IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-005139
[2014] NZHC 1898

BETWEEN	MARAC FINANCE LIMITED Appellant
AND	BODY CORPORATE 361477 Respondent

Hearing: 16 April 2014

Appearances: J E M Lethbridge for Appellant
E St John for Respondent

Judgment: 12 August 2014

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 12 August 2014 at 4.00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] Marac Finance Limited sued Body Corporate 361477 in the District Court for $67,652.61.[1] The claim related to a contract for work on an apartment building in Emily Place, Auckland. Marac sued as the assignee of the contract. It sought summary judgment, which the Body Corporate opposed on the ground that it (the Body Corporate) was not a party to the contract sued on. Marac contended that the Body Corporate's failure to respond to a payment claim served under the Construction Contracts Act 2002 (CCA) precluded it from raising this argument.

[2] Judge Sharp refused summary judgment. Marac appeals that decision on the grounds that the Judge failed to deal with its primary argument, made errors of law in the interpretation of documents and errors of fact in the assessment of evidence.

[3] The principles relevant to determining a summary judgment application, including where issues of fact arise, are well established and were in *Krukziener v Hanover Finance Ltd*:[2]

> 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; (1986) 1 PRNZ 183 (CA) at p3; p185. The Court must be left without any real doubt and 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 Me Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC) at 341; p381. 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).

[4] The Judge correctly identified these principles.

[5] Counsel disagreed as to the basis on which the appeal should be heard. Mr St John, for the Body Corporate, submitted that the decision to refuse a summary

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1 *Marac Finance Ltd v Body Corporate 361477* DC Auckland CIV-2012-004-002084, 13 November 2013.

2 *Krukziener v Hanover Finance Ltd* (2008) 19 PRNZ 162.

judgment application was a discretionary matter and an appeal from that refusal was to be treated as an appeal against the exercise of a discretion on the *May v May* principles.[3]

[6] Ms Lethbridge, for Marac, submitted that such an appeal was by rehearing and the principles in *Austin, Nichols & Co Inc v Stichting Lodestar*[4] applied. She argued that the discretion as to whether or not to grant a summary judgment is not the exercise of the discretion but rather an evaluative judgment as to the question of whether or not there was a defence to the claim.

[7] A judge retains a residual discretion as to whether to enter summary judgment, once satisfied that there is no defence. However, Marac's appeal is brought on the basis that the Judge made errors in determining whether there was an arguable defence. There was no exercise of the discretion and it is not suggested that there should have been. The appeal is properly dealt with in accordance with the *Austin, Nichols* approach.

[8] For the reasons I come to shortly I have concluded that, although the Judge made an error in not considering Marac's primary argument, she was not wrong in refusing summary judgment.

The claim in the District Court

Factual background

[9] The Body Corporate entered into a contract with Action Painters 2007 Ltd (APA) in March 2011. Before APA began work it sold its business to Pandora Development Limited or nominee. Action Group Ltd (AGL) purchased the business as Pandora's nominee. In June 2011 AGL assigned all its accounts receivable debts to Marac.

[10] AGL began work on the building in August 2011. It issued invoices in its name, which the Body Corporate paid until January 2012. In February 2012 the

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3 *May v May* (1982) 1 NZFLR 165.

4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

Body Corporate disputed some of the invoices on the basis that they related to additional work that the Body Corporate had not authorised.

[11] On 28 May 2012 AGL sent a payment claim under the CCA to the Body Corporate's agent, Crockers Body Corporate. The claim contained the usual advice regarding the effect of the CCA; if the Body Corporate wished to dispute the payment claim it had to provide a payment schedule to AGL by 26 June 2012.[5] Failure to either pay the amount claimed or provide a payment schedule would mean that AGL became entitled to recover the amount as a debt due together with the actual and reasonable costs.[6] Crockers did not take any steps in relation to the payment claim. It appears that this was an oversight.

The District Court claim

[12] In its notice of claim in the District Court, Marac asserted that:

> On 17 March 2011 Action Group Limited (in liquidation) ("Action Group")[7] entered into a construction contract with the defendant to carry out painting/plastering work to the exterior of a building managed by Crockers Body Corporate Management Limited ("Crockers") situated at 23 Emily Place. Work was carried out. The plaintiff took an assignment of the debt owed to Action Group including the debt owed by the defendant.
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> ...
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> Action Group made a payment claim under the Construction Contract and in accordance with the Construction Contracts Act 2002 required the defendant to pay it $67,652.61.
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> As the defendant failed to make payment of the amount claimed or provide a payment schedule to the plaintiff identifying its reasons for withholding any payment, within 20 working days of the date in which the payment claim was made, the defendant is now liable to pay the claimed amount to the plaintiff ... within five working days. No payment has been made by the defendant. The defendant has no defence to the claim.

