IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1109
[2015] NZHC 2145

BETWEEN	MDS DEVELOPMENTS LIMITED Applicant
AND	APPLEBY HOLDINGS LIMITED Respondent

Hearing: 25 August 2015

Appearances: Mr J Turner for Applicant
Mr M Heard and Ms L Clews for Respondents

Judgment: 4 September 2015

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***04.09.15 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

[1] The respondent was the developer of the property at Albany at St Andrews Way. The development offered either bare sections to buyers or what were described as "house and section packages", as Mr Heard put it. The design of the subdivision was carried out by MDS Design Limited. The actual construction work was principally carried out by a company associated with a third person, Mr Murphy. That company was Murphy Property Development Limited ("MPDL"). Mr Murphy was also a director of the principal, the respondent. The other director of the respondent was Mr Kendrick.

[2] The principals of these three corporate entities or groups appeared to work together cooperatively at least at the outset. In addition to providing design services, Mr Wilsons other company, the applicant, agreed to purchase Lot 18 upon which there was to be constructed a residence. I understand that the involvement of the applicant was of an investment type and it was intended that the property be on-sold. The respondent owned Lot 19, the adjoining property, to Lot 18.

[3] It was the intention of the three corporate entities/groups that there would be profit sharing on completion of the subdivision. However, I understand that the party who had overall responsibility for initiating and coordinating the development was to be the respondent who would obtain the necessary consents and take other steps to get the subdivision underway.

[4] The development involved the construction of a retaining wall on the boundary of some of the properties comprising the subdivision including, Lot 18 and 19. MPDL began work on the retaining wall and in the mid-point of 2014 work had progressed to the point where it was ready to continue construction on Lot 18, the property of the applicant.

[5] There was a discussion between Mr Wilson of the applicant and Mr Murphy of MPDL about the commencement of the work and about access for that purpose. Mr Wilson agreed to MPDL coming onto Lot 18 for the purposes of constructing the wall.

[6] As well as construction of the retaining wall, a fence was to be built between Lot 18 and 19. There was no dispute on the part of the applicant that it expected to pay one half of the cost of this fence.

[7] The parties have not been able to resolve the dispute and matters came to a head when the respondent served a statutory demand on the applicant dated 5 May 2015. The applicant has brought this application pursuant to s 290(4) of the Companies Act 1993, which is opposed, to set aside the statutory demand.

Principles relating to applications to set aside statutory demands.

[8] Section 290(4) of the Companies Act 1993 provides that the Court may grant an application to set aside a statutory demand if it is satisfied that:

> (a) there is a substantial dispute whether or not the debt is owing or is due; or
>
> (b) the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
>
> (c) the demand ought to be set aside on other grounds.

[9] In determining whether there is a substantial dispute, the following principles are applicable (see *Heath and Whale on Insolvency* at 20.7):

> (a) The Court is required to determine if the applicant can show a fairly arguable basis upon which it is not liable for the amount claimed (*Queen City Residential Ltd v Patterson Co-Partners Architects (No 2)* (1995) 7 NZCLC 260,396);
>
> (b) The mere assertion of a dispute is not sufficient; some material short of proof is required;

(c) It is not usually appropriate to resolve disputed issues of fact on affidavit evidence alone, particularly when issues of credibility arise;

(d) The jurisdiction is a summary one and calls for a prompt judgment as to whether there is a genuine and substantial dispute. It is not the task of the Court to resolve the dispute (see *Industrial Group v Bakker* [2011] NZCA 142 at [24]-[25]).

The issues

[10] The principal issue is whether there is a substantial dispute whether the applicant owed to the respondent the amount claimed in the statutory demand.

[11] The answer to that question involves two subsidiary issues. The first is whether the applicant entered into a contract relating to the construction of the retaining wall or whether it had entered into a contract with another party, MPDL, for that purpose. The second point is whether, if the applicant entered into a contract with the respondent it was a construction contract within the meaning of the Act.

The transaction in detail

[12] On completion of the work on 22 April 2014, MPDL issued an invoice to the respondent which seems to have covered part of the work on Lot 18. The total of that invoice was $3,105.

[13] By early 2015 there was friction between the applicant, on the one side, and the respondent and Mr Murphy/MPDL on the other. On 20 February 2015 Mr Murphy in the course of ventilating his views about matters relating to the overall costings that his company had rendered as part of the development in an email to Mr Wilson, noted that his company had not been paid for the retaining wall at Lot 18. Mr Wilson responded that:

> We have never had an invoice for this.

[14] Subsequently, an invoice and alleged payment claim was issued for the retaining wall. It was the respondent, rather than MPDL, which issued Invoice 1002 dated 5 March 2015 which stated that it was issued for the following services:

> To excavate, supply, place and finish front retaining wall Lot 18.

[15] The invoice charged the applicant for the retaining wall and half the cost of the fence and associated planting for a total of $11,675 which with GST took the total owing to $13,426.25.

[16] The invoice had endorsed upon it the following:

> Payment claim made under the Construction Contracts Act 2002.

