IN THE DISTRICT COURT
AT NORTH SHORE

CIV 2003/044/2801

BETWEEN	T U F PANEL CONSTRUCTION LIMITED Plaintiff
AND	ROBERT ERNEST CAPON Defendant

Hearing: 25 February 2004

Appearances: Mr Scott Galloway for Plaintiff
Mr Brian Stewart & Ms Everitt for Defendant

Judgment: 15 March 2004

RESERVED JUDGMENT OF JUDGE D M WILSON QC

INTRODUCTION

[1] This application for Summary Judgment is brought under the Construction Contracts Act 2002. It arises out of contracts for the supply of concrete panels by the plaintiff for construction work being undertaken on property in Albany, North Shore City by the defendant.

[2] The Construction Contracts Act 2002 received the Royal assent on 26 November 2002 and applies to construction contracts entered into after 1 April 2003. Counsel advise that this case is one of the first cases, if not the first case, to reach the courts under the Act. The case calls for an examination of the impact on construction contracts of a radically changed legal matrix.

FACTUAL BACKGROUND

[3] Mr J A Brennan, of the plaintiff company, after speaking to the defendant prepared a tender document on the letter head of the plaintiff company, addressed to 'Mr Robert Capon, 4 Dallan Place, Albany' dated 3 June 2003 for construction of concrete panels at that address. The defendant accepted this tender. He signed it ' R Capon' against the words 'Confirmation of agreement and approval to go ahead and proceed, signed for and on behalf of Robert Capon' and returned it to the Plaintiff Company.

[4] The Plaintiff Company commenced the construction of the concrete panels accordingly.

[5] The plaintiff prepared and sent a second tender document in the same form dated 6th August 2003 to 'Mr Robert Capon' at 6 Dallan Place, Albany. It mistakenly referred to construction of concrete panels for number 4 Dallan Place but was in fact, as everyone understood, for concrete panels at number 6 Dallan Place, the address to which the tender had been sent. Mr Capon advised his acceptance of this tender by telephone.

[6] Two progress payments were made to the Plaintiff Company:

- A cheque for $8,000 drawn on the account of Newco Construction Limited deposited on or about 24th July 2003.

- A cheque for $11,000 drawn on the account of Creamala Developments Limited deposited on or about 20th August 2003.

[7] Invoices for the progress payments (not particularly notable for care in their preparation) were prepared on the plaintiff's letterhead and sent to 'Mr Robert Capon, Newco Construction Limited, PO Box 300335, Albany 'for the attention of Mr Capon'. The second of the invoices gave credit for both of the payments made to the Plaintiff Company.

[8] Mr Brennan deposed that he knew of that address because he had, some time after the contract started, been given a business card in the name of Newco Construction Limited showing Mr Capon's name and giving the address above.

[9] The plaintiff company served formal Payment Claims on the defendant personally on 15th September 2003 addressed to 'Mr Robert Capon', respectively at number 4 Dallan Place Albany and at number 6 Dallan Place, Albany.

[10] The only written response was a letter dated 16 September 2003 addressed to the plaintiff company on the letter head of Creamala Developments (2003) Limited and signed 'Robert Capon'. The address and contact details on the letterhead were the same as on the Newco Construction Limited business card, which Mr Capon had given Mr Brennan. The letter raised concerns about the contractual arrangements and sought 'accounts as you agreed on a cost plus basis for both sides'. It raised no suggestion that Mr. Capon was not the contracting party.

[11] The Payment Claims have not been settled and the present proceedings for summary judgment were issued on 6 November 2003.

LEGISLATIVE BACKGROUND

[12] Both contracts came into being after the commencement of the Construction Contracts Act 2002 which, as the parties accept, applies to the contracts in issue in

these proceedings: Section 9 applies to *every construction contract whether or not governed by New Zealand law but related to carrying out construction work in New Zealand and was entered into on or after the date of commencement of the Act and is written or oral or partly written and oral.*

[13] 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.

[14] 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.*

[15] The purpose of the Act is set out in section 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.

