#89

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2009-443-156

	BETWEEN	SANDRA LYNN MORRISON-LOVE Appellant
	AND	THERMOCRETE LIMITED Respondent

Hearing: 30 June 2009

Appearances: Ms Quin for the appellant
Ms Wallace and Mr Fraser for the respondent

Judgment: 23 November 2009 at 2.30 pm

JUDGMENT OF MALLON J

Introduction

[1] Ms Morrison-Love has a default judgment in the sum of $14,274.65 entered against her that she seeks to set aside. Although her application is made in respect of the whole of that sum, it is only a portion of that sum ($4,999.15) for which she claims to have a defence. Whether she has a defence for that portion depends on whether a settlement entered into between the parties was a compromise of the whole of the dispute which had arisen between them and, if not, whether that sum had been properly claimed by the respondent (Thermocrete) from Ms Morrison-Love for costs incurred under the contract they had entered into.

Background

[2] The contract was for renovations to Ms Morrison-Love's house in Waitara. (The house is owned by a family trust of which Ms Morrison-Love is a trustee but for convenience I will refer to Ms Morrison-Love.) The contract conditions were as per the New Zealand Certified Builders Association's "Cost Reimbursement Building Contract". The conditions provided for how the contract price was to be determined. There was a maximum contract price ($100,000 plus GST) although there was also provision for variation.

[3] The invoices submitted by Thermocrete exceeded the maximum contract price and this was the cause of a dispute between Ms Morrison-Love and Thermocrete. As well as cost overruns Ms Morrison-Love raised issues concerning workmanship. Thermocrete left the building site in November 2004 by which time the parties had not resolved matters between them. An amount of something over $17,000 was said to be owing by Thermocrete and Ms Morrison-Love considered some work to be outstanding.

[4] The parties referred their dispute to a mediator. Their agreement to appoint a mediator referred to "the dispute" between the parties under their contract without any definition or other detail as to the scope of that dispute. It provided for a

mediation to first take place but, if that did not resolve the dispute, then the mediator "shall make a determination to settle the dispute" and "such determination shall be final and binding on both parties".

[5] On 22 March 2005 the parties attended the mediation. A settlement deed, drafted by the mediator (Mr Moyle), was entered into on that day. The deed described the dispute between the parties in general terms – "During the contract period the parties became involved in a dispute regarding the works". The deed provided that "The parties agree that this settlement deed records their wishes as Full and Final settlement of the dispute that exists between them."

[6] The deed provided for Thermocrete to carry out specified work on or before 5 April 2005 and at its cost. It provided a three step process in respect of invoices as follows:

a) By 29 March 2005 Thermocrete was to provide to Ms Morrison-Love "invoices from subcontractors and suppliers to support the payment [of] claims made to date";

b) By 5 April 2005 Ms Morrison-Love was to assess the invoices supplied; and

c) If the parties were unable to agree on any aspect of the invoices Mr Moyle was to "make a binding decision on the items that are in disagreement".

[7] As to payment of the invoices the deed provided that Ms Morrison-Love was to pay $6,000 inclusive of GST upon the signing of the deed. It further provided that Ms Morrison-Love would make a "final payment of $8,000.00 incl GST" which was to be paid to Thermocrete upon the completion of the specified work "and upon the final agreement in regard to the invoice assessment". At the latest this payment was to be made by 5 April 2005 "unless Mr Moyle has to make a ruling on the invoices, in which case, the final payment will be due at the time the ruling is released".

[8] It seems that the specified work was carried out and the $6,000 was paid in accordance with the terms of the deed. Invoices were submitted by Thermocrete and reviewed by Ms Morrison-Love although the process took longer than the timeframes in the deed. No agreement was reached on these invoices and so the issue was referred back to Mr Moyle for determination. This process took some time, in part because the mediator became unavailable for a period. Before reaching his determination Mr Moyle sought further information from the parties. In the course of this process Thermocrete went back over its records and revised its claim upwards to $12,995.15. (This amount apparently does not include the approximately $3,000 compromised at the mediation.)

