21(2) of the Act – it is in writing; it identifies the payment claims to which it relates by naming the specific invoices; and arguably it indicates a scheduled amount to be paid of "nil".

[33] More complex, however, is the question of whether the letter fulfils the requirements of section 21(3). The letter suggests that the defendant calculated the scheduled amount of "nil" by deducting the estimated cost of bringing the work under the contract from the amount claimed in the payment claims. The reasons given for withholding payment until more detailed information can be obtained are said to be dissatisfaction with the work done and alleged non-compliance with the construction contract between the parties.

[34] The level of information required for a payment schedule to be valid in accordance with section 21(3) is not immediately clear from the case law, where contextual considerations have resulted in varying determinations of what is needed.

[35] Counsel for the defendant pointed to the decision of Rodney Hansen J in *Westnorth Labour Hire Ltd v S B Properties Ltd* HC AK 19 December

2006 CIV-2006-404-1858. There, a letter from the payer explained that he doubted the amount claimed, as the payee's timesheets appeared to contain errors, and the payer had been charged for materials which had been returned and the cost refunded. The payer stated in this letter that he would not pay the invoices claimed until the payee provided full particulars of what work the contracted labour had completed. Rodney Hansen J stated at [29] and [30]:

> "[29] The relevant provisions of the New South Wales Building and Construction Industries Security of Payment Act 1999 are almost identical to the provisions of the New Zealand Act governing payment schedules. In the leading case of *Multiplex Constructions Pty Limited v Luikens* [2003] NSWSC 1140, the Court said at para [78]:
>
> "Section 14(3) of the Act, in requiring a respondent to 'indicate' its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. <u>The use of the word 'indicate' rather than 'state', 'specify' or 'set out', conveys an impression that some want of precision and particularity is permissible as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication. "</u>
>
> [30] In my judgment, the letter meets these basic requirements. Westnorth was given all the information it needed to understand S B Properties' position, to decide whether to pursue its claim and the case it would be required to meet at adjudication. I am satisfied the Judge was right to conclude that the letter was a payment schedule which complied with s 21 of the Act." (emphasis added)

[36] Following this approach, the letter at issue here might be seen as a valid payment schedule. However, an apparently more demanding approach was adopted by Harrison J in *Metalcraft Industries Ltd v Christie* HC Whangarei 15 February 2007 CIV-2006-488-645. The letter in that case, like Mr Chan's letter at hand here, informed the payee that the payer was not satisfied with the work and denied liability for payment, while stating that the payer was not yet in a position to determine how much payment if any would need to be made. With regard to this imprecision, Harrison J found at [19]:

> "[19] The statute does not allow for any delay in indicating a scheduled amount outside the specified time limit of 20 working days. A statement that Ms Christie "is unable to specify if any payment is to be made ... until she receives invoices for the remedial work ... " could not justify a failure within that period to quantify the scheduled amount..."

[37] At (para.) [23] of his judgment, he went on to state:

> "[23] ... An assertion that remedial work is required at a cost which would exceed the payment claim could never constitute a valid reason either for the difference between the scheduled amount and the amount claimed or for withholding payment. General and unspecified allegations of defective workmanship are insufficient unless quantified within a reduction for the claimed cost of remedial work.
>
> ...
>
> [28] ... a payment schedule which properly quantifies the amount incurred by a principal in remedying allegedly defective workmanship by a contractor may, in the particular circumstances of the case, constitute a valid reason for withholding payment for that amount." (emphasis added)

[38] Before me, counsel for the defendants argued that following *Metalcraft Industries Ltd v Christie* the letter in this case is a valid payment schedule, on the basis that it stated that the estimated cost of remedial work exceeded the amount claimed in the invoices. Counsel argued that this information was "full and unequivocal notice of all of the areas of dispute" and that it was apparent from the information stated why the amount payable was "nil".