[16] In the text 'Progress Payments and Adjudication' by Smellie J CNZN QC the retired High Court Judge comments on the payment claim system. I adopt the tenor of his analysis with respect:

> *The Construction Contracts Act 2002 is as much about prompt payment of progress claims as it is about a rapid form of interim resolution (adjudication) when the payments claimed are in dispute. The essence of those provisions is that there must be a more or less immediate response to a claim (20 working days) in default of which the amount is recoverable as a debt due, together with actual costs of getting judgment. So progress payments can no longer be ignored, and the time and cost of enforcing payments through the courts should in future fall less heavily on the unpaid contractor or sub contractor. In addition, there is the right to suspend work.*

[17] The mechanisms provided by the Act for dealing with payments are a 'payment claim' under section 13 and a 'payment schedule' under section 15. Both must meet formal requirements.

[18] A payment claim is served by the payee on the payer and must (under section 20(2)):

(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 the Construction Contracts Act.

[19] When a payer receives a payment claim, he or she can respond by providing the payee with a 'payment schedule.' This is his or her opportunity to agree or disagree with the amount claimed.

[20] The payment schedule provided to the payee must:

(a) be in writing; and

(b) identify the payment claim to which it relates; and

(c) indicate a scheduled amount (section 21(2)).

[21] A 'scheduled amount' means an amount of progress payment specified that the payer proposes to pay to the payee in response to a payment claim: (section 19).

[22] Section 21(3) requires inclusion of:

(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.

[23] Where no payment schedule is provided, and no payment is made on the payment claim, the payee:

(a) may recover from the payer, as a debt due to the payee, in any court –

(i) the unpaid portion of the claim amount; and

(ii) the actual and reasonable costs of recovery awarded against the payer by that court. (section 23 (2)).

THE CONTRACTS IN ISSUE: Foundation of dispute

[24] The contractual arrangements in this case were in a partly oral and partly written form. Work was carried out in accordance with those contracts by the plaintiff company between June 2003 and 9 September 2003. Common terms were that –

(b) Progress claims were to be paid within 14 days from the date of claim.

(c) The contract would be subject to nil retentions on monies for work completed.

[25] The contract price for 4 Dallan Place was $71,355 based on 1168 square metres, with any additional work to be charged out at the rate of $59.46 per square metre. An oral variation concerned the terms under which a labourer would be employed.

[26] The contract price for 6 Dallan Place was $39,600 based on 620 square metres, with any additional work to be charged out at the rate of $63.87 per square metre.

ANALYSIS

[27] The two separate payment claims under the Construction Contracts Act 2002 were served on the defendant personally on 15 September 2003. The sole reply from Mr Capon on the letter head of Creamala Developments (2003) Limited, did not mention a 'schedule account'. It did not identify the payment claim to which it related and did not indicate a 'scheduled amount'. It did not attempt to meet the requirements of Section 21(3) .It did not purport to be a 'payment schedule' under the Construction Contracts Act and it was not. Mr. Stewart did not attempt to argue that it was. No payment schedule has ever been provided.

[28] In the absence of a payment schedule within the time provided section 22 applied to make the defendant liable to pay the amounts claimed in the payment claims. Section 22 provides as follows:

> ***22. Liability for paying amount claimed.***
>
> *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) that 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.*

[29] 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 section 23 as a debt due (section 23(2)) together with the actual and reasonable costs of recovery (Subsection (2)(a)(ii)).

[30] In my judgment the Act was specifically designed to relegate to history losses within the construction industry being borne by those further down the contractual chain who are in the worst position to bear them because there was no effective way to enforce progress claims during the contract.

[31] 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 has been issued in respect of the work to which the payment claim relates, provided only that it meets the requirements of form under s20 of the Act and assuming, as here, that no payment schedule is forthcoming.

DEFENCES

[32] The defendant raised the following matters in his Notice of Opposition, namely:

> [32.1] The plaintiff has issued proceedings against the wrong defendant
>
> [32.2] The correct defendant has a set-off or counter claim that equals or exceeds the amount of the plaintiff's claim;
>
> [32.3] The plaintiff did not complete the contract works;
>
> [32.4] The payment claims issued by the plaintiff do not comply with the Construction Contracts Act 2002;
>
> [32.5] Summary judgment is inappropriate in the context of a building dispute;
>
> [32.6]As appeared in the affidavit of Robert Ernest Capon
>
> I deal with those submissions now.

[32.1] The plaintiff has issued proceedings against the wrong defendants

[32.1.1] Mr Stewart for the defendant submitted that there was a genuine conflict of evidence over who were the parties to the construction contracts and that it was inappropriate for the Court in a summary judgment context to assess the credibility of the parties' statements in their affidavits.

