IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-004969

	BETWEEN	WINSLOW PROPERTIES LIMITED Appellant
	AND	WOODING CONSTRUCTION LIMITED Respondent

Hearing: 4 April 2007

Appearances: Mrs H P Holland for Appellant
Mr D Hurd for Respondent

Judgment: 4 April 2007

JUDGMENT OF VENNING J

This judgment was delivered by me on 4 April 2007 at 4.00 p.m., pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Knight Coldicutt McMahon Butterworth, Auckland
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Introduction

[1] The appellant seeks leave to appeal the decision of Cooper J dismissing an appeal from a summary judgment entered in the District Court at Auckland on 21 July 2006.

Background

[2] The respondent is a contractor. The appellant is a property owner. The appellant and respondent were parties to a construction contract made on 21 July 2004. It was made in the standard form NZS: 3910:1998. Brannigan Project Management Limited (Brannigan) was the engineer under the contract.

[3] On 1 February 2006 the respondent posted a payment claim to Brannigan. Attached to the payment claim was a letter dated 31 January 2006 and a monthly progress claim summary setting out the amounts due. The letter and accompanying material were received by Brannigan on 3 February 2006.

[4] On 24 February 2006 the respondent received a faxed payment schedule payment from Brannigan putting in dispute the respondent's payment claim. The payment schedule indicated nothing was owing to the respondent.

[5] The respondent sought summary judgment in the District Court in the sum of $111,790.59, together with interest and costs.

[6] Three defences were raised in the District Court although the appellant did not file any evidence in opposition:

- First, the appellant claimed that the payment claim had not indicated the due date for payment and was in breach of s 20(2)(d) of the Construction Contracts Act 2002 (the Act).

- Next, it was argued that the payment claim failed to state that it was a payment claim made under the Act; and

- Finally, the appellant argued it had served the respondent with a payment schedule in accordance with s 21 of the Act within the time prescribed for that under s 22(b)(ii) of the Act.

[7] The District Court Judge rejected the arguments relying on the decision of *Marsden Villas Ltd v Wooding Construction Ltd* (HC Auckland, CIV 2006-404-002136, 25 May 2006, Asher J).

The High Court decision

[8] The appeal before Cooper J was advanced on three grounds, two of which had been the subject of argument in the District Court and one new ground. The appellant repeated its arguments that no payment claim had been made and that, in any event the payment schedule had been issued in time. The new ground was an argument that because the respondent's claim had been served on Brannigan and not on the appellant it was invalid. Cooper J had little difficulty in rejecting that new ground of appeal. He also rejected the rehearsal of the arguments presented in the District Court on the remaining points. He considered the argument that no payment claim had been made to be "devoid of any merit". Cooper J then independently came to the same view as Asher J did in the *Marsden Villas* case that the parties intended that the contractor's claims for payment and payment certificates issued under the standard form of contract should be treated as payment claims and payment schedules within the meaning of the Act.

The grounds of appeal

[9] The appellant now seeks leave to appeal to the Court of Appeal. It seeks to pursue two grounds of appeal:

- That the finding the payment claim was properly served by the contractor on the principal by way of service on Brannigan was wrong; and

- That the finding that the payment schedule was served out of time, being within time in terms of the default statutory period but outside the period provided in the contract for responses to payment claims, was also wrong.

[10] In the course of her written submissions Mrs Holland sought to refer to further evidence as to steps the parties had taken subsequent to the judgment but after discussion she accepted that that evidence could not be relevant to the determination of whether leave ought to be granted or not. She did not pursue the admission of further evidence for the purposes of this application.

Principles

[11] The principles are not in dispute. They were settled in *Waller v Hider* [1998] 1 NZLR 412:

> The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal: *Rutherfurd v Waite* [1923] GLR 34; *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 at pp 346 – 347. In the latter case the Court also remarked that in the end the guiding principle must be the requirements of justice.
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> p 413

In addition the Court went on to observe:

> The scarce time and resources of the High Court and of this Court are not to be wasted, nor additional expense for an unsuccessful client incurred without realistic hope of benefit.
>
> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

Decision

Is the argument that service of payment claims on the engineer is not effective service capable of bona fide or serious argument?

[12] This argument was raised for the first time on the appeal before Cooper J. As Cooper J observed it is inconsistent with the appellant's conduct throughout the course of the contract and with the other grounds of appeal the appellant pursued in the High Court.

[13] Nevertheless Mrs Holland submitted that s 20 of the Act required the payee to serve a payment claim on "the payer" and "payer" was defined in s 19 to mean the party to a construction contract so that the payment claim had to be served on the payer, the contracting party. She submitted that service on Brannigan was insufficient.

[14] The submission does not, however, deal with the terms of the contract made between the parties at cl 15.1.2 which provide:

> Any document which is to be served upon the Principal, the Contractor or the Engineer under the contract shall be sufficiently served if it is handed to that Person, or to their appointed representative, or delivered to their address as stated in the Contract Documents or as subsequently advised in writing. Except for a notice given to the Principal under 13.3 or 14.3.3 every notice to the Principal shall be sufficiently given if it is given to the Engineer.

[15] The parties had contractually agreed that where a notice was required to be given to the appellant it would be sufficiently given if given to Brannigan. As Cooper J observed that is not a contracting out of the Act.

