IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2005-488-000332

	BETWEEN	TOP END HOMES LIMITED Plaintiff
	AND	SALEM LIMITED Defendant

Hearing: 19 July 2005

Appearances: Mr R M Bell for Plaintiff
Mr W W Peters for Defendant

Judgment: 19 July 2005

ORAL JUDGMENT OF VENNING J

Solicitors: Webb Ross Johnson, Whangarei
Thomson Wilson, Whangarei

[1] The plaintiff seeks summary judgment against the defendant in the sum of $279,687.56 together with interest and costs.

Background

[2] The plaintiff is a builder. The plaintiff carried out work on the defendant's property known as the Money Factory site in Whangarei, pursuant to a construction contract made between the parties on 7 July 2004. The defendant has made payments under the contract totalling $920,477.13. In early February 2005 the plaintiff delivered a payment claim under the Construction Contracts Act to the defendant. In that claim the plaintiff sought payment of the $279,687.56. It was a final claim.

[3] The defendant did not pay that sum. Nor did the defendant serve a payment schedule under the Construction Contracts Act within the time specified in the Act. The defendant did purport to serve a payment schedule on 24 March 2005.

[4] The defendant opposes the application for summary judgment. It says that it has a complete defence and set-off/counterclaim to the plaintiff's claim arising from the actions of the plaintiff.

Principles

[5] The principles relating to summary judgment are well established. It is for the plaintiff to satisfy the Court that the defendant does not have a reasonably arguable defence to the plaintiff's claim: *Pemberton v Chappel* [1987] 1 NZLR 1.

The Construction Contracts Act

[6] The plaintiff relies upon the provisions of the Construction Contracts Act.

[7] That Act came into force on 1 April 2003. The purpose of the Act is stated to be:

- to facilitate regular and timely payments;
- to provide for a speedy resolution of disputes; and
- to provide remedies for recovery of payments due under construction contracts.

[8] The Act enables a contractor to serve a payment claim for progress payments (defined to include one-off or final payments) in accordance with s 20 of the Act: s 16.

[9] A progress payment is due and payable 20 working days after the payment claim is served in the absence of other agreement between the parties – s 18. The payment claim must

- be in writing;
- contain sufficient details to identify the construction contract to which it relates;
- identify the construction work and the relevant period to which the progress payment relates;
- indicate a claimed amount and the due date for payment;
- indicate the manner in which the payee calculated the claimed amount;
- state that it is made under the Act.

[10] If a payer wishes to challenge the payment claim or take issue with it then a payment schedule must be issued: s 21. The payment schedule must:

- be in writing; and

- identify the payment claim to which it relates; and

- indicate the scheduled amount.

[11] The scheduled amount is the amount of the progress payment that the payer proposes to pay to the payee in response to the payment claim.

[12] By s 22 of the Act the payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if:

- the payee serves a payment claim on a payer; and

- the payer does not provide a payment schedule to the payee within the time required by the contract or by default within 20 working days after the payment claim is served – s 22 (b)(ii).

[13] If a payer becomes liable to pay the claimed amount under s 22 by failing to provide a payment schedule and fails to pay the whole amount in the payment claim, then the payee may recover from the payer as a debt due to it the unpaid portion of the claimed amount and the actual and reasonable costs of recovery – s 23 (2).

Application in this case

[14] In this case on 3 February 2005 the solicitors acting for the plaintiff wrote to the defendant enclosing a payment claim for the $279,687.56, the subject of the present proceedings. The letter and accompanying schedules were clearly in writing. The letter and schedules contained sufficient details to identify the construction contract, the construction work and the relevant period to which the progress claim related. The letter set out that the claim was for:

> construction work carried out in building the offices for the Ministry of Education lease at the Money Factory site at Awaroa River Road between July 2004 and December 2004.

It went on to record that the schedule took into account all the work up until 31 December 2004. As noted the letter and claim included a schedule which set out in detail how the amount claimed was made up. The letter also recorded that the time for payment was 20 working days after receipt. Finally, the letter stated that the claim was a payment claim under the Construction Contracts Act. The letter and accompanying schedule was a payment claim for the purposes of the Construction Contracts Act.