[17] By April 2015 the dispute between the parties was in the hands of lawyers. The position that the respondent was taking was that it no longer considered that there was to be any profit sharing on the subdivision with the applicant. In regard to the invoice/payment claim the position that the solicitors for the applicant took was that the respondent had carried out no construction work and as there was no relevant construction contract there could not be a valid payment claim pursuant to the CCA.

[18] Initially the lawyers for the respondent responded on the basis that their instructions were that there had been an agreement between Mr Kendrick on behalf of the respondent and Mr Wilson for the applicant that the boundary side fence and retaining wall would be done at the same time as work was being done on Lot 19. Further, it was said that Mr Wilson had instructed the respondent to invoice his company, the applicant, once the work was completed. The solicitors also enclosed a copy of a statutory demand dated 5 May 2015 which had been served on the applicant.

[19] The arguments between the parties had by May 2015 extended to another subject which was that the retaining wall was in any case allegedly defective. Amongst other points which the applicants were also raising at this stage were that Mr Murphy, in communications with Mr Wilson for the applicant had sent emails from the email address for MPDL (that is Mr Murphy's construction company) and

not from AHL, the respondent. This was said to provide some evidence that the contract was, as the applicant contended, between itself and MPDL with the respondent, Appleby Holdings Limited, having nothing to do with it.

[20] Mr Murphy's riposte though was to the effect that he did not have a separate email address for his construction company and that is why when he sent emails in his capacity of director of the respondent, he used that email address rather than one specifically dedicated to the respondent.

[21] The arguments for the respondent (both in the exchanges with the applicant's solicitors and at the hearing before me), was that the respondent was the developer and had as is typical of such developments, subcontracted various parts of the work. Accordingly, Mr Heard for the respondent pointed out that Mr Wilson's design company was providing the design input and Mr Murphy's construction company, MPDL was going to carry out the construction. In essence it was the position of the respondent that at the time when MPDL approached Mr Wilson for consent to continue construction of the retaining wall onto the applicant's property it was already carrying out work which it was charging to the respondent; that MPDL was employed by the respondent and that when, as it expected it had progressed the retaining wall to the point where work had to be done in Lot 18, it would continue the work in the capacity of a subcontractor of the respondent.

[22] Mr Wilson on the other hand, said that the circumstances immediately leading up to MPDL commencing construction were relevant. He said that in late April 2014 he spoke to Mr Murphy:

> And it was agreed Murphy Developments would carry out the retaining wall work on Lot 18 for MDSD directly. Mr Murphy said he would do it for me "at cost" for no profit margin, and so to keep his crew going with work while he was out of the country to watch golf and cricket.

[23] Based upon this exchange Mr Wilson considered that MPDL and not Appleby was the party who would be entitled to charge for the work.

[24] He stated that it was his view that there was no contract between the applicant and Appleby for construction and that he expected that MPDL would invoice the applicant.

[25] Against all of this a significant exchange of texts which occurred on 27 February 2015 between Mr Wilson and Mr Kendrick.

[26] Mr Kendrick opened the exchange by saying:

> Hi Mark, sorry I have not had a good afternoon. We are going to produce invoices for the fence and walls so we can clear all debts from MDS and Appleby Holdings with just the profit share as the remaining issue …

[27] I interpolate that plainly Mr Kendrick was speaking for the respondent. There is no evidence that he is a director of the company that actually carried out the construction work, MPDL.

[28] The exchange continued with a text from Mr Wilson which was largely concerned with which company in the Masonry Design Solutions ("MDS") group ought to be the recipient of the invoice. He concluded his text by saying:

> In order for MDS Developments to pay, I will need a tax invoice from Appleby Holdings.

[29] The next texts were how the invoice might be paid when rendered including the possibility of cheque swap.

[30] It must be said that such an exchange of texts is quite at variance with the statements that Mr Wilson now makes to the effect that the charges for constructing the retaining wall had nothing to do with the respondent. The arrangement set out in those texts is also inconsistent with his evidence that he had made arrangements for the wall including the rate at which the applicant would be charged with Mr Murphy. Given that this exchange occurred in 2015 while any discussion with Mr Murphy must have occurred in 2014 before the work commenced, it may be that one explanation is that Mr Wilson had forgotten about his discussion with Mr Murphy or alternatively it could be that he did not consider that the question of who his company had to pay for the work was material.

[31] In his evidence, too, Mr Kendrick referred to the fact that MPDL had invoiced the respondent for the construction of retaining walls both in Lot 18 and Lot 19. I will discuss the admissibility or relevance of this material further on in this judgment.

[32] I need to note a point that Mr Turner mentioned that there was no written contract in evidence between the respondent and MPDL. However that is of limited relevance when it is considered that a contract does not need to be in writing to come within the provisions of the CCA, as Mr Heard submitted. Equally, there is no written contract in evidence between the applicant and MPDL. Therefore observations that there was no definition of the work to be carried out or the parties warranty periods etc are equivocal.

[33] Finally, there were arguments between the parties about what individual persons who were present at various discussions on site believed was the contractual position but I do not in the end consider that they offer a great deal of assistance on the question of who were the parties to the contract for the construction of the retaining wall.

