

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2008-004-002235

BETWEEN TROAKE WALLBOARD SERVICES
LTD
Plaintiff

AND TNR CONTRACTING LTD
Defendant

Appearances: R Cheriton for the Plaintiff
P Kennelly for the Defendant

Judgment: 19 January 2009

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] The plaintiff seeks summary judgment against the defendant in a proceeding brought under the Construction Contracts Act 2002. The plaintiff issued three payment claims to the defendant. The defendant did not provide payment schedules at all.

[2] The defendant made a payment of \$14,365 to the plaintiff on 30 January 2008, after the first and second payment claims had been issued, but before the third payment claim had been received. This amount constituted full payment of the 30 November 2007 claim and part payment of the 21 December 2007 payment claim. Therefore, the plaintiff seeks \$28,082.38 including GST as outstanding in respect of the three payment claims.

[3] The defendant opposes the summary judgment application on a number of bases and in the alternative, should judgment be entered, seeks a stay.

Legal principles

[4] If the plaintiff proves, on the balance of probabilities, to the Court that the defendant has no defence to its claim, summary judgment should usually follow. Construction Contracts Act disputes have been determined by way of summary judgment many, many times. As Asher J said in *Marsden Villas Ltd v Wooding Construction Ltd*, High Court Auckland CIV-2006-404-002136 [2007] 1 NZLR 807, 25 May 2006 at para 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 by 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.”

That is the case here. That is, within the statutory timeframe neither were payment schedules served upon defendant nor was full payment made.

[5] Section 23 of the Construction Contracts Act provides that: a payee is entitled to recover in any Court the unpaid portion of the amount claimed and the actual and reasonable costs of recovery awarded by the Court as a debt from the payee provided that these requirements are met:

- (a) That a valid payment claim has been served on the payer;
- (b) That the payer has failed to pay the claimed amount on or before the due date;
- (c) That the payer has failed to provide a valid payment schedule on or before the due date.

The pleadings

[6] The statement of claim, and indeed the application for summary judgment, are standard. They set out the legal position under the Construction Contracts Act, the factual position, which is as I have said, and no more is to be said.

The Notice of Opposition

[7] This numbers 15 grounds, although these seem almost entirely to relate to breaches of obligation, breaches of contract, failure to undertake work in a proper and workmanlike fashion.

[8] It appears, however, from counsel for the defendant's arguments today, that in reality the defendant is now seeking to argue that the plaintiff in fact did not have a valid payment claim because it did not carry out the work in respect of which it has issued a payment claim, and for which it now seeks judgment.

[9] The defendant argues fraud and seeks additionally that this Court should not exercise its discretion in favour of the plaintiff notwithstanding the "slam dunk".

Regime set up by the Construction Contracts Act

[10] In *Marsden Villas Ltd v Wooding Construction Lt* (supra) Justice Asher described this regime in the following way at para 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."

[11] Notwithstanding that I have already indicated to Mr Kennelly that I do not consider he is able to argue fraud and an invalid payment claim on the basis of his notice of opposition (, a position which I still take) it seems to me that the position is adequately clear from both Asher J's decision in *Marsden Villas Ltd v Wooding Construction* and the many decisions which preceded it, as to the lack of defence available for these sorts of matters raised by a defendant when the defendant has failed to serve a payment schedule within the statutory period after being served with

payment claims. It is indeed, for the plaintiff, a “slam dunk” or sudden death in that event.

[12] The defendant argues that the Court should have recourse to an Australian decision based on the Building and Construction Industry Security of Payment Act 1999 *Britannia Pty Ltd and Anor v Parkline Construction Pty Ltd* [2006] MSWCA 238, 28 August 2006, where the Court allowed as a defence to an application for judgment based on a claim under that Act in similar circumstances, a contention that the service of the payment claims was not effective because it involved misleading or deceptive conduct.

[13] As I have explained to Mr Kennelly during the hearing, in my view this decision is good as authority only for the facts which it serves and not for the wider proposition that claims under the Building Payment Act may in general circumstances be met by defences of misleading or deceptive conduct on the part of the plaintiff.

[14] However, even should I be wrong in my interpretation of this decision or its possible application in New Zealand, it seems to me that *Marsden Villas Ltd v Wooding Construction Ltd* amongst others is authority for a quite different proposition which is that provided the payment claim provisions of the Act have been followed and no payment schedules served, there is no defence open to a defendant.

