IN THE DISTRICT COURT
AT BLENHEIM

CIV-2008-006-000101

BETWEEN	SHAUN DAMIEN JENKIN First Plaintiff
AND	JENKIN HOMES LIMITES Second Plaintiff
AND	JAMES ADAIR HANNA AND MARIA GISELA HANNA Defendants

Hearing: 13 June 2008

Appearances: Mr Q Davies for Applicant
Mr M Wilson for Defendants

Judgment: 23 June 2008

JUDGMENT OF JUDGE A A ZOHRAB

Introduction

[1] On 18 April 2008, the plaintiff sought summary judgment against the defendant, for the total sum of $23,334.06, plus interests and costs in accordance with the Construction Contracts Act 2002 ("the Act").

[2] The summary judgment application was denied on the basis that the payment claims were defective in that they did not comply with s 20(2)(d) of the Act. In coming to the conclusion that the payment claim did not comply, I held, at paragraph 27 of my decision as follows:

> The accompanying Notice is quite separate from the payment claim, so I am left with the position of concluding that I am not going to grant the application for summary judgment because the payment claim both in its

> original form and in the submitted form is invalid because it fails to include a mandatory requirement, that is a due date.

[3] I went on to express my concern that I was unhappy with my conclusion, but I felt that given the mandatory requirements of the Act, it was the only reasonable conclusion that I could reach at a summary judgment stage.

[4] What has happened subsequently is that the plaintiff has made application on three bases for me to reconsider my decision, but more particularly they have made application for:

a) A recall pursuant to Rule 533(3) of the District Court Rules;

b) A rehearing pursuant to Rule 493, which has a 14 day time limit; and

c) A review pursuant to Rule 287(2), which provides for a 7 day time limit.

[5] All applications are opposed by the defendant.

The plaintiff's argument

[6] With respect to the application for recall, Mr Davies referred me to the decision of *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 which is authority for the proposition, at 633:

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendments to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[7] The case on behalf of the plaintiff is that the current matter before me falls within the category where counsel has failed to direct the Court's attention to an authoritative decision of plain relevance. More particularly, Mr Davies referred me

to the decision of *Winslow Properties Limited v Wooding Construction Limited*, High Court, Auckland, CIV-2006-404-004969 , 14 December 2006, Cooper J. In that case, the facts were as follows:

a) The payment schedule was said to include a covering letter, which included the following details:

   i) Reference to the construction contract to which the progress payment related;

   ii) Indicating a payment amount and the due date for payment; and

   iii) Stating that the payment claim is made under the Act.

b) Attached to that letter were "monthly progress claim summaries" detailing amounts due, itemised in respect of the units and particular works within the development. Also attached were a further 36 pages giving detailed breakdowns of the elements of the claim.

c) Those attached documents did not themselves make any reference to the Act. That had only been done in the letter.

[8] It was alleged in that case the attached monthly progress claim summaries did not describe themselves as "payment claims" and did not indicate a due date for payment as required by s 20(2)(d) of the Act.

[9] At paragraph 29 of *Winslow* the Court held:

> [29] In my view, these arguments are devoid of any merit. I consider that Kerr DCJ was correct to read the letter together with its attachments, as essentially one document constituting a payment claim ...

[10] In that decision the Court also went on to say at paragraph 30:

> [30] ... Because the due date for payment depends upon the date on which a payment schedule is served, it is not possible when making payment claim to specify a precise date to comply with the direction in section 20(2)(d) of

> the Act. Although no date can be specifically stated, words can be used which enable the due date to be ascertained. In my view, this was satisfactorily done by the wording used in this case, and which has earlier been set out.

[11] Mr Davies submitted that *Winslow* was authority for the following propositions:

a) A payment claim can take the form of a series of documents sent at the same time.

b) The requirement to indicate the due date for payment (s 20(2)(d)) merely requires words to be used which enable a due date to be ascertained and no precise date needs to be specified.

[12] Mr Davies' submission was that if the Court had been referred to the *Winslow* decision, I would have reached the opposite conclusion from that which I did. Accordingly, it is submitted, the application should be granted and summary judgment entered.

[13] Mr Davis then went on to refer me to the applicable law in relation to recalled matters and also the law in relation to Rule 493 (Rehearing) and Rule 287 (Review) for the sake of completeness. These matters were only raised if there was any issue with respect to jurisdiction to recall and he submitted there was not.

Defendant's submissions

[14] Mr Wilson opposed the application and, whilst he accepted the decision in *Winslow* was authoritative, it was his submission that the decision can be distinguished from the facts of this case, therefore it is not plainly relevant and the judgment should not be recalled.

[15] More particularly, his submission was that the facts were materially different in that in the *Winslow* case it was correct to read a letter, together with attachments is essentially one document constituting a payment claim and that read together the

documents complied with the provisions of s 20(2) of the Act and was a valid payment claim under the Act.