Subsequent conduct of the parties

[34] I accept the submissions that Mr Heard made based upon *Gibbons Holdings Limited v Wholesale Distributors Limited.*[1] The subsequent conduct was admissible for the purpose of interpreting the contract between the parties. In his judgment Tipping J said:

> If the Court can be confident from the subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.[2]

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1 *Gibbons Holdings Limited v Wholesale Distributors Limited* [2008] 1 NZLR 277.

2 At page 63 and see J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (4th ed), LexisNexis, Wellington 2012 at Page 204.

Discussion of subsequent conduct in context of present case

[35] I do not consider that the evidence which the respondent points to of the fact that the respondent and MPDL as between themselves treated the respondent as being liable for invoices from MPDL, represents subsequent conduct embracing the activities of the applicant. The applicant was not a party to a decision being made as to the pattern that the other two parties would follow when invoicing for work on the retaining wall. The conduct cannot therefore be seen as indicative of the understanding or state of mind of the applicant as to what the meaning and effect of the contractual arrangements was.

Discussion

[36] The arguments between the parties have been complicated by the different capacities in which these businessman interacted with each other during the completion of the subdivision. Mr Wilson's two company vehicles were involved in different capacities. As I have noted, one company provided design services to the project. That company, or one of the other companies in the group, was according to Mr Wilson's account of matters, entitled to a share of profits in the completed development. As well, the applicant company was a purchaser of a land and house package in the subdivision. From the evidence a reasonably clear picture emerges that the entities involved in the construction of the subdivision were the applicant as the client or "principal" and MPDL as the contractor. In the absence of evidence to the contrary, if the contractor was called upon to carry out work pursuant to its obligations as the contractor, one would expect that it would be doing so in the context of the company's contract with the principal, the respondent.

[37] Further, there is little doubt that the applicant expected that it would be paying for construction of the retaining wall which was part of completion of the property that it engaged to buy from the respondent. All things being equal, it must have been a matter of indifference to the applicant which party it paid for the work. There is no compelling business-type circumstance which suggests that it was important to the applicant to deal directly with MPDL as the principal in regard to that part of the construction that concerned completion of the retaining wall, rather

than for charges to flow through the structure previously applicable to payments for construction of the house and other construction services including landscaping.

[38] On the one hand, the respondent points to the fact that the work that was done on the retaining wall on Lot 18 was simply a continuation of the work which it had previously engaged MPDL to perform. Why would there be a separate arrangement arrived at for the construction of the section of the wall on Lot 18? Further, the analysis of the contractual arrangement which the respondent describes meant that the parties were carrying on work in conformity with the basic structure of the contractual arrangements that governed the subdivision as a whole. That meant that the respondent was the contractual principal who engaged MPDL as the contractor to carry out the construction.

[39] On the other hand, the applicant points to the specific discussions which allegedly took place between Mr Wilson and Mr Murphy prior to commencement of the work which, it says, resulted in a specific contract being entered into for the construction of the portion of the retaining wall on Lot 18.

[40] I consider that it is open to the applicant to assert that there is a substantial dispute concerning this question of the correct analysis of the contractual arrangements. Once that point is reached, it is not open to this Court to go on and give judgment based upon its interpretation of what the contractual intention of the parties was likely to be. That must be done at trial. Putting it another way, unless the Court is convinced that there is no contrary argument of substance which the applicant can mount, the Court is bound to grant the application to set aside the statutory demand.

[41] That being my view, it is not strictly necessary to consider whether, if the contract was in fact between the respondent and the applicant whether it amounted to a construction contract within the meaning of the Act. The answer to that question involves consideration of the objectives of the Act. It may ultimately be seen as decisive in resolving this dispute that the legislature would plainly have been cognisant of the fact that construction contracts frequently involve chains of contractual delegation down from the principal to subcontractors and that it may be

that a principal itself does not carry out any of the work which might be described as construction work.

[42] The second point is that the Act makes it clear that the focus is on providing "remedies for the recovery of payments under a construction contract".[3] The purpose of the act is to expedite payment where a party is owed amounts attributable to a contract entered into to construct something. In such a context, arguments about whether the claimant itself physically carried out part of the construction work are irrelevant. The only matters that the court will consider is whether money is owed under the contract and whether the contract may reasonably be viewed as being concerned with "construction work" as that term is defined in s 6 of the Act. There is no additional requirement in the act that the claimant carried out any part of the actual construction work.

[43] However because of the conclusions that I have come to on the point of who the parties were who contracted in this case, and because I consider that there are arguments both ways on that point, the further conclusion follows that there is a substantial dispute as to whether the applicant owed any amount to the respondent, whether under a construction contract or otherwise.

Order

[44] I make the order that is sought in paragraph 1.1 of the originating application dated 19th of May 2015.

[45] The parties are to confer on costs. Given the remarks that I made at the hearing about the need for a balanced approach to limiting the number of issues about which the Court ought to be required to rule on in the context of this relatively modest dispute, I would hope that it would not be necessary for the Court to give a ruling on costs. If my expectations are misplaced, then each party is to file and serve submissions not exceeding five pages on each side within 15 working days of the date of this judgment.

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[3] Section 3 Construction Contracts Act.

J.P. Doogue
Associate Judge