IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4420
[2015] NZHC 424

BETWEEN	R T VINCENT LIMITED Plaintiff
AND	WATTS & HUGHES CONSTRUCTION LIMITED Defendant

Hearing: 1 December 2014

Appearances: C R Pidgeon QC for Plaintiff
R E Kettelwell and R E Catley for Defendant

Judgment: 10 March 2015

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 10 March 2015 at 4.45 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Cargill Stent Law Limited, Taupo
Sharp Tudhope, Tauranga

Counsel: C R Pidgeon QC, Auckland

[1] The Plaintiff ("Vinteq") seeks leave to apply for summary judgment and, if leave is granted, summary judgment in respect of its claim for $250,668.91 plus interest and costs. The Defendant ("Watts & Hughes") opposes both applications.

[2] For the reasons given below, I propose to decline leave to Vinteq.[1]

Background

[3] In 2012 Taupo District Council ("Council") engaged Watts & Hughes to refurbish the AC baths at Taupo. Watts & Hughes subcontracted Vinteq to carry out various works required under Watts & Hughes' contract with the Council.

[4] First, Vinteq was contracted to dismantle, supply and install structural steel for the baths. Vinteq quoted for this work on 17 May 2012, the relevant quote being Q10339.[2] Watts & Hughes accepted the quote in or about September 2012. It is common ground this subcontract was on the terms of NZS 3910:2003 – Conditions of Contract for Building and Civil Engineering Construction ("NZS 3910:2003").

[5] Secondly, on 19 October 2012 and at Watts & Hughes' request, Vinteq quoted to supply labour only for site works in respect of particular scheduled quantities, the quote being for $62,994.20 excluding GST – Q10357.[3] This quote was arrived at on what is referred to as a "measure and value" basis. For instance, Vinteq quoted $11.90 per m^2 to install 1,003 m^2 of 9 mm Villaboard. Watts & Hughes accepted Q10357 on or about 25 October 2012.[4]

[6] Thirdly, the evidence for Vinteq is that on 15 October 2012 Watts & Hughes' site manager, Mr Stuart Gillard, asked Vinteq to supply carpenters, painters, trades assistants and engineers "on an hourly basis (on charge up)".[5] Few contemporaneous documents as to matters affecting the supply of labour on this

---

1 High Court Rules, r 12.2(1).
2 Affidavit of C B Michael sworn 19 November 2013 at CMB 1.
3 At CMB 3.
4 At CMB 4.
5 Affidavit of R T Vincent sworn 5 December 2013.

basis exist or, if they do, they are not in evidence. Vinteq's evidence, however, is that these employees:[6]

> ... all started on the [16th] October 2012 labour only. This was the beginning of the supply of labour only charge up work. Vinteq supplied daily time sheets that were signed off each day. Watts & Hughes did not like the system and they requested it be changed to daily Daywork sheets. Each Dayworks [sheet] was signed off by three Supervisors each day recording the charge up hours that each man worked, coded appropriately ...

[7] Between October 2012 and March 2013 Vinteq issued 26 invoices to Watts & Hughes in respect of its fees. These invoices are in respect of the three different types of work to which I have referred. The invoices are said to total $384,654.24.[7] Watts & Hughes has paid some in full, some in part and others not at all.

[8] Vinteq commenced proceedings in October 2013. Vinteq has given credit for $214,634.39, being payments that Watts & Hughes made to Vinteq between November 2012 and May 2013, and for a further $21,764.21. Vinteq's claim comprises the balance outstanding plus interest that it has incurred on a facility provided by its bank plus costs.

[9] In [4] of his affidavit sworn 6 October 2014, Mr Raymond Vincent, a director of Vinteq, refers to a further payment from Watts & Hughes of $21,510.52 including GST in December 2013. As at the date of this affidavit, Vinteq said it was owed $250,668.91 including GST.

[10] In its (first) statement of defence dated 20 November 2013, Watts & Hughes denied liability for the sum claimed. Watts & Hughes has since filed two amended statements of defence, one in June 2014 and the other in September 2014.

[11] At the time of its first statement of defence, Watts & Hughes sought an order staying the proceeding, on the ground that the dispute should be referred to arbitration in accordance with an arbitration agreement between the parties.

