

IN THE DISTRICT COURT
AT PAPA KURA

CIV 2007-055-61

BETWEEN STAINLESS FITTINGS &
FABRICATIONS LTD
Plaintiff
AND STAN ASH BUILDERS LTD
Defendant

Hearing: 22 April 2008

Appearances: Ms G Hikaka for Plaintiff
Mr BPC Carter for Defendant

Judgment: 25 July 2008

RESERVED JUDGMENT OF JUDGE A SWARAN SINGH
On An Application for Summary Judgment

Plaintiff's Claim

[1] The plaintiff's claim, as set out in the Statement of Claim, is based on s 20 of the Construction Contracts Act 2002.

[2] The plaintiff claims judgment in the sum of \$43,599.68, together with interest pursuant to s 62B District Courts Act 1947, and actual and reasonable costs of and incidental to the proceedings.

[3] In support of its claim, the plaintiff has filed and served: Notice of Proceeding, Interlocutory Application for Summary Judgment, Statement of claim and two Affidavits of F G Andrews, sworn on 22 January and 19 April 2007

[4] Further, on 5 March 2008, counsel for the plaintiff filed written submissions. At the hearing, plaintiff's counsel also made oral submissions.

Defendant's Opposition

[5] In opposition to the plaintiff's claim, the defendant has filed: Notice of Opposition and Affidavit of G W Ash, sworn on 16 March 2007.

[6] Further, defence counsel filed written submissions dated 7 March 2008.

[7] At the hearing, defence counsel also made oral submissions in opposition to the plaintiff's claim.

[8] Grounds for opposition, as set out in the Notice of Opposition, include:

1) Reasonably arguable defence.

2) Plaintiff's "payment claim" is invalid, as it does not comply with the Construction Contracts Act in that:

(a) It fails to identify the construction work and the relevant period to which the claim relates.

(b) It does not comply with the notice period, which requires a 20 working day period for payment.

[9] In the event the Court finds the plaintiff's *payment claim* was valid, which is not accepted by the defendant, then the defendant submits that its faxed letter of 31 October 2006 to the plaintiff constitutes a valid *payment claim schedule*.

[10] The defendant also relies on the Affidavit of G W Ash.

Background

[11] On or about 5 May 2005, the plaintiff was engaged by the defendant to manufacture and install a stainless steel balustrade and atrium handrails.

[12] There was no written contract, other than the plans and an acceptance by the defendant of the plaintiff's quote.

[13] In addition, the defendant required the plaintiff to undertake additional work as well as post-quote alterations and significant repairs to the stairwell site.

[14] The plaintiff's claim includes work carried out between 31 May 2005 and 31 March 2008.

[15] According to the plaintiff, the costs for the works carried out by it at the defendant's request totalled \$189,112.61.

[16] The total claim was comprised of \$58,100 as per the quote and \$131,023.61 for variations, at the defendant's request.

[17] By way of payments, the plaintiff had already been paid \$145,152.93 (excluding GST) by the defendant.

[18] As at 20 May 2006, the plaintiff's claim was for the balance outstanding, namely: \$43,599.68.

[19] According to the defendant, by November 2005 it had become concerned at the level of costs invoiced by the plaintiff for the project.

[20] Accordingly, the defendant disputed the plaintiff's invoice dated 30 November 2005 for \$72,455.58.

[21] According to Mr Ash, he had advised the plaintiff that the defendant disputed that invoice.

[22] In January 2006, the defendant paid \$15,000 and \$24,275 towards that invoice.

[23] On 16 March 2006, the plaintiff had provided the defendant with a reconciliation account, claiming \$53,033.31.

[24] The defendant states that it did not accept the account.

[25] However, on 20 March 2006, the defendant claims to have paid \$15,344.13 to the plaintiff.

[26] As at 20 May 2006, the amount in dispute was \$43,599.68, excluding GST.

[27] On 8 May 2006, the defendant faxed to the plaintiff a reconciliation, dated 4 May 2006, provided by its client's quantity surveyor, Dean, Murray & Partners.

