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IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2004-084-24

BETWEEN	O'CONNOR HOLDINGS LIMITED Plaintiff
AND	ACE BUILDERS CONSTRUCTION LIMITED Defendant

Hearing: 25 August 2004

Appearances: Mr T Greenwood for the Plaintiff
Ms K Davenport for the Defendant

Judgment: 2 September 2004

RESERVED JUDGMENT OF JUDGE D M WILSON QC

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[1] In late November 2003, Ace Builders Construction Limited ("Ace") were contracted to supply qualified carpenters for the building of the Oteha Valley School under sub-contract to Meridian Construction.

[2] In turn, Ace contracted with the Plaintiff to provide manpower for the Oteha Valley School project. Payment was to be in accordance with the terms and conditions of a written labour hire contract ("the Contract"). In accordance with the Contract, the Plaintiff supplied men who carried out work on the Oteha Valley School project at various times between 5 January and 25 February 2004.

[3] The Plaintiff served Ace with "payment claims" in admitted compliance with the Construction Contracts Act 2002 ("the Act") in January and February of 2004. The total now due under those payment claims is $34,971.68 and the Plaintiff seeks a summary judgment accordingly.

[4] The Plaintiff also claims interest under the Contract at 13 per cent to the date of hearing, namely 25 August 2004, together with reasonable costs under the Act.

[5] Under the Contract the payment for each payment claim was due seven days later. The Defendant did not pay the payment claims.

[6] At the hearing Ms Davenport submitted that a hireage contract was clearly not a construction contract. She argued that such people were not entitled to the benefit of the provisions under the Act, which were aimed to facilitate regular and timely payments between the parties to a construction contract and speedy resolution of disputes arising under construction contracts in terms of the purpose of the Act. She conceded that the correspondence raising complaints by the Defendant fell outside the seven day periods and did not meet the formal requirements of a 'payment schedule'.

[7] It is therefore common ground that the Defendant did not serve any "payment schedule" in terms of the Act.

The real issue: does the Construction Contracts Act apply?

[8] The sole legal question raised in the proceedings is whether a contract to supply labour to a construction contract is in itself a construction contract in terms of the Act. The interpretation section provides:

> **Commercial construction contract** means a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract
>
> **Construction contract**—
>
> (a) means a commercial construction contract or a residential construction contract; and
>
> (b) includes any variation to the construction contract; but
>
> (c) does not include a lease or licence under which a party undertakes to fit out, alter, repair, or reinstate the leased or licensed premises unless the principal purpose of the lease or licence is the carrying out of construction work.

[9] Counsel cited no case directly in point to me. The issue becomes one of interpretation of the Statute.

[10] Courts will at times interpret statues robustly, sometimes filling graps within the statutory framework "to make the Act work as Parliament would have intended". See, for example, ***Northland Milk Vendors Association v Northern Milk Ltd*** [1988] 1 NZLR 530 (HC and CA) at 537. Judges make frequent reference to the "objects" or "purposes" of the legislation, (***New Zealand Society of Physiotherapists v Accident Compensation Corporation*** [1988] 1 NZLR 346 at 353) to the "scheme of the Act" (***Commissioner of Inland Revenue v Official Assignee*** [2000] 2 NZLR 198 (CA) at 203), to the Act's "policy and spirit" (***Northland Milk Vendors Association Inc v Northern Milk Ltd*** (supra)), and to "purposive" construction ***(Wahrlich v Bate*** [1990] 3 NZLR 97 at 111).

[11] S 5(1) of the Interpretation Act 1999 provides that the meaning of an anactment must be ascertained from its text and in the light of its purpose. Although a purposive interpretation may not normally fill gaps in legislation, Courts have in some instances, after considering the various indications in the statute of its purpose,

been able to construct an answer to questions that the statute has not expressly dealt with. In the Court of Appeal, it has been emphasised that the Courts must try to make Acts work as Parliament intended and interpret them in the manner that best accords with their "intention" or "spirit" (see, in particular, the decision of Cooke P in ***Northland Milk Vendors Association Inc v Northern Milk Ltd*** [1988] 1 NZLR 530 (CA)).

