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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-001066

BETWEEN WEST CITY CONSTRUCTION LTD
Appellant
AND TIMOTHY LAIRD EDNEY
Respondent

Hearing: 29 June 2005

Appearances: P J Davey for Appellant
N Wilson for Respondent

Judgment: 1 July 2005

JUDGMENT OF VENNING J

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Introduction

[1] The appellant appeals from the decision of the District Court declining its application for summary judgment.

Background

[2] The appellant is a construction company. The respondent, Mr Edney is a trustee of the Rockfield Trust. Rockfield Trust is a property developer.

[3] On 31 May 2004 the respondent accepted the appellant's quote for certain construction work to be carried out at the respondent's property at 5 Maurice Road, Penrose.

[4] On 30 June 2004 the appellant issued a payment claim under the Construction Contracts Act 2002 (the Act). The claim was left at an address occupied by the respondent at Rockfield Road.

[5] The respondent did not accept the appellant's claim. On 4 August 2004 it purported to issue a payment schedule challenging the payment claim in accordance with the Act.

[6] The parties were unable to resolve issues between themselves. The appellant then issued proceedings in the District Court.

District Court decision

[7] In the District Court the issues for determination were:

- whether the payment claim issued by the appellant satisfied the requirements of the Act;

- whether the payment claim was properly served on the respondent; and
- whether the payment schedule issued by the respondent complied with the Act and, if so, was it served on the appellant.

[8] The Judge held:

The Payment Claim

[29] I am satisfied that the payment claim met, in terms of content, the requirements of the Act. ...

Service

[50] I find in this case that service in the terms promoted has not been established. ...

Payment Schedule

[53] ... The document provided here may arguably scrape in in that respect, [indicate a scheduled amount] as the second paragraph may amount to an equivalent formula. However, as will appear, that is not an issue upon which I am bound to form a view.

And later as to service of the payment schedule:

[62] But the short point is that by denying its receipt (as specifically he did in his first affidavit) [Mr Ireland] he also (in light of my prior findings) denies [the appellant] any evidence that the payment claim was ever served at all. ...

[9] In this Court the appellant challenges the Judge's findings as to lack of service and submits that the document issued by the respondent was not, in any event, a payment schedule.

[10] Although the respondent did not cross-appeal, in his written submissions for the respondent Mr Wilson raised a challenge to the Judge's finding on the validity of the payment claim issued by the appellant.

Principles as to summary judgment

[11] The principles as to summary judgment are well established. It is for the appellant to satisfy the Court that the respondent has no defence.

In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. ... On this [the appellant] is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

per Somers J in *Pemberton v Chappell* [1987] 1 NZLR 1, 3.

[12] The appellant's claim for summary judgment is based on the payment claim issued by it pursuant to that Act. It must be considered in the context of the Act.

[13] The Act has recently been the subject of consideration in the Court of Appeal. In *George Developments Limited v Canan Construction Limited* (CA244/04, 12 April 2005) the Court observed:

[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".

The payment certificate

[14] When the payment claim in this case is considered against the scheme of the Act, there can be no issue that the District Court Judge was right in his finding that the payment claim satisfied the Act's requirements.

[15] The Act provides for a contractor to serve a payment claim for each progress payment in accordance with s 20 of the Act - s 16. (A progress payment can be a final payment – as in this case).

- A progress payment is due and payable 20 working days after the payment claim is served – s 18.
- A payment claim must:

- be in writing;
- contain sufficient details to identify the construction contract to which the progress payment 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.

[16] If a payer wishes to challenge the payment claim or take issue with it then a payment schedule must be issued. A payment schedule must:

- be in writing; and
- identify the payment claim to which it relates; and
- indicate a scheduled amount.

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

[18] 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 payee serves a payment claim on a payer; and
- the payer does not provide a payment schedule to the payee within 20 working days after the payment claim is served – s 22 (b)(ii).

[19] 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 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).

[20] The payment claim in the present case that the appellant relies on is in writing. It is addressed to Rockfield Trust and it is identified as being from the appellant. It describes the property at Maurice Road, Penrose. It is dated as 30 June 04 and sets out in a scheduled form the description of the work claimed, quantity and rates, subtotals and the overall total together with GST. It also confirms that it is a progress claim made under s 20 of the Act.