Service

[15] The evidence of Mr McGonagle, a director of the plaintiff company, is that the claim was served on the defendant in the following ways:

- on 3 February 2005 by email sent to Mr Kim, a director of the defendant company;
- by the solicitor's letter being copied to the solicitors for the defendant by letter of 3 February;
- by service on the registered office of the defendant company on 7 February. I note there is an acknowledgement of receipt of the document that day on behalf of the defendant; and
- on 11 February by personal service on Mr Kim at the work site.

[16] I note that s 80 of the Act provides that service may be effected by:

- the notice or document being delivered; or
- the notice of document being left at a usual or last known place of business;
- the notice or document being posted in a letter addressed to the payer; and
- the notice or document sent in a prescribed manner if any.

[17] The evidence before this Court incorporates affidavits by both parties in related proceedings under the Companies Act 1993. In one affidavit Mr Kim a director of the defendant has confirmed receipt of the payment claim on or about 3 February 2005. In any event and to put the matter beyond doubt the document was served at the very latest by 7 February when it was delivered to the registered office of the defendant company, receipt of which was acknowledged: ss 387 and 388 of the Companies Act 1993.

The defendant's response

[18] The 20 working days, being the default period prescribed in the Act for a payment schedule response expired then at the latest on 7 March 2005. The evidence before the Court is that the first document purporting to be a payment schedule on behalf of the defendant under s 21 of the Act was the defendant's solicitor's letter of 24 March 2005. That letter is well outside the default period of 20 working days prescribed in the Construction Contracts Act. There is no suggestion that any extended period was agreed to by the parties in the construction contract. Indeed if anything the contract seems to have contemplated claims being responded to within seven working days. However, for present purposes the plaintiff relies on the default provision of 20 working days in the Act.

[19] The consequences of the defendant's failure to respond within the time prescribed by the Act is that the defendant became liable to pay the claimed amount on the expiry of the 20 working days: s 22. The defendant has failed to pay and in accordance with s 23 (2) of Act the plaintiff may now recover as a debt due to it the entire unpaid portion of the claimed amount from the defendant together with actual and reasonable costs of recovery.

The defence

[20] The notice of opposition filed on behalf of the defendant does not provide particulars of the defence. It simply alleges generally that the defendant has a complete defence to the claim and that the plaintiff's claim is an abuse of the

summary judgment procedure. It does not provide any further particulars as is required by r 244 (3).

[21] However, in submission Mr Peters expanded on the nature of the defence. In summary it is that summary judgment ought not to be entered because the defendant has in respect of the plaintiff's claim a "complete defence" and equally importantly has a set-off/counterclaim as against the plaintiff and that both the claim by the plaintiff in these proceedings and the set-off/counterclaim involve material issues of fact which should be considered and determined after the presentation of viva voce evidence.

Discussion

[22] On behalf of the defendant it was accepted there was a contractual relationship between the plaintiff and defendant but it was submitted that the nature of the contractual relationship was contained in an earlier document rather than that relied on by the plaintiff. On 10 May 2004 Mr McGonagle trading as D & D Builders forwarded a quote to the defendant for construction work to be carried out in relation to the Money Factory at Whangarei. At that time the quotation was for a fixed price contract of $589,000, excluding GST. The defendant's case is based on that document being the operative contractual document. However, the evidence satisfies me that that document did not form the basis of the contractual agreement between the parties and is not the construction contract for the purposes of the Act. As Mr McGonagle deposed he had further discussions with Mr Kim after that quotation was provided. The proposed tenant of the premises required further work to be carried out. The further discussions led to agreement that the project would proceed on the basis of a cost plus contract. That cost plus contract was recorded in written form as an agreement between the plaintiff Top End Homes Limited and the defendant Salem Limited. It is the cost plus contract which forms the basis of the plaintiff's claim and which is the construction contract for the purposes of the Act.

[23] That cost plus contract agreement clearly post-dates the earlier quotation of 10 May 2004. As at 10 May 2004 Top End Homes Limited had not been incorporated. The agreement on the cost plus basis was clearly made between the

plaintiff and defendant. It was executed on behalf of the plaintiff by its directors Mr McGonagle and Mr Pickerill. It was executed on behalf of the defendant by Mr Kim.

[24] The cost plus contract is of a completely different nature and, as counsel submitted, is the antithesis of a fixed price contract. I also note that the defendant has paid in excess of $970,000 already. That is evidence on the part of the defendant itself that it did not consider the earlier fixed price contract for $589,000 plus GST was the basis for the contract. It would not have paid up to $970,000 if it considered it had a fixed price contract for a substantially lesser sum.

