IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-3185
[2013] NZHC 3204

BETWEEN	ELLIS BUILD 2008 LIMITED Plaintiff
AND	NZ CHEMICAL CARE & STORAGE LIMITED First Defendant
	CHEMICAL STORAGE PROPERTIES LIMITED Second Defendant

Hearing: 6 November 2013

Counsel: K Badcock for Plaintiff
S Ladd and L Mannis for Defendants

Judgment: 3 December 2013

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 3 December 2013 at 2.30 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: K A Badcock, Rotorua
Bell Gully, Auckland

[1] The plaintiff, Ellis Build 2008 Limited, claims summary judgment for $421,684.70 by way of part payment of its total claim for $633,350.16 from either the first or second or third defendants or a combination of them. It also seeks interest and costs.

[2] The first to third defendants, NZ Chemical Care and Storage Limited, Chemical Storage Properties Limited and Middlemore Properties Limited oppose summary judgment. They are related companies, and have the same director and shareholder, John Bardebes. Though Mr Bardebes is named as fourth defendant, Ellis Build no longer wishes to proceed against him and at the hearing I made an order by consent striking out the claim against him. Relevantly, there is no dispute that he acted as agent for all three defendants in the dealings that Ellis Build's director, Mr Jorna, had with them at material times.

[3] The application for summary judgment is made pursuant to r 12.2(1) of the High Court Rules which states:

> The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[4] Broadly at issue is whether the defendants have a tenable defence to the second cause of action in the statement of claim or to a particular part of that cause of action.

[5] The onus is on Ellis Build to prove its claim on a prima facie basis and to establish the absence of a tenable defence.

Ellis Build's claim as pleaded

[6] The basis of Ellis Build's claim as pleaded in its statement of claim is a contract[1] for building and construction works that it entered into with one or more of the first to third defendants (it is unsure which) in early November 2009. It alleges that under the contract it agreed to carry out and complete building and construction works at 252 – 254 James Fletcher Drive, Otahuhu and that, in consideration, one or

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1 The contract is apparently partly written and partly oral.

more of these defendants agreed to pay $797,500 plus GST for the work plus additional sums for any variation. It further alleges that it completed the works in the period from November 2009 to December 2010 pursuant to the contract and issued the seven progress payment claims for amounts totalling $799,500 plus GST between 29 July and 23 December 2010.

[7] The statement of claim relies on two causes of action. Materially, the second cause of action is for breach of the Construction Contracts Act 2002. Essentially, it alleges that:

(a) Ellis Build served the seven progress claims on Mr Bardebes;

(b) The amount claimed in the first payment claim, inclusive of GST, was $585,493.48 which made due allowance for all progress payments that had been made by the defendants to that date.

(c) Because no payment schedules were issued in respect of any of the payment claims, the overall amount outstanding became a payment due under the contract and s 23 of the Act and that at least one of the defendants became liable for payment.

(d) It has received payment for a portion of the total amount of the overall sum claimed of $779,500 plus GST but the amount outstanding is $663,350.16.

[8] Ellis Build's position as to quantum was modified at the hearing. Counsel advised that it accepts that taking account of all it has received as part payment of the overall sum claimed. Hence the reduced amount that it seeks is now $421,684.70.

[9] The first to third defendants accept that a contract was negotiated in early November 2009 pursuant to which building and construction works were carried out at 252 – 254 James Fletcher Drive. They also accept the seven payment claims refer to works that were undertaken for one or more of them at that property. However, they avoid saying for which one and each disputes that it is liable for any of the

payment claims, claiming to have a good arguable defence which makes summary judgment inappropriate.

[10] The defendants also take issue with Ellis Build's allegations that all of the works were done pursuant to the November 2009 contract, pointing out that there were five separate construction contracts relating to the property and asserting that all but two of the payment claims are to entities that are not party to that contract and are not defendants. Additionally, they deny that the contract was with Ellis Build, contending that it was with a company called Jorland Developments Limited, a company related to Ellis Build.

[11] At the hearing counsel for the defendants emphasised the following:

(a) The statement of claim claims a global amount as outstanding on seven payment claims without identifying which defendant is said to be liable as payer for any individual claim. Additionally, the payment claims themselves fail to comply with the requirements of the Construction Contracts Act and are not valid claims. The claims do not contain sufficient details of the specific payer, or the contract to which each claim relates, as required by s 20(2) (b). It is not possible therefore for the defendants to identify which one is alleged to be liable or for what amount. The payment claims also do not set out the identity of the payer.

(b) If any defendant is liable for any of the payment claims relating to the November 2009 contract, its liability can only be for an unpaid portion of a payment claim. Additionally, there is in fact no unpaid portion of the total claimed amount of $779,500 as that amount contains duplication and payments that have not been accounted for. Therefore it is arguable that there is little or nothing that Ellis Build may recover from any of the defendants as "the unpaid portion of the claimed amount" on any of the payment claims pursuant to s 23(2), or on the overall amount claimed.

(c) Mr Jorna, the director of the plaintiff, has acknowledged that the payment claims are incorrect and agreed to withdraw them and to issue corrected claims.