Section 79 Construction Contracts Act

[15] This section states that where proceedings for the recovery of a debt are commenced under s 23 (as they have been here) the Court must not give effect to any counter claim or set off raised by any party other than the set off of a liquidated amount for which judgment has been entered, or where there is no dispute over the amount.

[16] In this case it seems that the complaints of the defendant would be a set off rather than a counter claim, in fact, but again it seems that s 79 precludes the

defendant from successfully defending this application on the basis of any such set off.

The payment claims

[17] Each payment claim met the requirements of s 20(2) Construction Contracts Act:

- (a) Each was in writing. Each referred to the address of the site and provided description as to the work that was undertaken by the plaintiff (therefore it contains sufficient detail to identify the construction contract to which it related);
- (b) Each payment claim identified the construction work undertaken at the bottom of the page and the relevant construction period to which the progress payment related, in the top right hand corner;
- (c) Each payment claim indicated the amount that was claimed for that period and set out the due date for payment;
- (d) Each payment claim set out the manner in which the payee calculated the claim demand as part of the description of the claim;
- (e) Each stated that it was a payment claim made under the Act;
- (f) Each was served by the plaintiff via post in accordance with the requirements of s 80 of the Act.

Each is, on the face of it, therefore, a valid payment claim for the purposes of the Construction Contracts Act and this litigation.

Decision

[18] The plaintiff as the payee is, at law, able to recover from the defendant (the payer) the unpaid portion of the payment claim as a debt due under s 23 (2) (a) (i) of the Construction Contracts Act.

[19] There is no defence to the claim made against the defendant; neither the issues raised in the notice of opposition, nor the additional oral matters that the defendant seeks to argue today can be raised as a defence to this claim under the Construction Contracts Act.

[20] That means that the plaintiff has discharged the burden upon it to satisfy the Court on the balance of probabilities that there is no arguable defence open to the defendant and I am prepared, therefore, to enter summary judgment in the amount claimed.

Discretion

[21] The defendant seeks to persuade me that notwithstanding that the claim appears to be made out, the Court retains an additional discretion in a summary judgment matter such as this not to enter judgment and points me to a District Court decision where the Court took exactly that stance.

[22] In *Williams Investment Group Ltd v Kingsview Developments Ltd* District Court Tauranga, 4 September 2008, CIV-2007-070-001323, Judge Ingram determining that the discretion to decline summary judgment is a remedial discretion to be exercised for the avoidance of injustice, and that an injustice would be created here if he did not exercise his discretion, decided on the unusual facts of that case that he should decline to enter summary judgment. In that case as he said at para 28:

“... Here there is a clearly defined dispute, which existed long before the payment claim was made, and there can be no suggestion that this dispute has been manufactured to avoid payment of sums properly due. To the contrary, the retentions were held to meet exactly the eventuality which has occurred, and plainly were intended to ensure that a sufficient sum is withheld to meet the costs of inadequate performance of contractual obligations, and no doubt intended to cover some of the risk of liquidation. Because liquidation would likely prevent practical access by the defendant to

any adequate pool of funds to meet a successful claim by the defendant, injustice must clearly result in this case if summary judgment is granted

...”

As that paragraph indicates, that was a case where a liquidator had been appointed to the plaintiff.

[23] Again I consider that that decision rests on its own particular facts, although I am bound to say that I find the residual discretion reposing in a District Court Judge to decline to enter summary judgment where no arguable defence is otherwise made out, is somewhat at odds with the Construction Contracts Act and the authorities which indicate that where the defendant has failed to serve payment schedules in answer to valid payment claims, the situation is one of “slam dunk” and the payee is entitled to judgment.

[24] That being so, I do not know that I necessarily agree with the decision which Judge Ingram took on that occasion although I appreciate that due to the particular facts of that case it may certainly have been an appropriate and just one.

[25] Because of the jurisdictional hurdle, however, that I feel the District Court has to overcome of the precedent decisions by which it is bound, such as *Marsden Villas Ltd v Wooding Construction Ltd*, I consider that any residual discretion reposing in the District Court is subverted by the Construction Contracts Act itself and I decline to exercise any such discretion if it still exists or remains open to me in respect to a Construction Contracts Act claim.

Stay Application

[26] Although no formal stay application has been advanced, it has been clear throughout this hearing (if not prior to it) that the defendant would be seeking that enforcement of this proceeding be stayed should summary judgment be entered, pending the defendant’s taking other steps to resolve the disputes to which it has referred during the course of argument. Ms Cheriton, who acts for the plaintiff, has been in a position to and has argued the stay application that is made.