[9] Mr Moyle's determination was dated 8 April 2008. Mr Moyle took the view that his jurisdiction under the deed was limited to a "maximum amount of $8,000.00". He suggested that the balance of Thermocrete's claim be settled via the Construction Contracts Act 2002. In respect of the $8,000 maximum Mr Moyle determined that it should be paid by Ms Morrison-Love and that it was due immediately on receipt of the determination.

[10] Mr Moyle's reasons for determining that the $8,000 was payable were that Thermocrete had amended its invoices in respect of valid points made by Ms Morrison-Love and that she had provided no other valid reasons to amend the claim any further. Mr Moyle referred to Ms Morrison-Love referring to a previous estimate that had been given and architectural draughtsman costs which Mr Moyle viewed as having no relevance to the final terms of the contract. He said that Ms Morrison-Love made accusations of irregular timekeeping but provided no proof of this. He said that Ms Morrison-Love had made other general comments but despite "continued requests" from him no specific details to support her claims was provided. He concluded:

> I am satisfied that TCL [Thermocrete] have [sic] provided sufficient details of the costs they [sic] incurred in regard to the building agreement.
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> ML [Ms Morrison-Love] have [sic] failed to convince me that there is any reason to determine that any amount less than that claimed should be paid. (up to $8000.00)

[11] Ms Morrison-Love did not pay the $8,000 pursuant to the determination. In July 2008 Thermocrete filed ordinary proceedings in the District Court for the $8.000, the $4,995.15 balance considered by Mr Moyle to be outside his jurisdiction, interest on those sums and costs. Ms Morrison-Love was served with the proceedings on 21 July 2008 and so had until 19 August 2008 to file a defence.

[12] Ms Morrison-Love's evidence before the District Court (on her subsequent application to set aside the default judgment entered against her), was that although she had instructed a lawyer to represent her, she told her lawyer that she thought she had been served on 31 July 2008. Ms Morrison-Love's evidence was also that she suffered from a condition called Fibromyalgia. She described the condition's symptoms as including "issues with forgetfulness and concentration" and said that she believes her condition affected her ability to remember what day she was served.

[13] On 22 August 2008, that is two days after Ms Morrison-Love was required to file a defence, Thermocrete obtained a default judgment for the amount of its claim ($12,995.15 plus costs). Ms Morrison-Love was informed of this when her lawyer contacted Thermocrete's lawyer on 22 August 2008. On 28 August 2008 Ms Morrison-Love filed an application to set aside the default judgment. She filed an affidavit in support of that application. The application was opposed and an affidavit from Mr Lightbody, a director of Thermocrete, was filed. The application was set down for hearing on 3 October 2008.

[14] Two days before the adjournment Ms Morrison-Love sought an adjournment. The adjournment was sought to allow further time for settlement negotiations and to file a response to Mr Lightbody's affidavit, and because she had applied for legal aid which had not yet been approved.

[15] The application was adjourned to 24 February 2009. In mid-February Ms Quin, who is Ms Morrison-Love's present counsel, contacted Mr Wilson to see if he would act for Ms Morrison-Love. By this time Ms Morrison-Love had not progressed any of the matters on which the adjournment had been sought. Mr Wilson attended the District Court on 19 February 2009 to review the file. At that time he was given a copy of the Court list for 24 February 2009. That list

included this matter under the heading "Matters for Mention". The Deputy Registrar explained that nevertheless the parties may be required to proceed on that day.

[16] Mr Wilson contacted Thermocrete's lawyer and they agreed that they would seek a further adjournment of the hearing. This was to see if settlement could be progressed and it would also enable Ms Morrison-Love to file a reply to Mr Lightbody's affidavit. However when they attended court on 24 February 2009, the court list had been amended to show this matter under the heading "Interlocutory Applications". When the matter was called Mr Wilson expressed surprise at this and referred to settlement negotiations. He intended to ask for an adjournment but before he could complete what he had to say the Judge interrupted and said "No, I'm dealing with it today, we're going to deal with it one way or the other today". The Judge noted that the matter had already been adjourned once. Further discussion between the Judge and counsel ensued with both counsel agreeing that they were in a position to argue the matter that day.