[39] Counsel for the plaintiff responded by submitting that the letter essentially raised a "phantom dispute". The allegations of non-compliance and unsatisfactory work were stated generally, and did not point to particular aspects of the work. The source and quantification of the estimate of $380,000 were entirely unclear and unsubstantiated.

[40] Mr Chan's reference to the figure of $380,000 as an estimate for remedial work is the only feature of the letter which makes it appear more like a valid payment schedule than the payer's letter in *Metalcraft Industries Ltd v Christie*. In both cases, as yet un-quantified remedial work formed the basis of the dispute. Looking at Mr Chan's letter here on its face, there is no indication of where the figure of $380,000 comes from. And as any detail regarding this sum is so lacking, I must conclude that the letter in this case can really be seen as no more sufficient than that in *Metalcraft Industries Ltd v Christie*. The substance of the dispute with the payment claims in the present case provides far less detail than was the case in *Westnorth Labour Hire Ltd v S B Properties Ltd,* where the payment schedule was found to be valid. Mr Chan's letter did not identify with any degree of specificity any

complaints regarding work carried out, time charges, material charges, sub-contractor's charges or the like. The letter referred in general terms only to work being substandard with materials not installed to a "manufacturer's product literature" requirement, and a preliminary "cost estimate" to "bring the works under the agreement" of $380,000 plus GST is mentioned. No specific complaints are detailed however. The letter simply states the second defendant "currently is having prepared a comprehensive report of all areas of none [sic] (compliance) ......" As I understand the position, none was provided.

[41] And as Harrison J confirmed in *Metalcraft Industries Ltd v Christie*, an assurance from a defendant that more detail would be provided in the future does not make up for a lack of actual detail in a purported payment schedule.

[42] Applying the reasoning in paragraph 30 of *Westnorth Labour Hire Ltd v S B Properties Ltd*, in my view the plaintiff here was clearly given insufficient information to understand the defendant's real position, and to decide whether or not to pursue its claim or seek adjudication. The defendants, as Mr. Chan's letter notes, expressed some general dissatisfaction with the plaintiff's workmanship and performance under the construction contract. The letter however did not itemise any specific matters of concern as the Act requires. Thus, the defendants did not effectively respond to the payment claims by providing a proper payment schedule to the plaintiff under s. 21 of the Act. That was the avenue they should have adopted. In the words of Asher J noted in *Marsden Villas Ltd v Wooding Construction Ltd* (as outlined at (para.) [12] above), in my view the defendants in this case have not complied with the "sudden death" regime set up by the Act. They have not "followed the correct procedure" by issuing a proper payment schedule and thus they are:

> ".... obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal (the defendants) does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor (the plaintiff) and sub-contractors, will have to bear the consequences of delay in terms of cash-flow."

Are invoices 1226 and 1227 covered by the Act?

[43] These invoices were sent under the exit agreement which provided for the termination of the construction contract. Counsel for the defendant argues that the exit agreement was not itself a construction contract, but merely provided a procedure for the termination of the contract, including the making of final payments. The work done and claimed for was pursuant to the construction contract, but the method of payment was pursuant to the exit agreement. As such, before me, counsel for the defendants submitted that invoices 1226 and 1227 were not "payment claims" under the Act, as they were not made under a construction contract.

[44] In response, counsel for the plaintiff rejected the defendants' attempt to sever the exit agreement from the construction contract in this manner. Counsel submitted that it was clear the parties intended the provisions of the construction contract, as described in the exit agreement, to continue to apply insofar as it governed the previous relationship between the parties. This is evidenced by clause 8 of the exit agreement which states:

> "Neither party shall initiate legal proceeding against each other after execution of this agreement unless this agreement or the original Head Contract agreement is breached by any of these two parties."

[45] The exit agreement is entirely concerned with the contractual relationship between the parties pursuant to the construction contract. It provided for the termination of that construction contract. The defendants' submission that the invoices are pursuant to the exit agreement only and therefore not governed by the Act is entirely artificial. In my view, the Act clearly applies to invoices 1226 and 1227.

