#41

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-7877

BETWEEN	THOMAS ROGER WELSH AND LYNLEY RAMARI WELSH Appellants
AND	GUNAC SOUTH AUCKLAND LTD Respondent

Hearing: 17 October 2007

Appearances: J Ropati for appellants
H P Holland for respondent

Judgment: 11 February 2008

JUDGMENT OF ALLAN J

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 11 am on Monday 11 February 2008

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[1] This appeal from a judgment of Judge Simpson in the Manukau District Court delivered on 5 December 2006, concerns the interpretation and application of several aspects of the Construction Contracts Act 2002 (the Act). The issues requiring the Court's determination are the subject of evidence which is substantially undisputed. It is convenient therefore to summarise the relevant factual material in a fashion which largely mirrors the Judge's factual findings.

Factual background

[2] The appellants are directors of Pathway Investments Ltd, a duly incorporated company which is registered as the proprietor of a dwelling situated at unit L, 24 Mt Smart Road, Onehunga. In about February 2006, the appellants requested the respondent contractor to carry out repair and waterproofing work at the property. The apartment complex of which the unit formed part had suffered damage due to water ingress. The respondent had undertaken remedial work on a number of other units.

[3] The respondent was asked to remove cladding from the dwelling and install waterproofing membranes, particularly around the decking areas. The appellants discussed their requirements with Mr Shepherd, an employee of the respondent. He explained that it was difficult to estimate the extent of the work required, and the length of time it would take, until the exterior cladding had been removed, but other apartments in the complex had required work which cost sums in the region of $50-70,000 per unit. Mr Shepherd indicated that he believed the work requested by the appellants would cost a similar amount, but no formal quotation was given.

[4] The appellants gave a written instruction to the respondent to carry out the relevant work. In return the respondent provided to the appellants a copy of a document setting out terms and conditions which included the following provisions:

a) The respondent would charge for the work at an hourly rate of $46 per person, plus materials and GST.

b) The respondent was to render interim invoices as work progressed.

c) The invoices fell due on the 20th day of the month following the date of the invoice.

[5] The respondent commenced work in February 2006. As agreed, periodic invoices were rendered as follows:

a) On or about 28 February 2006, invoice No. 14662 in the amount of $24,699.98 .

b) On or about 31 March 2006, invoice No. 14701 in the amount of $27,596.84.

c) On or about 28 April 2006 invoice No.14735 in the amount of $6,540.57.

[6] The invoices were sent to the appellants by registered post on or about the invoice dates. In terms of the arrangements between the parties, payment was due in respect of the various invoices on 20 March, 20 April, and 20 May 2006 respectively.

[7] The work was completed in May 2006, but the appellants have failed to pay the amounts set out in the invoices.

The District Court proceedings

[8] The respondent issued proceedings in the Manukau District Court in reliance on the provisions of s 23(2)(a)(i) of the Act. It sought from the appellants the sum of $58,837.39, together with interest and actual solicitor/client costs, pursuant to s 23(2)(a)(ii) of the Act. The respondent applied for summary judgment and was successful in recovering the amount sought. The appellants now appeal against Judge Simpson's finding that the respondent was entitled to summary judgment.

The District Court judgment

[9] Having recited the factual background and referred to the provisions of s 20 of the Act, Judge Simpson reviewed in brief terms a number of allegations made in the appellant's affidavits as to inflated costs, defective workmanship and the absence of proper authority for the respondent to undertake the work. The Judge appears to have rejected these allegations on their merits. For reasons to be discussed, I am of the opinion that such issues were not properly before the Court, and were not the subject of binding rulings. However, ultimately, the Judge's decision turned upon a single point; namely, whether the respondent's failure to refer, in its first invoice, to the fact that it constituted a payment claim under the provisions of the Act, was fatal to the respondent's claim in respect of that invoice. The Judge held it was not. In reliance on *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177, she held that the Act ought to be applied with "some degree of liberalism" and that the invoices were "presented in a manner that is consistent with the provisions of the Act". She therefore held that the respondent's claim for summary judgment had been made out.

The issues

[10] In this court, counsel advanced arguments on three separate issues:

a) Whether the first invoice was invalid because it failed to state that it was a payment claimed pursuant to the provisions of the Act. This was the issue upon which the District Court judgment turned;

b) Whether all three invoices were defective by reason of the claimed failure of the respondent to serve upon the appellants, who claimed to be residential occupiers, the documents required by s 20(3) of the Act. This point was argued before Judge Simpson, but is not referred to in her judgment.

c) Whether the respondent, if otherwise unsuccessful, partially or wholly, in its reliance upon the Act, could nevertheless in this present

proceeding recover the amount sought from the appellants as a simple debt due in respect of the work carried out.