[12] Under the previous law the factual background was often disconcertingly complex and the courts were understandably reluctant to deal with such cases by way of summary judgment, leaving contractors with the prospect of having to carry litigation through to a full hearing, abandon their claim, or settle for substantially less than their full entitlement.

[13] A general policy statement is set out at the beginning of the explanatory note, which accompanied the Bill when it was first introduced to the House of Representatives on 15 May 2001 -

> *This bill is intended to facilitate prompt and regular payments within the construction industry. Typically, construction industry contracts provide for work to be paid after the work has been carried out. Payments are usually made by instalments as the work progresses, but they are very seldom made in advance. This pattern of payments often means that a developer, principal, or head contractor with cash flow problems may deliberately delay payment for work done and, in effect, use those further down the contractual chain (for example, sub contractors) to partly finance the construction project. It also means that, if a developer or principal becomes insolvent, head contractors and sub contractors may not be paid at all for the work that they have already carried out.*

[14] The purpose of the Act is set out in s 3, which provides as follows:

> **3 Purpose:** The purpose of this Act is to reform the law relating to construction contracts and, in particular –

(a) to facilitate regular and timely payments between the parties to a construction contract; and

(b) to provide for the speedy resolution of disputes arising under a construction contract; and

(c) to provide remedies for the recovery of payments under a construction contract.

[15] S 9 provides as follows:

9 When Act applies: general

Subject to sections 10 and 11, this Act applies to every construction contract (whether or not governed by New Zealand law) that—

(a) relates to carrying out construction work in New Zealand; and

(b) is either—
(i) entered into on or after the date of commencement of this Act; or
(ii) entered into before the date of commencement of this Act and that is renewed for a further term on or after that date (except that this Act has effect only in relation to obligations that are incurred or undertaken on or after that date); and

(c) is written or oral, or partly written and partly oral.

[16] It is clear under s 9 that the Act could apply because the Contract was entered into on 24 November 2003, well after the Act came into force on 1 April 2003.

[17] Mr Greenwood drew my attention to the specific provision in s 11. That section provides that the Act does not apply to a construction contract under which a party undertakes to carry out construction work as an employee (within the meaning of s 6 of the Employment Relations Act 2000) of the party for whom the work is to be carried out (emphasis added).

[18] The head contractor, Meridian Construction, engaged the Defendant to provide outside labour for the Oteha Valley School job. The business of both parties to this case is to provide outside labour for construction contracts. No policy reason was cited to me why the Act should not apply to such contracts. The intention and spirit of the Act favour inclusion.

[19] It is significant that the direct hire of workers to carry out construction work is specifically excluded from the Act. That recognises that employment law covers their relationship with the contractor. Here, the labourers claim is against the Plaintiff for payment. The Plaintiff is therefore out of pocket. The Plaintiff provides services in relation to the construction contract by providing workers for it. I take into account the aims and policy of the Act and the reasons why it was brought into effect in the first place. In my view a contract for the provision of outside labour to a construction work is in itself a construction contract.

Consequences of the Application of 'the Act'

[20] In the absence of a payment schedule within the time provided, s 22 applies to make the defendant liable to pay the amounts claimed in the payment claims. S 22 provides as follows:

> **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.

[21] The legal consequences of not paying the claimed amount where there is no payment schedule are that the payer becomes liable to pay the unpaid portion of the claimed amount to the payee under s 23 as a debt due (s 23(2)) together with the actual and reasonable costs of recovery (subs (2)(a)(ii)).

[22] In my view the policy of the Act and the provisions to which I have referred establish that for construction contracts to which the Act applies, the claims for progress payments crystallise once a payment claim in, as here, the approved form, has been issued in respect of the work to which the payment claim relates, and assuming, as here, that no payment schedule is forthcoming.

[23] The implementation and enforcement of payment claims under the Act do not mean that a defendant permanently loses the opportunity of having its issues dealt with. The Act provides in Part 3 for a fast track adjudication procedure for disputes under construction contracts. But that procedure does not stand in the way of summary judgment being obtained by the payee, nor does it stand in the way of enforcing payment once judgment has been obtained.