---

6 Affidavit of R T Vincent, above n 5, at [8].

7 This total is incorrect but it is close enough for present purposes.

[12] Associate Judge Sargisson declined the application in April 2014.[8]

[13] First, the Judge held it was incumbent on Watts & Hughes to establish the existence of an arguable defence to Vinteq's claim and the Judge was not satisfied that it had done so. Before me, counsel for Vinteq submitted that this determination by the Judge raises an issue estoppel. I do not accept this submission. The Judge reached her decision on the evidence before her, at an early stage of the proceeding. I do not consider the Judge's decision binding on the parties in the context of the present applications.

[14] Secondly, in seeking its stay, Watts & Hughes was required to establish that there was in fact an arbitration agreement between the parties. Watts & Hughes relied on the agreement to arbitrate in NZS 3910:2003. The Judge was not satisfied that the terms of NZS 3910:2003 governed the parties' obligations as regards the issues in dispute, and so was not satisfied as to the existence of the necessary arbitration agreement.

[15] Having received the Judge's decision, Watts & Hughes filed the amended statements of defence to which I have referred and Vinteq made the applications with which this judgment is concerned.

Application for leave

[16] A plaintiff may make an application for summary judgment as of right at the time it serves its statement of claim on the defendant, or later with the leave of the Court.[9] In this case the application for leave has been made almost a year after the statement of claim would have been served.

[17] In *Stephens v Barron* the Court of Appeal stated that it is important to determine the matter of leave prior to determining the merits of an application for which leave is required, although the merits may be an important aspect of the leave decision.[10]

---

8 *R T Vincent Ltd v Watts & Hughes Construction Ltd* [2014] NZHC 847.
9 High Court Rules, r 12.4(2).
10 *Stephens v Barron* [2014] NZCA 82, (2014) 21 PRNZ 734 at [13].

[18] Vinteq applies for leave on the grounds that Watts & Hughes has no defence, the import of Associate Judge Sargisson's decision and that inspection of Watts & Hughes' discovery reveals that Watts & Hughes has no defence.[11]

[19] Watts & Hughes opposes the application for leave on the grounds that it has a defence, and that Vinteq had all documentation upon which summary judgment might be sought when it filed the proceeding.[12]

Discussion

[20] I propose to decline Vinteq's application for leave for the following reasons.

[21] First, I am not persuaded as to the grounds on which Vinteq relies for delaying its application for summary judgment. A plaintiff who believes a defendant has no defence to their claim should make an application or not as they see fit. In my view nothing in the Associate Judge's decision could have affected the assessment. Likewise as to Watts & Hughes' discovery.

[22] Secondly, a plaintiff who seeks summary judgment has the onus of satisfying the Court that the defendant does not have a defence.[13] On the evidence before me, I cannot be satisfied that Watts & Hughes does not have a defence to the claim. The parties take very different positions on the issues requiring determination. I accept the submission for Watts & Hughes that the factual and legal issues between the parties are incapable of resolution on the affidavit evidence before me.

[23] Thirdly, the Court is able to give the parties an urgent hearing of the claim.

[24] The first and third reasons are self explanatory. I should, however, say more about the second.

---

11 Plaintiff's Interlocutory Application on Notice for Leave to File Application for Summary Judgment dated 12 September 2014.

12 Defendant's Notice of Opposition to Plaintiff's Interlocutory Application on Notice for Leave to File Application for Summary Judgment dated 12 November 2014.

13 High Court Rules, r 12.2(1); *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

Evidence

[25] The affidavit evidence was given in two stages and is extensive. Unfortunately, however, neither Vinteq's nor Watts & Hughes' supervisor on site, Mr Manu Vincent and Mr Stuart Gillard respectively, has sworn an affidavit in the proceeding. Mr Vincent and Mr Gillard appear to have been on site day to day and it is likely their evidence would have assisted the Court.

[26] The evidence before me comprises affidavits addressing the issues that arose on the application for stay and those filed for and against the applications before me.[14] The evidence for Vinteq is from Mr (R) Vincent and from Mr Robert Boden, strategic project manager employed by the Council. For Watts & Hughes it is from Mr Chris Michael, a quantity surveyor employed by Watts & Hughes; Mr James Murphy, a construction manager employed by Watts & Hughes; Mr Mark Gutry, a director of Watts & Hughes; and from Ms Michele Wacker, a quantity surveyor in private practice who gives expert evidence. There are numerous affidavits from the parties but as I say in my view two important witnesses were omitted.