Legislative purpose

[11] The objectives underpinning the Act and the procedure which lies at its heart, were succinctly summarised in a judgment of Asher J in *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 at [14]-[17]:

> [14] The effect of the New Zealand Construction Contracts Act 2002 was to strongly confirm that such a regime which protected and encouraged cashflows was right for cases between the principal and contractor. The intention was to improve the head contractor's ability to obtain payment, by setting up a quick and mandatory payment process. In enacting such legislation, the Legislature set aside the long-established conservative contractual approach to construction contracts which emphasised freedom of contract. The history of these cases is described in Hon. R Smellie CNZM QC, *Progress Payments and Adjudication*, paras 1 – 15. The Act has "emphatically vindicat[ed] Lord Denning's approach" (Smellie, para 31.)
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> [15] Consistent with the Law Commission Paper, the General Policy Statement which was set out at the beginning of the Explanatory Note accompanying the Bill reads as follows:
>
>> This Bill is intended to facilitate prompt and regular payments within the construction industry.
>
> [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 timeframe 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. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.
>
> [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 cashflow.

[12] A contractor wishing to take advantage of the summary procedure prescribed by the Act, must of course comply with the requirements imposed by the Act, and in particular those specified in s 20, which deals with payment claims. In some cases the contractor will need to comply with the letter of the legislative requirements. In others however, it may be sufficient if there is substantial compliance: *George Developments Ltd v Canam* where the Court of Appeal said at [41]-[43]:

> **Discussion**
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> [41] We are satisfied that the necessary analysis must be undertaken with the purpose of the Act in mind. 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 MR (quoted in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 (HL) at p 214 per Lord Diplock) said: "There must be a 'cash flow' in the building trade. It is the very life blood of the enterprise."
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> [42] As is noted in Smellie 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". The learned author notes the New South Wales case of *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* (2001) 163 FLR 18 where Windeyer J considered the validity of a payment claim under legislation equivalent to the New Zealand Act and said at para 8:
>
> > "8 [Counsel] contended that the payment claims served on the plaintiff . . . were ineffective because they did not comply with s 13(2)(a) and (c) of the Act. The arguments were that they contained the incorrect contract number and abbreviated the name of the Act under which the claim was made . . . As to the first, while the contract number may have been wrong in some cases, the claims did identify the work done. The second argument was that because the payment claims abbreviated the name of the Act, they did not fulfil the statutory requirement to name the Act. This argument might have had some weight in 1800. In 2001, an argument based on the absence of the word 'and' and the letters 'ustry' has no merit. It should not have been put."
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> [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*.

The first invoice

[13] Mr Ropati argues that the first invoice, dated 28 February 2006 and claiming the sum of $24,699.98 (including GST), cannot be the subject of a valid claim under the Act because it fails to refer to the fact that it constitutes a payment claim, and so infringes s 20(2)(f). Section 20 provides as follows:

> **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) If a payment claim is served on a residential occupier, it must be accompanied by—
>
> (a) an outline of the process for responding to that claim; and
>
> (b) an explanation of the consequences of—
>
> (i) not responding to a payment claim; and
>
> (ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).
>
> (4) The matters referred to in subsection (3)(a) and (b) must—
>
> (a) be in writing; and

(b) be in the prescribed form (if any).

[14] It is common ground that the first invoice contains no reference to the Act or to the fact that the invoice constitutes a payment claim under the Act. In contrast, the second and third invoices each conclude with the following statement:

> This Invoice is made under the 'Construction Contracts Act'.

Mrs Holland says that the Judge was right to find that the absence of any such notation in the first invoice does not vitiate the invoice as a payment claim under the Act. She argues that the Judge was right to adopt the non-technocratic approach advocated in *George Developments Ltd*.

[15] It is important to bear in mind the context in which the observations of Robertson J, delivering the judgment of the Court of Appeal, were made. That was not a case concerning s 20(2)(f); rather it involved an argument by the principal that the contractor had failed to comply with s 20(2)(c), because the payment claim concerned included both work done prior to the period stated in the claim without expressly itemising which work had been done in which period, and an item for extension of time costs, rather than for physical construction work.