[24] When as here a payment schedule is not forthcoming from the contractor/payer, the payee may proceed under the Act to claim the amount as a debt due under s 23 (2)(a). Summary judgment proceedings are appropriate to collect such debts: ***TUF Panel Construction Limited v Capon*** (Unreported, North Shore District Court, CIV 2003-044-2801, 15 March 2004, Judge Wilson QC). The default procedure may also be available under Rules 462 and 463 of the District Courts Rules 1992.

Defendant's case

[25] The Defendant's Notice of Opposition made no reference to the Construction Contracts Act, advancing instead the grounds that any monies due and owing to the Plaintiff were uncertain, that its workman carried out the work without due care and skill, and 'other matters' to be included in the affidavit to be filed for and on behalf of the Defendant by Mr F P J Best.

[26] Ms Davenport argued that if these were construction contracts under the Act, then s 79 allowed a set-off of various items listed in the Defendant's affidavit and could be brought into account under that section which provides as follows.

> **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.

[27] She submitted that repair costs estimated in Mr Best's affidavit at between $10,000 and $15,000, and certain other matters were capable of being calculated although she did not have a figure at hand. She said that the failure of the Plaintiff to file an affidavit in reply meant that there was no dispute as to those amounts.

[28] In reply Mr Greenwood submitted that the evidence relied on to support this set-off did not meet the threshold of credibility, being essentially reliant on the production of correspondence between the Defendant and its head contractor and that there was in fact no acceptance by the Plaintiff of a liquidated amount.

[29] S 79 applies to a liquidated amount for which judgment has been entered or if the claim has been accepted. Here, the Plaintiff's evidence is that a net amount is due to it leaving those sums out of account. The Plaintiff does not accept liability for them. Counsel pointed to Mr Best's affidavit at paragraph 14, which refers to matters to be resolved before the claim by the Defendant can be calculated. He submitted that was an indication that the amounts were not liquidated. He correctly, submits that the damages claimed of $20,000 are not liquidated. He pointed out that the complaints from the head contractor to the Defendant set out in the letters annexed to Mr Best's affidavit referred to complaints about the work that arose when the Plaintiff's workers had left the site.

[30] I find that the amounts referred to by Ms Davenport are not "liquidated" in terms of s 79. They may not be offset in these proceedings.

[31] Ms Davenport submitted that a provision in the Contract for the supply of "qualified carpenters" was to be inferred from the rates of pay provided in the schedules which were she says appropriate only to qualified carpenters. The factual basis for Ms Davenport's submissions is inadequate. No such inference is available in my view. Mr Best refers to specific instructions that "they were required to provide only qualified carpenters" but that was an aspect of the contract between the Defendant and Meridian, not the Contract between the present parties.

[32] She then went on to submit that it was a term of the contract that the Plaintiff would supervise the contract but that the Plaintiff had not done so. This submission

failed on the specific terms and conditions of paragraph 3 of the contract that made it clear that the duties of supervision fell on the Defendant.

Decision

[33] I am satisfied that there is no reasonably arguable defence and that summary judgment should be given. Accordingly, there is summary judgment against the Defendant for:

(a) $34,971.68

(b) Interest at the rate of 13% on the judgment sum from 16 February 2004 to 25 August 2004, the sum of $2,403.94 calculated on 193 days at $12.45 per day, and a further $12.45 per day for each day after 25 August 2004.

[34] The Plaintiff will have actual and reasonable costs pursuant to s 23(2)(a)(ii) of the Construction Contracts Act.

[35] Counsel are to endeavour to agree on costs and disbursements but in the absence of agreement are to file and serve memoranda. The Plaintiff will file and serve its memorandum on or by 4 p.m. Friday 10 September 2004. The Defendant will respond on or by 4 p.m. on 17 September 2004.

D M Wilson
District Court Judge

Signed on 2 September 2004 at am/pm.

Solicitors: Craig Griffin & Lord, P O Box 9049, Auckland, for the Plaintiff.
Sellars & Co, Solicitors, P O Box 8, Wellsford, for the Defendant