[25] I find as a matter of fact that the relevant agreement was the contract agreement between Top End Homes Limited and Salem Limited as set out on the cost plus basis. As discussed with counsel I do not consider the fact that that contract expressly stated to be between those parties was made on a letterhead that refers to D & D Builders to be material. Given the nature of the parties to this contract I do not consider that to be of any significance at all.

[26] The position then is that the defendant acknowledges there is a contractual relationship between the parties. This Court has found that the contractual relationship is the written cost plus contract. The defendant faces the position that the payment claim issued under the Act was issued pursuant to that agreement. It was not responded to by way of payment schedule within the time as required by the Act.

[27] The substance of the defence, namely that the contractual document was a quotation has been found as a matter of fact against the defendant. Apart from that issue then absent any challenge to the quantum of the plaintiff's claim by way of payment schedule in the manner required by the Act the other matters raised by the defendant in the letter of 24 March 1995 effectively amount to a set-off or counterclaim. The provisions of s 79 of the Act make it clear that a party in the position of the defendant can only raise a set-off in very limited circumstances in proceedings for the recovery of debt pursuant to s 23. Section 79 provides:

> **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.

[28] The section prevents the Court from giving effect to any counterclaim, set-off or cross demand raised by the party in the position of the defendant in proceedings such as these. The only exception is that if there is a set-off of a liquidated amount in relation to which either judgment has been entered or there is not any dispute between the parties in relation to it. Neither of those circumstances apply in the present case.

[29] With respect to the matters advanced on behalf of the defendant in my view they are based on a misapprehension of the force and effect of the Construction Contracts Act. The Act represents a change in the approach to the recovery of claims by contractors. The previous authorities referred to and relied on by Mr Peters for the defendant: *Hempseed v Durham Developments Limited* [1998] 3 NZLR 265 and *Savory Holdings Ltd v Royal Oak Mall Ltd* [1993] 1 NZLR 12 are not applicable to claims based on the statutory provisions of the Construction Contracts Act. The Act was recently considered by the Court of Appeal in *George Developments Limited v Canam Construction Limited.* In that case the Court of Appeal observed that:

> [41] We are satisfied that the necessary analysis [whether the item of the payment claim was adequately identified as such] 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 (quoted in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, 214 (HL) Lord Diplock) said: "There must be a "cashflow" in the building trade. It is the very life blood of the enterprise".

[30] Given that clear statement as to the purpose of the Act and the provisions of s 79 this Court can not take into account any potential counterclaim, set-off or cross

demand the defendant may wish to raise against the plaintiff. *A fortiori* it follows that where the defence is a challenge to the quantum of the claim the appropriate way for that to be challenged is by means of the payment schedule process.

[31] Where as here the Court has found there is sufficient evidence to confirm the construction contract and the plaintiff has otherwise complied with the provisions of the Act then prima facie the plaintiff is entitled to summary judgment in reliance upon ss 22 and 23 of the Act.

The discretion to decline summary judgment

[32] Towards the end of his submissions Mr Peters recognised that the Court may come to that view. He submitted that even if the Court came to that view the Court should exercise its discretion against entering summary judgment in this case. He invited the Court to consider what the position might be after judgment in that there were issues between the parties that may still need to be resolved. He submitted they should appropriately be resolved by arbitration. He also suggested that there would be no point in the plaintiff seeking to enforce any judgment by way of issuing liquidation proceedings as the defendant was solvent and would be able to defend any such proceeding.

[33] I acknowledge there may be some practical force in aspects of Mr Peters' submission, however, as the Court has acknowledged where a plaintiff is otherwise prima facie entitled to summary judgment it will be rare for the Court to exercise discretion against entering summary judgment: *Berg v Anglo Pacific International (1988) Ltd* (1989) 1 PRNZ 713, 717; *Dominion Breweries Ltd v countrywide Banking Corporation Ltd* (CA 314/91, 18 August 1992). It is not for this Court at this time to second guess what steps the plaintiff may or may not take in terms of executing the judgment which it is otherwise entitled to. I am not minded to exercise the discretion against the plaintiff in this case.

Conclusion

[34] The result is that I accept the submissions for the plaintiff that it is entitled to summary judgment. The plaintiff satisfies me the defendant has no reasonably arguable defence. I enter summary judgment for the plaintiff against the defendant in the sum of $279,687.56 together with interest at the Judicature Act rate to today's date of $9,540,03 and costs as contemplated by s 23 according to scale in the total sum of $8,390.00, in total the sum of $297,617.59.