[13] The Body Corporate's notice of opposition to the summary judgment application challenged Marac's standing to claim on the ground that only a party to the contract could issue a payment claim and AGL was not a party; instead, the contract the Body Corporate had entered into was with APA. The Body Corporate

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5 Section 22(b)(ii).
6 Section 23(2)(a).
7 This was, of course, incorrect; the contract was originally entered into with APA.

further asserted that there was no novation of the original contract between the Body Corporate and APA; in these circumstances, AGL had no status to issue a payment claim and no debt was created that could have been assigned to Marac.

[14] The matter was heard over the course of two days before Judge Sharp on 12 and 13 November 2013. The Judge delivered an oral judgment, refusing summary judgment on the grounds that:[8]

> (a) It was arguable that the original assignment of the contract from APA to AGL was not valid with the result that the assignment of the debt to Marac was not valid either;
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> (b) Nor was there a valid equitable assignment of the original contract because there was no or insufficient evidence of the intention of the original parties to assign the contract;
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> (c) Nor was there a new contract between AGL and Body Corporate by way of novation of the original contract because there was no or insufficient evidence of the parties' intention to effect that;
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> (d) There was insufficient evidence of intention to show estoppel.

The appeal

Did the Judge fail to consider Marac's primary argument?

[15] Marac's position was that, in accordance with ss 22-23 of the CCA, once a party fails to respond to a payment claim it becomes liable to pay and cannot thereafter raise issues regarding the validity of the debt, including whether it was a party to the contract sued on. Marac's appeal proceeded on the basis that the Judge failed to consider this critical issue and that, had she done so, none of the reasons given for refusing summary judgment would have been relevant.

[16] Although the Judge recorded this ground of opposition she did not go on to consider it. Rather, the Judge proceeded immediately to focus on the validity of the assignment, the possibility of novation and whether the Body Corporate was estopped from denying the contract. I agree that this was an error.

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8 *Marac Finance Ltd v Body Corporate 361477*, above n 1.

Was the Body Corporate entitled to challenge the validity of the payment claim?

[17] The process for requiring payment and the consequences for not responding to that request are set out in ss 22 and 23. Section 22 provides that:

> A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if –
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> (a) A payee serves a payment claim on the payer; and
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> (b) The payer does not provide a payment schedule to the payee within –
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> (i) the time required by the relevant construction contract; or
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> (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[18] Section 23 relevantly provides that:

> (1) The consequences specified in subsection (2) apply if the payer –
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> (a) Becomes liable to pay the claimed amount to the payee under s 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by s 22(b)
>
> (b) Fails to pay the whole, or any part, of the claimed amount on or about the due date for the progress payment to which the payment claim relates.
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> (2) The consequences are that the payee –
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> (a) May recover from the payer, as a debt due to the payee, in any court –
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> (i) the unpaid portion of the claim amount; and
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> (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
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> (b) May serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.
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> ...
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> (4) In any proceedings for the recovery of a debt under this section, the Court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

[19] There is no doubt that the provisions of the CCA are stringent. They reflect the purpose of the Act, to facilitate essential cash-flow in the construction industry and provide a means for prompt identification and resolution of disputes. In *George Developments Ltd v Canam Construction* the Court of Appeal emphasised the need to approach the determination of cases with the purpose of the Act in mind:[9]

> [41] … the purpose provision of the Act includes the fact that the Act was "to facilitate regular and timely payments between the parties to a construction contract". The importance of such regular and timely payments is well recognised. Lord Denning (quoted in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, 214 (HL) Lord Diplock) said:
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> > There must be a "cash flow" in the building trade. It is the very life blood of the enterprise.