[16] The Court, expressly eschewing a "technocratic" approach, held that the Act was specifically intended to avoid artificial distinctions, and the notice contained sufficient information to render the recipient sufficiently informed. It could have obtained further particularisation through a payment schedule response, the Court held.

[17] There is only limited authority on the application of s 20(2)(f). In *Winslow Properties Ltd v Wooding Construction Ltd* HC AK CIV 2006-404-4969 14 December 2006, Cooper J held that a written claim that failed to refer to the fact that it purported to be a payment claim for the purposes of the Act was nevertheless valid, because it was accompanied by a covering letter, the first paragraph of which referred to the attached claim as "Progress Claim No.18 which is a payment claim under the Construction Contracts Act 2002". Accordingly, Cooper J upheld the judgment of Judge Kerr on that point.

[18] The issue has been confronted head on by Judge Joyce in *Civil Construction Group Limited v Dhuez Ltd* DC AK, CIV 2006-004-102 19 May 2006. There the Judge noted that although the opening words of s 20(2) stipulate certain mandatory requirements: "A payment claim **must** …", the succeeding sub-paragraphs do not uniformly impose immutable obligations. For example, s 20(2)(d) requires that a payment claim "contain sufficient details …". Section 20(2)(c) requires that a payment claim "identify the construction work and the relevant period …". Sections 20(d) and (e) respectively require that a payment claim "indicate" certain categories of information.

[19] Judge Joyce observed that a requirement to "indicate" was not unduly demanding. Neither was a requirement to provide "sufficient details". But he noted that there is no such flexibility in s 20(2)(f). The requirement there is that the payment claim "must … state that it is made under this Act".

[20] I am in no doubt that Judge Joyce is right. A failure to comply with the sub-section cannot be regarded as "trifling" or amounting to no more than a "technical quibble", to use the language appearing in [43] of *George Developments Ltd.*

[21] The Act provides a summary procedure pursuant to which contractors are enabled to obtain "regular and timely payments": s 3(a) of the Act. In part, that objective is facilitated by requiring principals who are in receipt of a payment claim under the Act, to respond to the claim within 20 working days after service of the payment claim, or the time stipulated by the relevant construction contract. A principal who disputes a claim may serve a payment schedule, which must indicate the differences between the amount of the payment claim and the principal's calculation of liability. A principal who fails to respond to a payment claim by serving a payment schedule within the stipulated time, becomes liable to pay the amount of the payment claim: ss 21 and 22. It is therefore vital that a person served with what purports to be a payment claim, be able from the document itself to ascertain whether it is indeed a document which attracts the consequences set out in s 20(1). Only if a document is a valid payment claim is the principal obliged to serve a payment schedule in order to avoid automatic liability to pay the amount of the payment claim.

[22] In my view, the requirements of s 20(2)(f) are mandatory, and not subject to the substantial compliance considerations discussed by the Court of Appeal in respect of other aspects of s 20. It may be that in a given case a Court might properly conclude that an omission to comply with s 20(2)(f) is not determinative. An example might be the case of a major construction project in which a single payment claim appearing in the middle of a series of similar documents, happens to omit the necessary reference to the Act. In those circumstances, it could not properly be said that the principal has been misled, or is in any doubt as to what is intended. A Court might well then hold that the document ought to be read along with all previous payment claims in the series. But I express no firm view as to that. It is a matter for another Court at another time. This case is quite different. The first invoice is defective because it does not comply with s 20(2)(f). The respondent was therefore unable to rely upon it for the purposes of the making of a claim pursuant to the provisions of the Act. This aspect of the appeal accordingly succeeds.

Residential occupiers?

[23] It is common ground that the respondent did not serve upon the appellants the documents required by s 20(3), namely a written outline of the process for responding to the payment claim, and an explanation of the consequences of not responding to it and not paying the claimed amount. That service obligation arises only if the appellants are residential occupiers for the purposes of the Act. The term "residential occupier" is defined in s 5 as meaning

> … an individual who is occupying, or intends to occupy, the premises that are the subject of a construction contract wholly or mainly as a dwellinghouse.

[24] Mr Ropati argues that the appellants are caught by the definition and that the appeal must therefore succeed on this ground also.

[25] The point was argued in the District Court, as both counsel accept (and as is plain from the synopsis of submissions in the District Court, which were included in the agreed bundle). But the Judge did not deal with the argument in her reserved

decision. It is proper in those circumstances that this Court nevertheless entertain the argument. Mrs Holland did not contend otherwise.