[28] Based on that reconciliation, on 20 May 2006 the defendant paid the plaintiff \$10,491.73.

[29] On 20 June 2006, the plaintiff responded by a further reconciliation in justification of its claim for variations.

[30] The plaintiff provided its calculations for the extra work done.

[31] In that letter, the plaintiff called for a meeting to discuss the claim.

[32] According to the plaintiff, the defendant made no attempts to resolve the dispute.

[33] On 16 October 2007, the plaintiff made a payment claim for \$43,599.68 under the Construction Contracts Act 2002.

[34] On 31 October 2006, the defendant wrote to the plaintiff that it had:

"Discussed your claim with the Trendz Project Manager and Quantity surveyor ... they believe they have fairly calculated and paid a full

settlement given your original quotation and quantities of subsequent works. Therefore any monies you believe are still outstanding is the subject of dispute ...”

Issues

[35] The issues to be determined are:

- (a) Did the plaintiff make a valid *payment claim*?
- (b) If so, did the defendant provide a valid *payment schedule*?

Construction Contracts Act 2002

[36] The applicable law is the Construction Contracts Act 2002 (“the Act”).

[37] The plaintiff relies on sections 22 and 23 of the Act which provide:

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if –

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within –
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

23 Consequences of not paying claimed amount where no payment schedule provided

- (1) The consequences specified in subsection (2) apply if the payer—
 - (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and

- (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) The consequences are that the payee—

- (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the claimed amount;and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court.

(3) 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.

[38] If the Court is satisfied that the payer is liable under s 22 and fails to pay the whole or any part of the claimed amount, that amount is recoverable as a debt in Court. The payer is under an obligation to pay first and argue later.

[39] In *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807, Asher J set out an overview of the Act’s objectives:

[16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain time frame and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor’s claim ...

[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 processes that it

sets up are designed to side-step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As 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. (emphasis added)

Payment Claims

[40] Section 20 of the Act sets out the requirements for a payment claim:

20 Payment claims

- (1) A payee may serve a payment claim on the payer for each progress payment—
 - (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
 - (b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).
- (2) A payment claim must—
 - (a) be in writing; and
 - (b) contain sufficient details to identify the construction contract to which the progress payment relates; and
 - (c) identify the construction work and the relevant period to which the progress payment relates; and
 - (d) indicate a claimed amount and the due date for payment; and
 - (e) indicate the manner in which the payee calculated the claimed amount; and
 - (f) state that it is made under this Act.
- (3) ...

Discussion

[41] The defendant contends that the "payment claim" relied on by the plaintiff not a valid payment claim under the Act, for reasons including:

- (a) the claim fails to identify the construction work and the relevant period to which the claim relates
- (b) the claim was provided to the defendant on or about 16 October 2006 and demanded payment by 31 October 2006, being less than the 20 working day period for payment provided by the Act.

Failure to Identify Construction Work and the Relevant Period

[42] The payment claim states that the claim period is for "05/05/2005 – 30/09/06".

[43] Counsel for the defendant submits that the payment claim fails to identify the relevant period to which the payment relates as required under s 20(2)(c).

[44] Defence counsel submits that the payment claim is a reconciliation or statement of the plaintiff's position with regard to earlier invoices and not a payment claim.

[45] Counsel for the plaintiff submits that it is a *cumulative style claim* and includes claims for amounts remaining unpaid over the whole period of the construction contract.

Case Law

[46] In *George Developments Ltd v Canam Construction* [2006] 1 NZLR 177 the Court of Appeal confirmed that the provisions of the Act do not prevent the use of a cumulative style claim.

[52] Section 17(1) requires that the progress payment must be calculated by reference to certain factors however the list of factors was not exhaustive. Because s 17(1)(b) refers to "the value of the construction work carried out, or to be carried out, *during that period*" it does not mean that a payment claim must only refer to work carried out in that particular period. Such a "technocratic" or "formalistic" interpretation would undercut Parliament's intent that cash flow be maintained.