Legal principles on summary judgment

[12] It is trite law that the plaintiff who applies for summary judgment has the overall onus of proving its case and showing that there is no defence. It is important for the plaintiff to establish sufficient basic facts to raise at least a prima facie case against the defendant. Where there is insufficient detail, the Court may not be persuaded that there is no possible defence.[2] Where the evidence is sufficient, the defendant will have to respond if the application is to be defeated.[3]

[13] The Court of Appeal set out a succinct summary of the legal principles applying to applications for summary judgment in *Krukziener v Hanover Finance Limited*:[4]

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on a plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66(CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[14] Where it is alleged that one or other of two defendants is liable, but the specific defendant against whom judgment is sought is not identified, the procedure should not be used. As stated in *Seeley v Webb*, the specific defendant must be identified and the court must be able to make the identification with confidence.[5]

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2 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at HR 12.2.
3 *MacLean v Stewart* (11) PRNZ 341 (CA).
4 *Krukziener v Hanover Finance Limited* [2008] NZCA 187, [2010] NZAR 307 at [26].
5 *Seeley v Webb Ross & Co* HC Whangarei CP22/86, 25 July 1986.

The issues

[15] The issues for determination are these:

(a) Has Ellis Build identified in its statement of claim the defendant against who judgment is sought, and established sufficient basic facts to show that the Court can make that identification with confidence – as required in *Seeley*?

(b) Has Ellis Build shown that the defences that the relevant defendant relies upon are fanciful or not bona fide? Do the payment claims provide sufficient detail to comply with the requirements of s 20(2)(b)? Is there are genuine dispute as to the unpaid portion of any of the payment claims under s 23.

Discussion

Has Ellis Build identified the defendant so that the Court can make that identification with confidence – as required in Seeley?

[16] In this case, Ellis Build's statement of claim fails to identify which of the named relevant defendant or defendants were in fact parties to the November 2009 contract. It states that one or all or a combination of the defendants were parties to the contract.

[17] Counsel for Ellis Build contends that one of the three defendants must be liable. Though recognising that the statement of claim is equivocal on the issue of identity he argues that it is for the defendants to sort out which of them should meet the overall unpaid portion of the combined payment claims. He also argues that if satisfied that the evidence clearly shows which defendant is the correct contracting party under the November 2009 contract (and therefore the payer under the Construction Contracts Act) the court could properly make an order amending the statement of claim and enter judgment against that defendant on the payment claims. I accept as a broad proposition that if there is sufficient evidence the court may

amend the claim in the way counsel has suggested[6] but the evidence as to which defendant or defendants contracted for the work is not clear and unequivocal and the defendants have elected not to clarify the position.

[18] Materially, the defendants have been unwilling to assist by providing any specific acknowledgment as to the correct contracting party or parties to assist the plaintiff's case and it remains therefore for Ellis Build to provide proof of its case against at least one of the defendants. In the circumstances, the claim is not amenable to the summary judgment jurisdiction. I agree with counsel for the defendants that the Court cannot make that identification with confidence.

[19] Summary judgment must therefore fail. I am satisfied that given the claim as presently pleaded and the evidence, such as it is, the application must be dismissed.

Has Ellis Build shown that the relevant defences that the defendant relies upon are fanciful or not bona fide? Do the payment claims provide sufficient detail to comply with the requirements of s 20(2)(b)? Is there a genuine dispute as to the unpaid portion of any of the payment claims under s 23(2)?

[20] Given these findings it is unnecessary to make any findings in relation to these matters. However, without wishing to be determinative, I observe that there are at least some factors suggestive of a case that is not suitable for summary judgment:

(a) It is not immediately apparent that each payment claim contains sufficient detail to identify that it relates to the 9 November 2009 contract as required by s 20(2)(b) – in which case each or some may be invalid. The need for such detail is not academic because, as counsel for the plaintiff accepts, there were five contracts for different works.

(b) Section 23(2) permits a claimant (the payee) to recover as a debt the **unpaid** portion of a payment claim where a payment schedule has not been provided. It therefore appears to permit a defence where

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6 *Cambria Commercial 2009 Ltd v Pedley* HC Palmerston North CIV-2011-454-457, 7 December 2011.

> payment has been made of part or all of a payment claim despite the failure to challenge it by providing a payment schedule. That is hardly surprising – there would be no need for a payment schedule if payment is made instead. The defendants say that as a matter of fact payments were made that have significantly reduced and possibly cleared the overall amount claimed. Counsel for the defendants points out that the plaintiff now accepts that an even greater amount than previously acknowledged has been paid.

[21] I also make a few observations that may assist the parties to bring this claim to a resolution by avoiding significant delay and cost despite the unavailability of summary judgment. First, the real issues appear to be limited to quantum and to which one of the three defendants is liable for the outstanding quantum. These issues should be capable of resolution by agreement failing which an early trial date should be achievable. Secondly, the defendants suggest that the real plaintiff is Jorland Developments Limited. Again without wishing to be determinative, the documentary exchanges between the parties appear to lend little support for this. Almost invariably the invoices are from Ellis Build or require payment to Ellis Build, and other correspondence is largely from Ellis Build. But in any event if early resolution of this issue or the entire dispute by agreement fails, then the issue can be progressed by Jorland's being added as a plaintiff to further resolution through discovery, interrogatories (if necessary) and trial.

Result

[22] The application for summary judgment is declined. Costs are reserved in accordance with the Court of Appeal's decision in *ANZ Bank v Philpott.*[7]

[23] The Registrar is to allocate the soonest available case management conference for the initial conference. In the meantime I direct:

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7 *ANZ Bank v Philpott* [1992] NZLR 403.

(a) An amended statement of clam is to be filed and served not later 16 December 2013. (The plaintiff will need to set out amended particulars as to quantum among other things).

(b) Leave is given to add Joyner Developments Limited if issues remain between the parties as to the correct plaintiff.

(c) A statement of defence to the amended statement of claim is to be filed and served by 30 January 2014.

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Associate Judge H Sargisson