[16] I accept Mr Hurd's submission that in addition to the plain words of the contract, the parties' previous conduct precludes any serious or bona fide argument on this point. All previous payment claims had been sent to Brannigan and were responded to with payment schedules and then payment. In *George Developments Limited v Canam Construction Limited* (CA244/04, 12 April 2005) in dealing with an objection to the validity of the payment claim the Court observed:

> George had never raised any problems with previous payment claims that were of the same form as PC-15.

[17] Further, the payment schedules on behalf of the appellant were in each case issued by the engineer. Section 21 provides for a "payer" to respond to a payment claim by providing a payment schedule. If Mrs Holland's argument was correct then the payment schedules issued on behalf of the appellant under s 21 would have to have been issued by the appellant rather than Brannigan. There cannot be one interpretation that applies to s 20 and another that applies to s 21. It is clear that absent any contractual agreement to the contrary (and there may now be in the new form of contract a different process prescribed) then a payment claim under s 20 could be served on a properly authorised agent, particularly where the contract provided for that as it does in this case. The first point is simply not capable of bona fide and serious argument.

Is the time period for service for the payment schedule in a contract of this kind the 20 working days default provision under s 22(b)(ii) or is it governed by the contract?

[18] Section 22 of the Act reads:

> **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.

[19] The relevant clause of the contract, cl 12.2.1 provided:

> Within 10 Working Days after the receipt of the Contractor's claim the Engineer shall issue a progress payment certificate for a sum comprising the value of the Contractor's claim amended as necessary under 12.3, less previous payments certified, and less any other deductions which are required by the terms of the contract or by law. The certificate shall show details of any amendments and deductions.

[20] Although the contract was made in the old form NZS 3910:1998 it referred to the general conditions of contract as including the Construction Contracts Act 2002. The effect of a similar provision was considered by Asher J in *Marsden*. In that case Asher J held:

- It was unsurprising the words "payment certificate" were used in the standard form contract instead of "payment schedule" as the wording in the standard form contract pre-dated the Act.

- The technical requirements for a payment schedule under the Act are similar to those for a payment certificate under the Contract;

- In the *Canam* case which concerned a similar contract, the Court proceeded on the basis that the combined effect of the specific conditions of contract and the Act was that a mechanism existed for periodic claims to be made which had to be responded to in a timely manner.

- If the contractual provisions did not apply for the purposes of the Act there would need to be two responses to each claim, that was contrary to the conduct of the parties.

[21] Asher J concluded the parties had unequivocally adopted the provisions of the contract by their actions in that case.

[22] Kerr DCJ followed the reasoning of Asher J in *Marsden*. Cooper J independently came to the same conclusion. As Cooper J observed it is only by reading the contract on the basis that the parties agreed the contractor's claims for payment under cl 12.1.1 and payment certificates under cl 12.2 should be treated as payment claims and payment schedules within the meaning of the Act that the parties' intention can be given effect to and the contract read in a sensible, commercial way.

[23] During the course of submission Mrs Holland accepted that the nature of the payment certificate under cl 12.2.1 and a payment claim under the provisions of

subpart 3 of the Act were the same and that it was the potential effect or consequence of them which was draconian.

[24] Further, in the present case, the parties dealt with the payment claims on the basis they were claims under the Act but that cl 12.2.1 applied. In the letter with the claim dated 31 January 2006 the respondent stated:

> In accordance with the terms and conditions of our contract and the provisions of the Construction Contracts Act 2002 we anticipate the issue of your corresponding payment schedule within 10 Working Days of receipt of this payment claim. …

[25] While I acknowledge there is an argument on this second point, I have to observe that it does not seem to be an argument with any particular merit.

Exercise of the discretion

[26] Both grounds of appeal sought to be advanced relate to the interpretation of a private contract between the parties. While the contract incorporates the standard form condition of contracts NZS 3910:1998, that standard form of contract has been supplanted, (since August 2003), by a new standard form of contract directly intended to apply and incorporate the provisions of the Act. There will be limited precedent value to other parties if leave were granted.

[27] I conclude that the first argument proposed to be raised is not capable of bona fide and serious argument. It is inconsistent with the second argument. I accept that the second argument proposed to be raised is capable of argument. But that argument has been considered by the High Court on two separate occasions now and rejected.

[28] The approach of the High Court (Asher J in *Marsden* and Cooper J in this case) on the second point is, in my judgment consistent with the approach of the Court of Appeal to the interpretation and application of the Act, namely that technical quibbles as to payment claims will not be entertained: *George Developments Ltd v Canam Construction Ltd* (supra).

[29] The issue is one of construction of the Act and the provisions of the now outdated standard form contract. It is essentially a dispute between two commercial entities.

[30] The availability of a fairly arguable issue is not sufficient by itself to warrant the grant of leave: *Fitzroy Engineering Group Ltd v Technix Group Ltd* (CA38/04, 31 August 2004).

[31] As a matter of discretion I am unable to accept that the limited prospects of success that the appellant may have on the second point are sufficient to justify the appeal which will inevitably lead to further delays and additional costs in relation to this construction dispute. The interests of finality are important particularly in this area of law. An express purpose of the Act is:

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

There has already been considerable delay. The relevant payment claim is dated 1 February 2006. The judgment of the District Court was delivered 21 July 2006. The appeal judgment was delivered 14 December 2006.

Result

[32] I decline the application for leave to appeal.

Costs

[33] Costs to the respondent on a 2B basis together with disbursements as fixed by the Registrar.

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Venning J