[32.1.2] The Court is not bound to 'accept uncritically as raising the dispute of fact which calls for further investigation on an affidavit however unequivocal, lacking in precision, inconsistent with undisputed contemporary documents, or other statements made by the same deponent, or inherently improbable in itself it may be'. The Court is entitled to act on a more robust and common-sense manner and in summary judgment cases in New Zealand it is not obliged 'meekly to accept without question whatever unvarnished statements may happen to be made on affidavit':

United *Homes (1988) v Workmen* [2001] 3 NZLR 447, 452 per McGechan J, Court of Appeal.

[32.1.3] The present assertion by Mr Capon that the true contracting party was one of his companies fails to meet the test of comparison with contemporaneous documents. The most significant of these is the original tender document of 3 June 2003 which Mr Capon took away with him over night and returned the next day. It had been addressed to him at the place where the work was to be done and he had signed his name against the words 'Confirmation of agreement and approval to go ahead and proceed – signed for and on behalf of Robert Capon'.

[32.1.4] Although the same words appeared at the end of the next tender document dated 6 August there is no evidence that Mr. Capon hedged his discussion in any way when he rang to confirm his acceptance of that tender.

[32.1.5] The fact that subsequently invoices were addressed to Mr Robert Capon at the Newco Construction Limited address is, in my view, insignificant. That was simply an address. It does not detract from the clear position that Mr Capon was the contracting party.

[32.1.6] Furthermore the two payment claims were addressed to 'Mr Robert Capon' at the two addresses in Dallan Place, Albany where the work had been done.

[32.1.7] The response to that was a letter signed by Mr Capon on 16 September 2003 on the letterhead of Creamala Developments (2003) Limited. He did not then challenge the fact that he was personally named as the payer in the payment claims. Mr Capon in his affidavit neither explains whether he noticed the payment claims were addressed to him personally or whether he failed to raise the issue because of an oversight.

[32.1.8] The Court of Appeal considered a similar situation in *Orrell v Midas Interior Design Group Limited (1991) 4 PRNZ 608*. That was a summary judgment application against a number of defendants, including individuals trading as a joint venture. The individuals opposed summary judgment on the ground that the debt

was owed by a limited liability company. The affidavits in that case were described as 'the model of vagueness' by the Court of Appeal at page 612. Bald assertions that the plaintiff 'knew he was dealing with the company' made without reference to the substance of the conversation in which this was alleged to be made known, failed to indicate any substance in the defence. Their bare assertions as to the plaintiff's knowledge did not pass the threshold of credibility (op cit page 613).

[32.1.9] In the present case, Mr Capon's evidence on the crucial point is in these words: 'Mr Brennan was clearly told he was working for Newco' and the second 'at our first meeting Mr Brennan was given Newco's name as the contracting party'. No detail is given about where the conversation took place, or the context of the conversation.

[32.1.10] Having regard to the vagueness of the assertion, the responsibility of Mr Capon to convey plainly that the contract was with the company and not him personally under the doctrine of undisclosed principal, the contemporaneous documents, the signature by Mr Capon on his own behalf on the initial tender document, the assertions of Mr Capon that his company was the contracting party, and that he told Mr. Brennan of that, fail to pass the threshold of credibility.

[32.2] The correct defendant has a set-off or counter-claim that equals or exceeds the plaintiff's claim

This was an attempt to set up matters alleged to be available to Newco Construction Limited.

In view of the factual finding that the present defendant is the correct defendant, and that the specific provisions of section 79 of the Act exclude counterclaims, set-offs, or cross-demands except in circumstances which do not apply here, this defence must fail.

[32.3] The plaintiff did not complete the contract works

Mr Stewart did not pursue this defence.

[32.4] The payment claims issued by the plaintiff do not comply with the Construction Contracts Act 2002.

[32.4.1] Mr Stewart submitted that from a policy standpoint, shoddy claims should not be upheld.

[32.4.2] He said that serious consequences could flow from a failure to follow the tight formal and time requirements under the Act.

[32.4.3] They might lead to the injustice of a disorganised defendant having to make early payment of an unjustified claim. He submitted that the plaintiff should 'get it right' and that this plaintiff did not. Despite a valiant effort he was unable to establish in argument any way in which the payment claims fell short of the formal requirements of section 22.