[21] The District Court Judge was correct to hold that the document issued by the appellant satisfied the requirements of s 20 of the Act, particularly bearing in mind the comments of the Court of Appeal in the *George* decision. The claim issued by the appellant clearly satisfied the requirements of the Act.

Service

[22] The District Court Judge found that the appellant's payment claim had not been served. With respect I consider the District Court Judge was wrong in that finding and the claim was served by being left at the respondent's usual place of business.

[23] The undisputed evidence regarding service is that of Mr Anton Ireland. He says:

4. I telephoned Mr Hennah on 30 June 2004 and told him that I wanted to meet him and give him a claim for the works completed at Maurice Road. He said he would meet me at his office in Rockfield Road. He was not there when I arrived and, after waiting for about an hour, I eventually managed to contact him by phone. I told him that I had to return to another job and said that I would slip the Payment Claim under the door of his office. He indicated that was fine and I put the Payment Claim under his door and left the premises.

[24] Mr Hennah was employed as the property manager of the Rockfield Trust of which Mr Edney is a trustee. The respondent himself acknowledged in his affidavit that Mr Hennah was employed as "property manager by the Rockfield Trust and was "authorised to negotiate contracts on the Trust's behalf". Mr Hennah was actively involved in the particular project in issue.

[25] More significantly, while the Rockfield Trust letterhead did not disclose a business address other than a P.O. box address the respondent himself, Mr Edney, says in his affidavit:

5. On 19 May 2004, a meeting was held at the offices of Rockfield Trust between Len Ireland, John Hennah, and myself regarding proposed works at 5 Maurice Road, a property owned by the Trust. At this meeting, I told Len Ireland that the Rockfield Trust had a number of building and development projects in the pipeline. ...

[26] On Mr Edney's own evidence that meeting was held at the offices of Rockfield Trust. Mr Anton Ireland's evidence in his affidavit in reply is:

3. As stated in paragraph 10 of my first affidavit I phoned Mr Hennah on 30 June 2004 and arranged to meet him at his office in Rockfield Road. I had been to his office on a previous occasion with my father, Len Ireland where he introduced me to both Tim Edney and John Hennah there. During that meeting Mr Edney showed us his motor home that was in the yard of the premises. Mr Hennah's office is located in a separate building on the left hand side about 100 metres up a large access way from Rockfield Road.

[27] Further, Mr Len Ireland deposed that:

3. Mr Edney refers in paragraph 6 of his affidavit to a meeting that he had with Mr Hennah and me "at the offices of the Rockfield Trust" on 19 May 2004. That meeting was held in an office at Rockfield Road, Penrose. I have been to this office on more than one occasion where I have met Mr Hennah.

[28] The evidence satisfies me that the payment claim was left at the same premises used as the offices of the trustees, including the respondent, Mr Edney, of the Rockfield Trust. Both Mr Len Ireland and Mr Anton Ireland were able to identify the premises as those of the Rockfield Trust. Mr Anton Ireland was able to confirm that it was at those premises that he left the payment claim.

[29] Section 80 of the Act provides that:

Service of notices –

Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if –

...

(b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; ...

[30] The payment claim was left at the respondent trustee's usual or last known place of business in New Zealand at Rockfield Road.

[31] Where the District Court Judge referred in his judgment and placed reliance upon the following statement:

Hennah refers in his 4 November 2004 affidavit to a 19 May meeting "*at the offices of the Rockfield Trust ... at 5 Maurice Road, a property owned by the Trust*". (Emphasis added).

as suggesting the payment claim was served at 5 Maurice Road, the Judge has, with respect, misdirected himself. The particular passage when quoted in full is:

On 19 May 2004, a meeting was held at the offices of Rockfield Trust between Len Ireland, Tim Edney, and myself regarding proposed works at 5 Maurice Road, a property owned by the Trust.

[32] By omitting the underlined words the Judge has misdirected himself and come to the incorrect conclusion that the meeting took place at 5 Maurice Road when in fact the meeting was held at the offices of the Rockfield Trust but was held "regarding the proposed works at 5 Maurice Road".