[20] Approving Windeyer J's comments in *Hawkins Construction v Mac's Industrial Pipework*[10] the Court added that:

> [43] The general observation that technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act is critical …

[21] In *Marsden Villas Ltd v Wooding Construction Ltd* Asher J made the following observation about the purpose and effect of that procedure:[11]

> [17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, and the quick resolution of disputes. The process that it sets up are designed to side-step immediate engagement of the substantive issues such as setting off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. *So 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.
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> (emphasis added)

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9 *George Developments Ltd v Canam Construction* [2006] 1 NZLR 177.

10 *Hawkins Construction v Mac's Industrial Pipework* [2001] NSWSC 815.

11 *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807; adopted by Harrison J in *Metalcraft Industries Ltd v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007.

[22] However, stringent though the provisions of the CCA are, there are certain prerequisites that a contractor seeking to utilise the statutory procedure must satisfy. Relevantly in this case, the entity serving a payment claim (the payee) and the party upon whom the payment claim is served (the payer) must both be parties to the contract. This is obvious from the definitions of "payee" and "payer".

[23] Under s 19 these terms are defined:

> Payee means the party to the construction contract who is entitled to a progress payment. Payer means the party to the construction contract who is liable for that payment.

[24] A construction contract is defined in s 5:

> **Construction contract** –
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> (a) Means a commercial construction contract or residential construction contract; and
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> (b) Includes any variation to the construction contract; but
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> (c) Does not include a lease or license under which a party undertakes to fit out, alter, repair or reinstate the leased or licensed premises unless the principal purpose of the lease or license is the carrying out of the construction work.

[25] Self-evidently, a valid payment schedule can only be served by one party to a contract on the other. The existence of a contract between the parties is not technical quibble but an essential element of any claim for payment. It is a circumstance referred to in s 23(1); if it does not exist s 23(4) will preclude judgment being entered.

[26] For these reasons, the Body Corporate was entitled to defend the summary judgment application on the ground that AGL was not a party to the contract being sued on and/or Marac did not hold a valid assignment.

The case was unsuitable for summary judgment

[27] The Body Corporate's defence was that it was not a party to the contract of which Marac claimed to be the assignee. Its notice of opposition put that question squarely in issue. Its identification of the issues of novation, the validity of the

assignment to Marac and the possibility of it being estopped from denying the existence of the contract anticipated arguments that Marac might raise in response to its primary assertion that it was not a party to the contract. They were not matters that the Body Corporate had to disporve. The point being made in the notice of opposition was that, on the pleadings and evidence as they then stood Marac could not prove that the Body Corporate was a party to the relevant contract.

[28] The initial submissions that Marac filed in early 2013 were replaced by a second set dated 9 August 2013. It also filed a third, undated set of submissions close to the trial but the Judge referred only to the submissions dated 9 August 2013. Marac's final position, recorded in its third set of submissions, was that:

(a) The evidence disclosed a new contract between AGL and the Body Corporate on the same terms as existed in the contract between APA and the Body Corporate; or

(b) There was a novation of the APA contract by conduct; or

(c) Even if there was no new contract and no novation of the APA contract the contract had been performed and the benefit of it validly assigned.

[29] The first point to note is that by the time the application reached hearing Marac was advancing the alternative propositions of assignment of the APA contract (as pleaded) or an entirely new contract between AGL and the Body Corporate (not pleaded). Although the parties addressed the new argument, that was not actually the basis on which the summary judgment application had been brought and not the case that the Body Corporate was originally faced with. However, even leaving that aspect aside, there were disputed factual issues that, as the Judge rightly concluded, made the case unsuitable for summary judgment.

[30] In relation to the possibility of a new contract, the Judge was not satisfied regarding the intention between AGL and the Body Corporate to create a legal relationship:[12]

> [43] Whether there was an intention between AG and the defendant to create a legal relationship is a question of fact. But, on the evidence adduced there appears to be little indication of an intention to enter into contractual relations. There was no evidence of communications, either oral or written, between AG and the defendant body corporate confirming a new contract on terms identical to the original contract between APA and the defendant.
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> [44] Employees of Crockers the body corporate secretary deposed that they believed that either the contractual party was APA (see the affidavit of Mrs A Stehlin) or that AP had changed its name to AG (see the affidavit of Ms J Kopua). Ms Kopua also deposed that she noted on one of AG's invoices that there had been a name change from APA to AG and that bank account details were different.
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> [45] After she rang the phone number on the invoice she was informed that the account, phone and address details remained the same. Consequently she did not inform the defendant or its account manager at Crockers of AG carrying out the construction contract believing the matter to be of little importance. That is understandable.
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> [46] The evidence does not support an intention to create a legal relationship between AG and the defendant and I consider that this ground of the summary judgment application also appears unsustainable or put a better way, there is an arguable defence open to the defendant also on this ground.