Whether invoice 1227 was provided in accordance with the exit agreement

[46] Clause 1 of the exit agreement provided that *"no more claim of payment will be made after 25th November 2008"*. I am satisfied on the evidence before me that the plaintiff sent invoice 1227 on 25 November 2008, at 10.03 p.m. However, it appears the defendant may not have received the invoice until 26 November 2008.

[47] Clause 9.2(c) of the construction contract provides:

> "Where one party sends the notice to the other Party by electronic mail to the electronic mail address of the other Party provided for in clause 10.1, and the sending electronic mail system confirms the notice was delivered successfully by the electronic mail system, the notice is deemed to have been received by the other Party on the day of the successful confirmation."

[48] Regulation 9(3) of the Construction Contracts Regulations 2003 also provides that a notice or document sent by electronic mail is deemed to have been served at the time the email enters the addressee's information system, or at the time the email comes to the attention of the addressee. While a payment claim must be validly served, clause 1 of the exit agreement which provides the cut-off date of 25 November 2008 is not, on its face, a matter of service.

[49] The issue then essentially is whether clause 1 of the exit agreement required a payment claim to be *sent* by 25 November 2008, or *received* by 25 November 2008. The natural interpretation of clause 1 is that a claim of payment "*is made*" at the time that it is sent. Accordingly I accept the submission of counsel for the plaintiff that receipt of the payment claim by 25 November 2008 is not something which the exit agreement required. I conclude that invoice 1227 was properly provided.

Was invoice 1226 or invoice 1227 responded to with a valid payment schedule?

[50] In my view the answer to this question is no. No payment schedule was ever provided in response to invoice 1227. With regard to invoice 1226, on 20 November 2008, in response to the receipt of this invoice, Mr. Chan for the first defendant wrote to Mr. Preddy for the plaintiff as follows:

> "In response to this claim and any future claim, as per last notice, we are still investigating the list of remedial works and we can not make any payment until a clear picture of the works have been outlined.
>
> However, we have completed 70% of the list. A complete report will be sent to you at our soonest possible time. No further response to future claim until such report is due."

[51] The sum of $13,500.00 claimed in invoice 1226 is for a project management fee. It is explicitly provided for and agreed upon in the exit agreement at clause 1. Payment schedules are confined in scope to claims raised upon a payment claim: *Canam Construction Ltd v George*

Developments Ltd HC AK 10 November 2004 CIV-2004-404-3565 para 45. As such, the cost of remedying allegedly unsatisfactory work completed and claimed for in invoices 1222, 1223 and 1224 cannot form the basis of a payment schedule against invoice 1226 for a project management fee.

Counterclaim

[52] It was argued for the defendants that they are entitled to have their counterclaim for the remedial work they say is required set off against the payment claims. Consideration of such a counterclaim or set off, however, is barred by section 79 of the Act which states:

> "79 **Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—
> (a) judgment has been entered for that amount; or
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount."

Conclusion

[53] All five invoices are valid payment claims in accordance with section 20 of the Act, and have complied with the requirements of the construction contract and the exit agreement where it applied. No valid payment schedule was provided in response to these payment claims. As such, the defendants are liable for the amount claimed in each invoice. Pursuant to section 79 of the Act, the Court is not entitled here to consider any counterclaim or set off the defendants might have in these proceedings.

Result

[54] The plaintiff's application for summary judgment is successful. Summary judgment is granted to the plaintiff against the defendants jointly and severally in the sum of $205,167.27 together with interest on each unpaid invoice in terms of clause 23.6 of the construction contract from the respective due dates for payment down to the date of actual payment.

[55] Costs on this summary judgment application are also awarded to the plaintiff against the defendants on a category 2B basis plus disbursements (if any) as approved by the Registrar.

'Associate Judge D.I. Gendall'