[53] We are persuaded that the provisions of the Act and the contract did not prevent the use of a cumulative-style claim ... there is nothing in the Act to prevent such a claim.

[47] At paragraph 45, the Court also noted that it "would have been better if the claimed amounts from different periods were itemised according to when those amounts were incurred, but to say that is not hold that what occurred lacked legal efficacy".

[48] I note that in *George* the period stated was a one month period, but the work claimed also included work outside of that period that had previously been invoiced. However, in the present case, the period stated covers a number of months and appears to only include work inside that period that has previously been invoiced.

[49] I find that the plaintiff's claim is a cumulative style payment claim. Apparently, it is common practice in the building industry.

Error in due date

[50] Section 18 of the Act provides as follows:

18 Due date for payment

A progress payment under a construction contract becomes due and payable on the date occurring 20 working days after a payment claim is served under section 20 in relation to the payment.

[51] Plaintiff's payment claim was received by the defendant on or about 16 October 2006. It stated that payment was due on 31 October 2006.

[52] Counsel for the defendant contends that this makes the payment claim invalid.

[53] Plaintiff submits that according to the quote, payment is due on 20th of the month following the issue of an invoice. As the parties have addressed this issue, the contract takes precedence.

[54] In the alternative, counsel for the plaintiff acknowledges that there was an error in the payment claim regarding the due date for payment, but submits that it was merely technical in nature and that the payment claim substantively complies with the requirements of the Act.

Case Law

[55] In *George Developments Ltd v Canam Construction*, the Court made the following observations

[42] As is noted in Smellie [*Progress Payments and Adjudication* (2003)] at p 31, "Although [the s 20(2)] requirements are mandatory, technical quibbles that they have not been complied with will probably receive scant attention". ...

[43] We acknowledge that the approach of this appellant was not as pedantic as those confronting Windeyer J, but 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 and needs to be weighed alongside the "technocratic" interpretation advanced by George*. (Emphasis added).

[56] I note that in its letter dated 31 October 2006, the defendant did not take issue about the short notice.

[57] In my view, the error in the payment due date was merely technical in nature and the payment claim substantially complied with the requirements of the Act.

[58] The defendant was not disadvantaged by the mistake because the statute prevails and, in any event, took no issue with short notice in its reply dated 31 October 2006.

Payment Schedules

[59] Section 21 of the Act sets out the requirements for a payment schedule:

21 Payment schedules

- (1) A payer may respond to a payment claim by providing a payment schedule to the payee.
- (2) A payment schedule must—
 - (a) be in writing; and
 - (b) identify the payment claim to which it relates; and
 - (c) indicate a scheduled amount.
- (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
 - (a) the manner in which the payer calculated the scheduled amount; and
 - (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and
 - (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

Discussion

[60] The plaintiff contends that the defendant's letter dated 31 October 2006 is not a valid payment schedule under the Act for the following reasons:

- (a) The reference to the amounts calculated by the Trendz Project Manager and Quantity Surveyor does not indicate the manner in which the payer calculated the scheduled amount.

- (b) The reference to discussions with the Trendz Project Manager and Quantity Surveyor and their attendance at previous meetings does not indicate the reasons for the difference between scheduled amount and the amount claimed in the payment claim.

[61] The defendant's letter states:

We have discussed your final claims with the Trendz Project Manager and Quantity Surveyor. They believe they have attended a number of previous meetings to resolve your issues and there is little sense in going over it again. Furthermore they believe that they have fairly calculated and paid a full settlement given your original quotation and quantities of subsequent works.

We regret that we can no longer progress this claim from our end.

[62] The defendant submits that this letter was a valid payment schedule. It was calculated by reference to the Project Manager and Quantity Surveyor.

[63] The defendant also submits that the letter indicates the reasons for the difference between the scheduled amount and the claimed amount. The reason is that the proper payment for the job had been calculated by the Project Manager and Quantity Surveyor and that amount had been paid.