G J Venning J

	by UN. The CA observed that it could "hardly ignore the reality that utility operators often (and perhaps usually) resort to litigation when affected by regulatory action". (11 pp)
CONSTRUCTION CONTRACTS – PAYMENT SCHEDULE – FAILURE TO RESPOND WITHIN TIME – COUNTERCLAIM/SETOFF NOT CONSIDERED	In *TOP END HOMES LTD v SALEM LTD* (HC, 19/7/2005; Venning J, Whangarei, CIV 2005-488-000332), summary judgment for $279,687 was granted on a builder's "payment claim" under the Construction Contracts Act 2003 after the defendant failed to respond by way of payment schedule within the time prescribed in the Act. The HC held that s 79 prevents the Court from taking into account any potential counterclaim, set-off or cross-demand, and commented that the matters advanced by the defendant were "based on a misapprehension of the force and effect of the … Act [which] represents a change in the approach to the recovery or claims by contractors". The appropriate way to challenge the quantum of a claim is by means of the payment schedule process. (13 pp)
CONTRACT – INSURANCE – BUSINESS INTERRUPTION INTERPRETATION FLOODING DAMAGE TO CROPS – NOT "INSURED DAMAGE"	In *WHAITIRI POTATO COMPANY LTD v IAG(NZ)LTD* (HC, 20/7/2005; MacKenzie J, Palmerston North, CIV 2005-454-122), the application of an insurance policy for business interruption was in issue, where flooding had caused damage to WPC's growing potato and onion crops. WPC held two insurance policies issued by IAG. The first was a "Rural Business Assets Policy" covering accidental loss to insured assets, under which the crops could not have been insured (the policy providing insurance for live plants only when grown in a building). WPC claimed that the crops were covered as "insured damage" under the second "Rural Business Interruption Policy" on the basis that, once a loss under the assets policy has occurred as here (a claim for damage to a pump and diesel tank having been accepted), the business interruption policy was triggered to cover any loss of profit caused by the same event. Disagreeing, the HC held that the focus of the policy is on the loss to the property, rather than the event which caused that loss and it "would be artificial to hold that the 'trigger' for the operation of the interruption policy is the event which has caused the loss under the assets policy when that event was not the 'trigger' for the operation of the assets policy itself. In both policies the focus is on accidental damage to property insured under the assets policy". (5 pp)
CONTRACT – SALE OF DEVELOPMENT SITE – DISPARITY BETWEEN PURCHASE PRICE AND VALUATION – PURCHASER TERMINALLY ILL – UNCONSCIONABLILITY REJECTED	In *GUSTAV & CO LTD v MACFIELD LTD* (HC, 15/7/2005; John Hansen J, Christchurch, CIV 204-409-0001606), GC (the shareholders in which are two family trusts representing the interests of the late P - a well known property developer, his wife and their family) failed to have set aside an agreement with ML for the sale and purchase of a prime development site in Christchurch for $12.3M (valued independently at $10.63m) on the grounds of unconscionability as the purchaser (P) was dying of cancer at the time. After discussing the authorities on unconscionability, the HC held that, in the context of the development project planned by P for the site, the disparity of price was not as great as contended for (P aware he was paying a premium but had assessed the site's long term potential), and there was no evidence to indicate that P's medical condition would affect his ability to look after his financial interests (there having been no suggestion that any of the other property transactions he had been conducting at the same time should be attacked in any way). (41 pp)
CONTRACT – SALE OF LAND – OPTION TO KEEP OFFER OPEN – WITHDRAWAL OF OFFER TO SELL – VALIDITY – ACKNOWLEDGEMENT OF RECEIPT OF CONSIDERATION	In *ATTORNEY-GENERAL v WHANGAREI DISTRICT COUNCIL* (HC, 20/7/2005; Miller J, Wellington, CIV 2005-485-792), WDC had agreed to sell land to the A-G for use as a police station containing an option supported by consideration to hold the offer open until 3/12/2004, but after that WDC asked the A-G to accommodate its long-term wish to widen the street by accepting a set-back of the building (there was no building line restriction) to which the A-G replied by asking for compensating land to be sold at the back of the lot and WDC revoked its offer on 3/11/2004. The HC has held (on a preliminary separate question) that WDC was not entitled to revoke its offer: (i) WDC in signing the