[26] In support of his argument Mr Ropati is able to identify only the most flimsy evidence. The appellants were the original owners of the property. It was transferred to Pathways Investments Ltd on 14 April 2005. The appellants are the sole directors and shareholders of that company. There is no evidence as to whether the appellants were living, or intending to live, in the unit. In the Court papers the appellants' address is given as Omagh Avenue, Papatoetoe and not the property concerned. The Papatoetoe address is also the registered office of the company. There is no evidential basis upon which the Court can properly hold that the appellants are "residential occupiers" for the purposes of the Act. Accordingly, this aspect of the appeal must fail.

Other grounds

[27] Mrs Holland submits that should I conclude (as I have), that the appeal must partially succeed, nevertheless the respondent is entitled to maintain its judgment by reference to what she says are the merits of an ordinary claim for debt, outside the provisions of the Act. To that end she has filed a notice of intention to support the judgment on other grounds.

[28] As I understand it her argument runs as follows:

a) Paragraph 11 of the statement of claim reads: "Despite demand the defendants have failed and/or refused to pay the invoiced amounts or any part thereof, and the sum of $58,837.39 remains due and owing".

b) This allegation is wide enough to encompass not only a claim under the Act, but also an ordinary contractual claim for debt.

c) The affidavit evidence for the appellants raised a number of complaints about workmanship, lack of authority on the part of the

respondent, inaccurate estimates and inflated invoices. All of these allegations were rejected by the District Court Judge.

d) Any defence raised by a defendant to a summary judgment application must be reasonably arguable if summary judgment is to be resisted: *Pemberton v Chappell* [1987] 1 NZLR 1. The necessary analysis must be robust: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

e) Given that the District Court has rejected the appellants' allegations, summary judgment was appropriate irrespective of any procedural deficiencies under the Act.

[29] In my view this argument is untenable. The respondent commenced its proceedings under the Act. Indeed, the statement of claim in the District Court proceedings is so endorsed. The whole of the statement of claim is devoted to the procedural prerequisites to a valid claim in debt under the Act. Paragraph 11 cannot be construed as forming a foundation for a claim, other than as may be authorised by the Act itself.

[30] Neither can the ambit of the proceeding in the District Court be regarded as having been widened in some fashion by the choice of the appellants to raise in their affidavits a range of matters of no relevance to a claim under the Act. The appellants having chosen not to serve a payment schedule, the complaints raised by them, as Mr Ropati readily accepts, ought not to have been included in the affidavit material before the Court. Nothing in the Act affects the right of any party to maintain or defend any other civil proceedings arising under a construction contract: s 27(1), and so the merits (if any) of any complaint which the appellants may have against the respondent remain for determination in other proceedings, if the appellants choose to pursue the matter. In my view, the findings reached by Judge Simpson in this proceeding as to the merits of the appellants' complaints are not binding on the parties, because issues other than those relating to the payment claims themselves were simply not properly before the Court. That may account for the relatively truncated complaints which appear in Ms Welsh's affidavit.

[31] My conclusions on this point are reinforced by the provisions of s 79, which reads:

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—
>
> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[32] The word "proceedings" where it appears in s 79, includes a civil proceeding for the recovery of debt by way of summary judgment: *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* HC AK CIV 2005-404-1320 24 May 2005.

[33] The statutory inability of the appellants to maintain a counterclaim or claim a set-off against the respondent in the present proceedings is intended to ensure that proceedings under the Act are kept within their proper boundaries.

[34] The respondent is entitled to maintain a claim in reliance upon its payment claims, but not otherwise. A wider claim for debt may be commenced separately: s 27, and no doubt that is a likelihood, given the appellants' partial success on this appeal. In any such separate proceedings the appellants will be entitled to raise all available defences, including substantive defences, and as appropriate, to file a counterclaim.

Result

[35] For the foregoing reasons the appeal succeeds in part. The judgment entered in the District Court is set aside. In substitution the respondent is entitled to judgment for $34,137.41.

[36] Counsel are asked to file written submissions as to interest and costs, in accordance with the following timetable:

a) The respondent is to file and serve submissions on or before Friday 22 February 2008;

b) The appellants are to file and serve submissions on or before Friday 7 March 2008;

c) The respondent is to file and serve submissions in reply on or before Friday 14 March 2008.

[37] Following receipt of counsels' memoranda, I will deliver a further ruling in respect of interest and costs.

C J Allan J