[17] The hearing proceeded. Mr Wilson's principal submission for Ms Morrison-Love was that either both parties were bound by the settlement or neither of them were. If they were bound by the settlement agreement then Ms Morrison-Love was liable for the $8,000. If they were not bound by the settlement agreement then Ms Morrison-Love disputed the whole of the claim and wished to advance her counterclaim.

District Court decision

[18] The key parts of the District Court's decision are as follows:

> [13] The Defendant assumes the onus of establishing that there has been a miscarriage of justice and Mr Fraser, in his written submissions, has referred me to the legal principles that are often considered as to whether or not a miscarriage of justice has occurred. There is no defence to the first cause of action detailed in the statement of claim. That is to say, the $8,000.00. The second cause of action is the difference between that sum and the final claim Mr Moyle refers to in his determination of $12,995.15.
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> [14] For one reason or another the process did not work as smoothly as it should have. There was the claim that the Defendant had not cooperated with Mr Moyle and the matter directly relating to Mr Moyle's personal life

explaining the delay up to 8 April 2008. Mr Moyle properly records the extent of his jurisdiction in so far as it relates to his need to make a decision on "the amount owing to TCL" [Thermocrete]. Mr Moyle has suggested a process that the Plaintiff might assume. Counsel for the Defendant challenged Mr Moyle's authority. It really, however, does not impact at all on the determination.

[15] I recognise that the Defendant maintains she has paid far more for what she got than the original quotation. There is good reason for that however as detailed within the affidavit of Mr Lightbody.

[16] For the purpose of decision I record that:

a) the Defendant's deposition as to the impact of her medical condition is vague and otherwise unsubstantiated as to how that might have impacted on her thought processes. This is insufficient to explain away her delay. I concede that the delay is not a significant one but the Memorandum accompanying proceedings is quite clear and unequivocal. It requires and [sic] immediate response;

b) secondly, I am not satisfied that the Defendant has demonstrated a substantial ground of Defence. The initial processes to secure finality did not achieve that for one reason or another. The ultimate determination was thus necessary. I accept the Plaintiff's submission that the Defendant did not comply with the Settlement Deed.

c) The Defendant has not discharged the onus resting on her. I conclude that there is no Defence to the Plaintiff's claim and no substance to her contention that a valid Counter Claim exists.

[17] This matter has been unresolved for some time and I do not consider it to be in the interests of justice that further delays occur. I am satisfied that the defendant has demonstrated an unwillingness to address issues. She did not participate in the process prior to Mr Moyle's determination. She did not pay her share of Mr Moyle's fee and thus, that too fell at the door of the Plaintiff and even, with the determination finalised, she made no effort to actually settle. That attitude I am satisfied, has continued. It accounts for the passage of time, and then some, after service of the proceedings.

My assessment

[19] There is no dispute as to the relevant principles when an application to set aside a judgment is made. Nor is there any dispute that the Judge applied those principles. Whether the Judge was correct that Ms Morrison-Love had not demonstrated a substantial ground of defence is in issue.

[20] Ms Morrison-Love does have a substantial defence to the $4,999.15 portion of the claim if she and Thermocrete had agreed that the $8,000 was the maximum final payment that could be claimed. Whether they had done so depends on the terms of the deed.

[21] The deed is not clear in this respect. On the one hand it referred to invoices to support the payment of claims "made to date". This indicates that further claims might be made. On the other hand it referred to a "final payment" of $8,000 and if Mr Moyle had to make a ruling then "the final payment" would be due at the time the ruling was released. As well, the deed provided that it was "Full and Final settlement of the dispute that exists between them". The factual context of this settlement was that the work had been completed by November 2004 subject to the items in dispute. It was agreed that the further work to be carried out in respect of those items was to be at Thermocrete's cost. At the time the deed was entered into Thermocrete's invoices exceeded the $14,000 maximum ($6,000 plus $8,000) provided for in the deed. Thus this maximum was a compromise of Thermocrete's claim as it then was.