Case Law

[64] In *Westnorth Labour Hire Ltd v SB Properties Ltd* (HC Auckland, 19 December 2006, Rodney Hansen J) the Court held that:

Although the letter does not adopt the terminology of the Act, is not stated to be a payment schedule and does not specify that the scheduled amount is nil, the essential message is clear and unequivocal. (emphasis added).

[65] In that case, the letter clearly explained why the payer doubted the accuracy of the timesheets and hence the sums that he had been charged. The letter explained

that the payer would not pay the invoices until he was provided with full particulars of what the contracted labour had done.

[66] In *Westnorth*, the Court held that the letter met the basic requirements. It gave all the information needed to understand the payer's position, to decide whether to pursue its claim and the case it would be required to meet at adjudication.

[67] In *Westnorth*, The Court referred to the relevant provisions of the New South Wales Building & Construction Industries Security of Payment Act 1999 and to the leading case of *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, there the Court said at para [78]:

Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

[68] In *Jian Hua Property Ltd v Freemont Design & Construction Ltd* (HC Auckland, 16 February 2006, Associate Judge Doogue) the Court noted that, at [27], that: "[t]he key is the provision of sufficient information to make clear the manner in which the claimed amount or the scheduled amount has been calculated".

[69] The Court further held at [30] that: "the payee should not have to guess at the payer's intentions. A reasonable degree of certainty is required if the mechanisms contained in the Act are to accomplish the Act's objectives".

[70] In the case of *Miles Construction Ltd v Wedding Earthmovers Ltd* (HC, Auckland, 20 December 2006, Associate Judge Sargisson) the Court held:

It is important not to allow technical quibbles to vitiate payment schedules that substantially comply with the Act. However, what is provided to the

payee must be recognisable as a payment schedule. Failure to meet this basic requirement would frustrate the express purpose of the Act.

[71] In the Court's view, the letter in that case could not be viewed as a payment schedule. It pointed to dissatisfaction with the quality of the work but did not specify the extent to which any charges would be set off against the claim. This approach left the payee with an unacceptable level of uncertainty as to the payer's intentions.

[72] I find that the defendant's letter in this case was not clear and unequivocal in indicating the manner in which the payer calculated the scheduled amount or the reasons for the difference.

[73] The wording of the statute, particularly the use of the word "calculations," requires more than just a reference to a third parties opinion. It is not clear that the plaintiff would have had all the information needed to understand the defendant's position, all that was clear was that the defendant was refusing to pay any more.

[74] I note that the defendant had provided the plaintiff with its calculations of costs prepared by Dean, Murray & Partners, Quantity Surveyors, dated 4 May 2006.

[75] By letter dated 20 June 2006, the plaintiff provided the defendant with a detailed breakdown of its calculation of extras.

[76] At no stage did the defendant respond to it, let alone dispute it.

[77] In its letter of 31 October 2006, the defendant does not even refer to the plaintiff's letter of 20 June 2006

[78] In that letter, the defendant claims to have "discussed" the plaintiff's:

"final claims with the Trendz Project Manager and Quantity Surveyor. They have attended a number of previous meetings to resolve your issues and there is little sense in going over it again."

[79] In his Affidavit of 19 April 2007, F G Andrews confirms his efforts to engage in a dialogue in an attempt to resolve the matter.

[80] He wrote to the defendant on 31 May 2006 but had no response.

Solicitors:

[81] Likewise, the plaintiff had no response to its letter dated 20 June 2006, setting out detailed calculations on costs for extras.

[82] The plaintiff had no response until the defendant's letter of 31 October 2006 in response to the plaintiff's payment claim, dated 16 October 2006.

Conclusion

[83] Having carefully considered the relevant provisions of the Construction Contracts Act 2002, the pleadings, counsels' submissions and the principles governing summary judgment, I find that the plaintiff has discharged its onus in satisfying the Court that the defendant has no defence to the claim.

Result

[84] Judgment is entered against the defendant in the sum of \$43,599.68, together with interest pursuant to s 62B District Courts Act 1947, and actual and reasonable costs of and incidental to this proceeding.

A Swaran Singh
District Court Judge
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