[27] The defendant, inter alia, relies on a decision of this Court in *Hamilton R & M Builders Ltd v Karken Trustees Ltd*, CIV-2008-019-000811, 13 October 2008. In that case Judge Maze entered summary judgment (a Construction Contracts Act claim) but was satisfied that the interests of justice and fairness as between the parties required that she issue a stay of enforcement of the judgment for a short period of time to allow the parties limited but reasonable opportunity to resolve their disputes and to determine what, if any obligations, the plaintiff may yet have to the defendant.

[28] In that decision she cited the principle that unfair consequences flowing from non contemporaneous decisions may be met by a stay of enforcement relying on *Australian Guarantee Corporation (New Zealand) Ltd v McBeth* (1992) 4 PRNZ 544 (CA) per Greig J at 550, 551.

[29] In this case, as the affidavit filed on behalf of the defendant reveals, the defendant maintains that the plaintiff actually did not carry out some of the work for which it has made claim in a payment claim. The defendant maintains that it was forced to bring in other workers to carry out the plaintiff's obligations and thus the plaintiff's payment claims are based on fraud. What work it did perform, says the defendant, was undertaken in an improper and unworkmanlike fashion thus in essence, it is said, the plaintiff abandoned the job and refused to return to it to either perform its obligations or to remedy or rectify defects in the work that it had already carried out, causing the defendant to suffer losses through overruns on budget and by holding up other sub contractors on the site.

[30] This affidavit has not been answered by the plaintiff. No doubt the plaintiff considered that it was not required to do so since no payment schedules had been served in terms of the Act.

[31] I can understand the plaintiff's lack of response in this respect, however, when it comes to arguing a stay application it seems to me that the allegations made by the defendant are unchallenged.

[32] If I accept that they are unchallenged and treat them as so, it means that there would be a gross injustice to the defendant were the plaintiff not only to receive judgment, in the manner that I have already indicated, but if it were able to enforce that judgment in the near foreseeable future.

[33] The pleadings and evidence filed appear to indicate that the defendant has very real cause for complaint. It wants the opportunity to file a notice of adjudication under the Construction Contracts Act so that these matters can be dealt with within the statutory framework that is provided.

[34] It seems to me that that is an appropriate response to what is alleged has occurred and that I should assist the defendant in doing so by allowing a stay in order to give the time necessary for these procedures to be undertaken.

[35] However, I do not consider that the time frame available to the defendant, to undertake the steps referred to, should be great. There will therefore, as Judge Maze offered in *R & M Builders Ltd v Karken Trustees Ltd* be limited but reasonable opportunity for this dispute to be resolved. I, therefore, intend to impose a strict timetable with which the parties must comply.

Overall Conclusion

[36] The balance outstanding by the defendant to the plaintiff in terms of the payment claims is \$28,082,38. Interest of \$3,949.13 accrued on that outstanding balance at a daily rate of 2% per calendar month, compounded monthly. The plaintiff also incurred collection costs of \$2,583.28. The plaintiff is entitled to its actual and reasonable costs in recovering these amounts.

[37] I now enter summary judgment in the amount of \$34,614.79 plus interest on the judgment sum from the date of filing to the date of judgment at the rate of 24% per annum compounding monthly pursuant to the contract. I also grant summary judgment in the amount of the actual and reasonable costs of the plaintiff in recovering this amount.

[38] The stay that I grant is one of enforcement of this judgment and it is on these terms:

- (a) The defendant has fourteen days within which to file a notice of adjudication under the Construction Contracts Act;
- (b) If it fails to do so the plaintiff can understand that the stay will be discharged by memorandum to the Court;
- (c) In the event that the application or notice for adjudication is filed within the requisite time then the strict times frames under the Construction Contracts Act or timetables imposed by any adjudicator appointed, must be observed;
- (d) in the event that they are not observed strictly by the defendant who will be the claimant, then memorandum can be made to this Court again for discharge of the stay;
- (e) in other terms, however, the stay will remain in force until the adjudicator appointed has given a final adjudication in respect of that notice;
- (f) The parties are at liberty to seek a telephone conference with me or any other Judge at any point should any matters arise which are of concern to them.

[39] The plaintiff may file a memorandum adverting to the actual and reasonable costs incurred in bringing this matter to this point but execution of those costs, of course, is also stayed under the general stay order.


M-F Sharp
District Court Judge