[16] By way of distinction however in the current case, a number of invoices relating to a residential construction contract and one relating to a commercial construction contract were sent to the defendant. Because some invoices related to a residential construction contact, the plaintiff was also required to comply with s 20(3) of the Act, which requires the payee to also provide:

> (a) An outline of the process for responding to that claim; and
>
> (b) An explanation of the consequence of;
>
> > (i) Not responding to a payment claim; and
> >
> > (ii) Not paying the claimed amount, or the scheduled amount, in full (whatever is applicable).

[17] Mr Wilson observed that those matters must be in writing and in the prescribed form which is outlined in the Regulations to the Act.

[18] Accordingly, by way of distinction from the current case, Mr Wilson submitted that the Plaintiff was under a statutory obligation to abide by the payment claim in terms of the provisions of the Act, and a Notice, pursuant to s 20(3) of the Act, which are two separate and distinct documents. Accordingly, as the accompanying Notice is quite separate from the payment claim, it cannot be read with the payment claim to constitute one document as there was a statutory obligation to provide both. They are quite separate documents, and each had to comply with the provisions of the Act to be valid.

[19] Mr Wilson's submission was that it was clearly Parliament's intention to provide residential occupiers with the additional information outlined in the Notice so that they were fully informed as to their obligations in addition to the specific information in the payment claim relating to the a particular claim. No such Notice is required for commercial construction contacts, therefore it follows that payment claims must comply with the Act to be valid and be capable of being read alone. To argue otherwise is inconsistent with the plain words of the statute. If Parliament had

intended the payment claim and Notice to be read together then it would have expressly provided for that in the Act.

[20] Not only did Mr Wilson seek to distinguish the *Winslow* case, he also reminded me that if the mandatory requirements of s 20(2) are not complied with, then the payment claim is invalid. His submission was that a payment claim must be capable of standing by itself and being read alone and cannot be read with an accompanying Notice, which was also required to be sent under the Act.

[21] Mr Wilson in his submissions also went on to deal with the issues in relation to the rehearing matter, and whether or not there had been a miscarriage of justice of the application was not granted. In support of that submission his contention was there was no miscarriage of justice because my judgment was correct in law when it held that for the payment claim to be valid it had to comply with the mandatory requirements of s 20(2) of the Act, and that there was no due date for payment. He also referred me to the decision of *Thomas Roger Welsh and Lynley Ramari Welsh v Gunac South Auckland Ltd,* unreported, High Court, Auckland, CIV-2006-404-007877, 17 October 2007, Allan J. Mr Wilson's submission was that this case was authority for the proposition that the mandatory requirements in s 20(2) must be contained within a payment claim for it to be valid.

Plaintiff's response to the argument with respect to s 20(3) of the Act

[22] Mr Davies acknowledged there was a statutory requirement to comply with s 20(3) of the Act, but noted that in fact, there was no requirement to give a due date under s 20(3) of the Act, and in fact, the Notices accompanying the invoices on this particular case went further beyond the requirements of the legislation by giving a basis on which the defendant would have been readily able to ascertain a due date.

[23] Essentially the argument and response was that one needed to give thought to the purposes of the Act, and here the Notice could serve a dual function because it was readily ascertainable from reading the payment claim and the Notice what the due date was under the payment claim.

Discussion and Decision

[24] In my view, it is entirely appropriate for me to recall my decision given on 18 April and issue a new decision granting summary judgment in favour of the plaintiff. If the *Winslow* decision had been before me, I would have reached a different decision to the one that I did. At the time I felt constrained by the Act to conclude that the payment claim should include a due date. I am quite happy to conclude that it is only fair and appropriate to read the Notice which accompanied the "payment claim" as supplementing the "payment claim" and that the effect of reading the two together is that it provides the defendant with a readily ascertainable due date, thereby complying with s 20(2) of the Act.

[25] This is not a situation as in the *Thomas Roger Welsh and Lynley Ramari Welsh v Gunac South Auckland Ltd* case, where there was no mention of the Act. This was a situation where the "payment claim" document itself failed to mention a due date. However, I agree with the *Winslow* decision that if the two documents are read together, then a due date is readily ascertainable. It offends common sense to hold that since the Notice is a separate document required under the Act, it cannot be read with the payment claim so as to supplement the payment claim, more especially when the Notice includes a method of calculating the due date, and as such goes further than the requirements of the legislation.

[26] Given my clear view on this matter, and the view that I am bound by the decision in the *Winslow* case, I need not deal with the other bases for the application, except to observe that it is in the interests of justice that the Court "gets it right". As I was not provided with the relevant authority, I am quite comfortable granting the application.

[27] If the parties are unable to resolve the issue of costs among themselves then I invite the submission of memoranda within 14 days of my decision.

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A A Zohrab
DISTRICT COURT JUDGE