[33] In short I find that the payment claim was properly served on the respondent by it being left by Mr Anton Ireland at the respondent trustee's last known place of business in New Zealand at Rockfield Road.

[34] There are related issues concerning service which it is strictly unnecessary for the Court to consider given my prime finding. I refer to them briefly. The first is that it is apparent the document was left for Mr Hennah. Mr Hennah was a duly

authorised property manager of the Trust. He had authority to negotiate in terms of the contract. It is implicit that he had authority to accept payment claims on behalf of the Trust.

[35] Next, the provisions of s 80 are not mandatory. As Mr Wilson accepted during the course of submission, s 80 provides a means by which a party may satisfy the Court on an evidentiary basis that proceedings have been served. If a party complies with s 80 then there can be no dispute that the notice has been properly served. However, the provisions are not mandatory nor exclusionary. If a document is served on a party by another means and the evidence satisfies the Court that the document has come to the attention of that party then that is sufficient proof of service.

*Served by
another means*

[36] The position can be contrasted with the service provisions under the Companies Act which are mandatory in relation to the means by which service may be effected on a company under that Act.

[37] Further, Mr Hennah wrote on behalf of Rockfield Properties to the plaintiff disputing the invoice claim on 4 August confirming in that claim that they had received the payments claim on July 9, 2004. The District Court Judge suggested that such evidence was inadmissible but in my judgment it is an admission on behalf of the respondent as to acceptance on 9 July. It is admissible as a statement against interest.

[38] For the above reasons I find that the appellant effected service of the payment claim upon the respondent.

Payment schedule

[39] The next issue is whether the respondent challenged the payment claim within the time prescribed by the Act. Two particular issues arise here. First, the timing of the challenge, and secondly, whether the challenge itself was valid.

[40] The payment claim was served on 30 June. As such the challenge to the payment claim the payment schedule issued by the respondent by letter of 4 August was issued out of time as it was outside the 20 working days from 30 June. That is sufficient to dispose of that point.

[41] In the event I am wrong, however, in finding that service was effected on 30 June and service was effected when the document came to the notice of the respondent, which on its own acknowledgement was at least by 9 July, the issue then is whether the payment schedule itself was sufficient to satisfy the requirements of the payment schedule in accordance with the Act.

[42] The Judge did not make a finding on this aspect. Section 21 requires the schedule be in writing, identify the payment claim to which it relates, and indicate a scheduled amount. The letter disputing the payment claim of 4 August was in writing and identified the payment claim to which it related. The issue is whether it indicated a scheduled amount. Scheduled amount is defined in the Act as:

An amount of progress payment specified in a payment schedule that the payer proposes to pay ... in response to a payment claim.

[43] In this case the respondent did not specify a payment amount but rather, at most, it specified a formula:

Please represent on the basis of the discussions at our meeting of May 19, my fax of the same day, other phone calls and face to face meetings, in the cost plus 10% format to allow us to make payment.

[44] In my view that falls short of satisfying the requirement of specifying an amount as is required by the Act. The purpose of the payment claim and payment schedule provisions of the Act is to enable a contractor to make a claim for work done in an identified sum and, in the event the employer disputes the claim, the employer has the ability to challenge the claim by formally referring to it but importantly in doing so is required to specify how much the payer says is actually payable. The legislation is designed to ensure the parties identify the difference between them, and to identify what is in issue between the parties in monetary terms so that the parties are adequately advised as to the extent of the difference.

[45] It is not sufficient to refer in some general way to a formula of the nature referred to by the respondent in this case. That is not the intent of the legislation.

[46] The letter issued by the respondent on 4 August is not a payment schedule for the purposes of the Act. On that basis even if, as a fallback position, the payment claim was not said to be served on the respondent until 9 July there was no response to that within 20 working days by way of payment schedule. There is no basis upon which the appellant's claim for summary judgment could properly have been resisted.

Result

[47] The appeal is allowed. There will be judgment entered for the appellant in the sum of its payment claim of \$51,604.70. I have been told by counsel that a cheque for \$39,082.87 will be met when presented. That will satisfy part of the judgment.

[48] Costs are reserved to be dealt with by way of memorandum.

G J Venning J