[32.4.4] Even assuming that Mr. Stewart is right in his submissions on the policy underlying the Act, I find that his argument fails on the facts:

- The payment claims were in writing : section 20(2)(a);

- they identified the construction contracts to which the progress payments related (section 20(2)(b);

- They identified the construction work as being manufacture of tilt panels

- They showed the relevant period (section 20(2)(c));

- They showed the claimed amount and the due date for payment (section 20 (2)(d));

- They indicated the manner in which the payee calculated the claim by reference to the number of metres by the square metre rate and the percentage of work done (section 20 (2)(e));

- Due credit was given for variations to the contract in relation to wages and a deduction of the two previous payments totalling $19,000 was allowed for because the deduction of $16,888.90 shown was the GST exclusive element of the payments.

- The payment claim forms used by the plaintiff is the one approved by the New Zealand Sub-Contractors Federation Incorporated.

- They specifically stated that they were made under the Construction Contracts Act 2002 (section 20(2)(f).

[32.4.5] In my view, and contrary to the thrust of Mr. Stewart's submissions on policy, the Act makes it clear that parties must be pro-active in resolving those matters while they are still fresh. This does not mean that a defendant permanently loses the opportunity of having his 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.

[32.4.6] I am satisfied that the formal requirements of s20 are fulfilled. In Australia where similar legislation has been in force for some time it has been held that technical quibbles that formal requirements had not been complied with will receive scant attention: *Hawkins Constructions (Australasia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2001] NSWSC 815 per Windeyer J. A similar approach may be apt in New Zealand. The issue does not arise in this case and I express no concluded view on it.

[32.5] Summary Judgment is inappropriate in the context of a building dispute

[32.5.1] The scheme of the Act acknowledges that differences arise between parties over payment claims and it sets up a mandatory system for those to be crystallised at the time by the filing of a payment schedule.

[32.5.2] When a payment schedule is not forthcoming from the contractor/payer, the payee may proceed under the statute to claim the amount as a debt due under section 23 (2)(a). Previous authority to the effect that summary judgment proceedings are inappropriate in the context of a construction dispute has been overtaken and can now be firmly put aside.

[32.6] The final matter raised by way of defence was a reference to matters that ' appear in the affidavit of Mr Capon'.

[32.6.1] In my view this type of pleading in a Notice of Opposition is too vague and is unsatisfactory. However here the plaintiff's counsel did not claim to have been caught by surprise. I now deal with the matter raised in argument under this head.

[32.6.2] The defendant asserted in his affidavit that a binding variation to the contracts was entered into orally on Monday, 8 September 2003 when he says that Mr Brennan agreed to his paying cost plus 10% on both sites. Mr. Brennan deposed that he never agreed to accept less than the full amount owing to the plaintiff but provided an amended invoice to correct an earlier error and a list of costs and expenses in an attempt to get some money.

[32.6.3] I accept the submission for the plaintiff that there is no advantage to a plaintiff in agreeing to waive its contractual rights to payment and that to do so would be, in the words of Master Venning (as he then was) "commercially unrealistic and inherently improbable" There was an understandable advantage in providing the information sought to improve cash flow from the defendant who was pressed for funds.

[32.6.4] There is no room to regard the faint and vague suggestion of accord and satisfaction as passing a threshold of credibility. In addition, the Construction Contracts Act 2002 provides that there is no contracting out of its provisions: section 12.

DECISION

[33] Accordingly, I find that valid 'payment claims' have been served. No payment schedule has been received in response. The debt has crystallised.

[34] 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 -

- $46,236.90 plus GST in respect of the contract at 4 Dallan Place, Albany and
- $35,872.51 plus GST in respect to the contract at 6 Dallan Place, Albany.
- Interest is sought and allowed at the rate of 7.5% in respect of 4 Dallan Place at $1,130.50 and in respect of 6 Dallan Place in the sum of $877.03 up to the date of hearing. Interest is allowed at the same rate to the date of judgment.

[35] The plaintiff will have actual and reasonable costs, including counsel's travel expenses pursuant to s23 (2)(a)(ii) of the Construction Contracts Act.

[36] 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 4pm on the 24th March 2004. The defendant will respond on or by 4pm on 1st April 2004.

[37] My thanks to counsel for their helpful submissions.

(D M Wilson QC)
District Court Judge

Signed on: 15th March 2004 At: am 6.02 pm