[22] I consider that the intention of the parties, as expressed in the deed in light of the factual context, is that the $14,000 maximum was a full and final settlement of the items of work in dispute and the payments to be made by Ms Morrison-Love. The deed did not expressly reserve to Thermocrete the right to submit further invoices not covered by those compromised in the settlement. By the time of the mediation there was no reason why Thermocrete could not have submitted all the invoices. The deed provided for Thermocrete to submit invoices to support its claim. It would not be a full and final settlement of the parties' dispute (as to work and costs) if Thermocrete was able to go back over its invoices and submit a claim that exceeded $8,000. If it did, that would simply support its claim that it should be paid the maximum of $8,000 (rather than some lesser sum).

[23] The respondent submits that Mr Moyle was not restricted to the $8,000 maximum and that although he could have ordered payment of the $12,995.15 claimed he was also able to direct Thermocrete to claim the $4,995.00 balance separately. I disagree. The $8,000 was the maximum that Thermocrete could claim

even if it turned out that Thermocrete had outstanding claims for more than $17,000 (approximately) at the time of the mediation.

[24] I therefore consider that Mr Moyle erred when he suggested that the balance be claimed through the Construction Contracts Act. The balance had been compromised by the deed. Consequently the Judge also erred in finding that Ms Morrison-Love had no substantial defence to that part of the default judgment that related to the balance. This point had been raised on Ms Morrison-Love's behalf, but the Judge's decision does not really deal with this point. He said that Mr Moyle had properly recorded his jurisdiction and had suggested a process. He also referred to Ms Morrison-Love not complying with the deed. The Judge did not, however, address the point that the deed was intended as a full and final settlement and that no amount above $8,000 could be claimed. The deed had not reserved right to Thermocrete to sue for all its invoices if the $8,000 was not paid by Ms Morrison-Love in the time required by Mr Moyle. Thermocrete's remedy for Ms Morrison-Love not complying with the deed by paying the $8,000 was to sue for breach of the deed.

[25] Because I have concluded that the $4,995.15 could not be claimed by Thermocrete it is unnecessary for me to consider whether the $4,995.15 was properly claimed for costs incurred under the contract. It is also unnecessary for me to determine whether Ms Morrison-Love had a counterclaim for any sum. The settlement was a full and final settlement of all matters between them.

[26] In reaching my decision I have not found it necessary to consider the new evidence for which Ms Morrison-Love sought leave to adduce and which was opposed by Thermocrete. This evidence sought to explain Ms Morrison-Love's health difficulties and to also explain why she considered the invoices supporting the $8,000 and the $4,995.15 claims were not legitimate. I have considered Mr Wilson's affidavit which explained what occurred at the hearing on 24 February 2009. This affidavit was new evidence rather than evidence available to Ms Morrison-Love at the time of her application to set aside the default judgment. However, having considered Mr Wilson's affidavit, I consider that the Judge was entitled to require the parties to proceed on that date. Mr Wilson indicated he was able to proceed, the

matter was relatively straightforward, it involved small sums in respect of work that had been largely completed more than four years ago and Ms Morrison-Love had already been granted one adjournment. I mention this only because I consider that there is no basis on which to set aside the costs of $500 the District Court ordered in favour of Thermocrete.

Result

[27] The appeal succeeds in part, in that the default judgment is partially set aside. The $4,995.15 is not payable by Ms Morrison-Love. The $8,000 plus the costs component of the default judgment together with the costs and disbursements ordered by the District Court on the unsuccessful application to set aside the default judgment remain payable. The costs of this appeal are to lie where they fall. Ms Morrison-Love did not seek costs on this appeal and, although she has been partially successful, the appeal stems from her failure to pay the $8,000 when it was due and to file a defence to the balance in a timely fashion.

Mallon J

Solicitors:
C Quin, Quin Law, New Plymouth, office@quinlaw.co.nz
L Wallace, Govett Quilliam, New Plymouth, lauren.wallace@gqlaw.co.nz