[27] Vinteq's case appears straightforward. Vinteq has rendered invoices in respect of work charged and payable on an hourly basis (see [6] above), there is a balance outstanding and it seeks judgment for that balance. Vinteq states that it was required to keep a record of the hours that each employee was on site, that it did so and that those time records were signed by, amongst others, the Council's clerk of works and by the Watts & Hughes' foreman on the site, usually Mr Gillard.

[28] In support of this submission, Vinteq relies on an email from Mr Michael of Watts & Hughes to Mr Vincent, which states:[15]

> I have reviewed your claimed hours for work on charge up. These hours have been submitted to the client for approval and we await their response.

---

[14] Affidavit of C B Michael sworn 19 November 2013; Affidavit of R T Vincent sworn 5 December 2013; Reply Affidavit of C B Michael sworn 12 December 2013; Affidavit of R T Vincent sworn 12 September 2014; Affidavit of R T Vincent sworn 6 October 2014; Affidavit of R A Boden sworn 9 October 2014; Affidavit of C B Michael sworn 12 November 2014; Affidavit of J T Murphy sworn 12 November 2014; Affidavit of M Wacker sworn 17 November 2014; Affidavit in Reply of R T Vincent sworn 27 November 2014; Affidavit of J T Murphy sworn 28 November 2014.

[15] Affidavit in Reply of R T Vincent, above n 14, at RTV D.

> Please note that we need a daily record of hours on site to be signed off by our site management. This was the requirement from the client and we, Vinteq and W&H will need to comply. A nominal offsite overhead charge can be added to recover some of the admin time.
>
> I note you have claimed hours for yourself and Manu as Supervisors. It is not normal for us to pay for non-working supervision when we have a site management team in place. We would expect that the hourly rate for labour would already include overheads such as supervision.
>
> Please contact me if there is a problem with your men working under supervision from Lindsay or Stuart.

[29] Counsel informed me that the "Stuart" referred to in that email is Mr Gillard and that "Lindsay" is Mr Gillard's deputy.

[30] Vinteq also relies on the fact that Watts & Hughes paid some invoices submitted on an hourly rate basis, without dispute. An example of this is invoice 31255 dated 24 October 2012.[16] Although this invoice refers to Q10339, which was for the structural steel work, the invoice itself is for labour only. I accept that Watts & Hughes' actions may be evidence that the terms of the contract were as Vinteq contends in so far as concerns provision of labour.

[31] All of that said, the impression given in Vinteq's pleading and evidence - that the invoices are solely in respect of work charged on an hourly basis - is not in fact borne out by the narrative in some of the invoices. The invoices appear to relate to work performed across the three different categories referred to in [4] to [6] above. The distinctions required explanation that was absent from Vinteq's evidence.

[32] Watts & Hughes' case is quite different. Watts & Hughes' case is that it agreed to pay hourly rates for particular work only and that any invoice not paid in full was for work to be done on a "value basis" or was greater than that due under the quotes to which I have referred. In respect of the "value basis" work, Watts & Hughes contends that Vinteq was/is required to allocate a price or cost to each "site instruction" or "variation" (of which there were many), and that Vinteq is then entitled to be paid a sum which is reasonable for the work carried out. That sum may be less than the cost of hours for which the employee concerned was on site. Watts & Hughes also submits that Vinteq has charged for some employees as if they

---

[16] Affidavit of M T Gutry sworn 18 November 2014 at MTG 5.

possessed higher qualifications than they do in fact eg that Vinteq has charged a "hammerhand" at a carpenter's rate, or that Vinteq's staff were inefficient or not working all the time they were on site.

[33] Watts & Hughes also contends that Vinteq's invoices did not meet the requirements of a "payment claim for a progress payment" as referred to in s 20 Construction Contracts Act 2002 but, in any event, Watts & Hughes responded to each such invoice by providing a "payment schedule" to Vinteq as required by s 21 of that Act.

Conclusion

[34] The principal issue on the evidence before me is to determine the agreement between the parties as to the basis on which Watts & Hughes was required to pay Vinteq for its work. It may be that some of the work was to be paid for on one basis and other work on another. It is not possible for me to determine this issue on the evidence before me. Accordingly, I am not satisfied that Watts & Hughes would have no defence to Vinteq's claim.

[35] I decline to grant leave to Vinteq to make an application for summary judgment. As I have said, however, the Court is able to offer the parties an urgent trial of the proceeding. I am issuing a minute regarding trial at the same time as I deliver this judgment.

[36] In the usual course of events Watts & Hughes would be entitled to an order for costs. I shall delay making any order at present but the parties may submit memoranda if they wish.

.....

M Peters J