[31] Ms Lethbridge submitted that, although the Judge identified the evidence that Marac relied on to show a new contract she was wrong to conclude that there was insufficient evidence to show that the Body Corporate intended to enter into a contract with AGL. However, I consider that the Judge was entitled to be concerned about the state of the evidence relating to intention and motivation. Without satisfactory evidence on which to make findings regarding a contract between AGL and the Body Corporate there could be no satisfactory basis for finding a valid assignment to Marac.

[32] The Judge was also right to reject novation as a basis for summary judgment on the evidence before her. Novation of the original contract to substitute AGL for APA depended on consent from the parties involved, including the Body Corporate. Marac relied on invoices rendered by AGL and paid by the Body Corporate, a file

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12 *Marac Finance Ltd v Body Corporate* 361477, above n 1 at [43] – [46].

note by the Body Corporate referring to AGL having purchased APA's business, emails between AGL and the Body Corporate about performance of the contract and a communication (email or letter) from the Body Corporate asserting a breach by AGL of the contract. The Judge considered, however, that:[13]

> ... the evidence is not compellingly supportive of novation. The plaintiff can and has pointed the Court to the sale and purchase agreement of APA's business to AG as being contextual evidence of the business restructuring. However, unlike in *Hela Pharma*, no issues arose in respect of the performance of the construction contract by AG until February 2012. Accordingly there were no claims and counterclaims by the parties until it reached the point where an arbitration agreement was necessary as had occurred in the *Hela Pharma* case. Certainly aside from invoices and emails from AG there were no formal exchanges of correspondence between AG and the defendant (such as the termination notice in *Hela Pharma* which had been expressly signed on behalf of "Hela AB/Hela Pharma AB") that were expressed in commercial terms capable of alerting the defendant to the fact that AG had superseded APA.

[33] The Judge went on to refer at some length to the decision in *Karaka Estates Ltd v Savvy 3552 Vineyards Ltd*[14] in which the Court of Appeal acknowledged that consent to novation could be inferred citing from Halsbury's Laws of England:[15]

> Consent to novation may, however, be inferred from conduct without express words ... Slight acts of recognition of the existence of the new firm which are not incompatible with a determination to continue to look solely at the old firm as responsible for the debts are not, however, sufficient to constitute novation ...

[34] The Judge particularly referred to the Court's finding at [70] that the payment of invoices rendered by the new company was neutral, being consistent with novation but also with the reality that the new company was providing services in respect of which the invoices were issued. On this approach much of the evidence relied on by Marac would not exclusively support its assertion of novation.

[35] Marac sought to distinguish *Savvy* from *Hela Pharma* on the ground that consent was not found on the facts of the case because there had been an expresss request to sign a deed of novation that was not complied with. However, the factual differences between this case and *Savvy* do not assist Marac. On established

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13 At [56].

14 *Karaka Estates Ltd v Savvy 3552 Vineyards Ltd* [2013] NZCA 101.

15 Halsbury's Law of England (5th ed, 2012) vol 22 Contract at [604].

principles the evidence did not support a finding of novation. At a full trial at which the parties are cross-examined the position may prove to be different. But the state of the evidence was not so clear as to justify a finding of novation in a summary judgment context.

[36] Nor can there be criticism of the Judge's refusal to find that there had been a valid assignment of the APA contract to AGL. The terms of the sale and purchase between APA and AGL did not clearly include that contract; that might be a finding available to a judge at trial with the benefit of evidence regarding the circumstances in which the contract was entered into so that the factual matrix is seen in its entirety. Further, in respect of equitable assignment there is no evidence before me to indicate APA's intention at the time of the alleged assignment.

[37] On the issue of estoppel the affidavit evidence put in issue the Body Corporate's belief as to who the other contracting party was. This dispute could not be resolved on the basis of the affidavit evidence.

Summary and result

[38] I have held that the Judge made an error in failing to determine Marac's argument regarding the right to challenge the validity of the payment claim. However, the case was not suitable for summary judgment and the Judge was not wrong to refuse the application.

[39] The appeal is dismissed. The Body Corporate is entitled to costs on a 2B basis.

P Courtney J