EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT HUTT VALLEY

CIV-2015-096-000530
[2016] NZDC 15293

BETWEEN	ENVISAGE CONSTRUCTION LIMITED Plaintiff
AND	PETER ANTHONY BULMER AND VICKI JEANE BULMER Defendants

Hearing: 23 May 2016

Appearances: M Freeman for Plaintiff
F Collins for Defendants

Decision: 15 August 2016

RESERVED DECISION OF JUDGE AIM TOMPKINS

The Bulmer's House

[1] In 2014 Peter and Vicki Bulmer wanted to build a house in Lower Hutt. In October 2014 they entered into a building contract with Envisage Construction Limited ("ECL") for that purpose ("the Contract").

[2] Construction proceeded apace. But work stopped in June 2015 when the Bulmers refused to pay an ECL invoice issued under the staged payment regime of the Contract into. By that time, construction had advanced to the point where the interior of the house was plastered and painted. Up until then all prior ECL invoices rendered under the contract had been paid by the Bulmers.

[3] ECL now seek summary judgment in the amount of $14,518.48, representing the unpaid amount under ECL's 9 June 2015 invoice, as well as summary judgment dismissing the Bulmer's counterclaim. ECL also seeks summary judgment on liability to the effect that the Bulmers repudiated the contract. ECL accepts that a

further hearing will be needed to determine the quantum of damages that may flow from this repudiation.

[4] The Bulmers oppose ECL's applications. They say that they validly cancelled the Contract after ECL wrongfully stopped work. Furthermore they say:

(i) ECL has overcharged the Bulmers under the Contract; and

(ii) The Bulmers have overpaid ECL, and the amount of overpayments sets-off or exceeds the amount now claimed by ECL; and

(iii) The Bulmers have had to pay other contractors to complete work which they have already paid for in earlier stages of the build, and these costs set off or exceed the amount claimed by ECL; and

(iv) The Bulmers terminated the contract due to non-performance, and the difference in costs to complete the building contract using other contractors will set-off or exceed the amount claimed by ECL.

Summary Judgment Principles

[5] The rules governing summary judgment are set out under Part 12 of the District Courts Rules 2014. The starting point is r 12.2. This requires a plaintiff seeking summary judgment to satisfy the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[6] The principles underpinning summary judgment are "well settled"[1], and were summarised recently by the High Court in *Gidden v IAG New Zealand Ltd*[2], per Associate Judge Osbourne, at [61]:

(a) Commonsense, flexibility and a sense of justice are required.[3]

[1] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 163 at [27]
[2] [2016] NZHC 948
[3] *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.[4]

(c) The Court will not hesitate to decide questions of law where appropriate.[5]

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.[6]

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.[7]

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.[8]

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.[9]

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the summary judgment process.[10]

(i) Once the Court is satisfied there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general

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[4] *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
[5] *European Asian Bank AG v Punjab & Sind Bank* (No. 2) [1983] 1 WLR 642 (CA).
[6] *Harry Smith Car Sales Pty Ltd v Clayton Vegetable Supply Co Ltd* (1978) 29 ACTR 21 (SC).
[7] *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).
[8] *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).
[9] *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28].
[10] *Bilbie Dymock Corporation Ltd v Patel and Bajaj* (1987) 1 PRNZ 84 (CA).

> purpose of the [District Courts Rules] which provide for the just, speedy and inexpensive determination of proceedings.

Application of the Construction Contracts Act

[7] Applications for summary judgment relating to construction disputes will often turn on the validity of "payment claims" and "payment schedules" under ss 20 and 21 of the Construction Contracts Act 2002, as amended by the Construction Contracts Amendment Act 2015.[11] These form part of the Act's streamlined payment regime.

[8] There does not appear to be any substantial challenge to the legitimacy of the payment claim issued by ECL in this case, nor to the payment schedule issued by the Bulmers in turn. A payment claim must be in the form set out under s 20 of the Act. ECL's 9 June 2015 invoice meets the requirements of a payment claim under s 20(2), identifying a balance due of $14,518.48 for "Staged Payment Claim – (xii) All interior decoration or coatings (as per Building Contract Staged Payment Schedule)".

[9] In response, Mr Bulmer sent a letter to ECL on 16 June 2015. This constituted a valid payment schedule, the requirements of which are set out under s 21 of the Act. Mr Bulmer stated in his payment schedule that the scheduled amount he is willing to pay is "$0". A number of reasons were listed for withholding payment. Mr Bulmer asserted mistakes allegedly resulting in unnecessary expense, and claimed credit for items not delivered and work not yet done.

[10] As a result of compliance by both sides with the payment procedure under the Construction Contracts Act, and the fact that the scheduled amount claimed by the Bulmer is nil, there is no interim debt due that can be recovered under the provisions of ss 23 and 24 by way of statutory demand or the summary judgment procedure. Furthermore, because this is not a proceeding for the recovery of debt under ss 23 or 24, the prohibitions on giving effect to set-offs and counterclaims under s 79 do not apply.

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[11] See for example *Haley Construction Ltd v Evolving Projects Ltd* [2015] NZDC 11641; *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA); *Herbert Construction Company Limited v Alexander* HC Napier CIV-2010-441-500,21 October 2011; *CJ Park Construction Ltd v Ketan* [2015] NZHC 2421.

[11] The present dispute has therefore moved beyond the ambit of the Act, and must be determined with reference to the terms of the Contract. Recognising this, ECL's statement of claim, and this application for summary judgment, does not rely on the provisions of the Act but rather is founded on breach of contract.

Breach of Contract

[12] At the centre of this case are two asserted breaches of contract. The first is the Bulmer's asserted failure to pay the "Staged Payment Claim - (xii): All interior decoration or coating". The second is the Bulmer's purported cancellation of the Contract, in response to ECL attempting to suspend the Contract.

The Failure to pay the Staged Payment Claim

[13] ECL claims that Mr and Mrs Bulmer are in breach of the Contract by failing and refusing to pay the invoiced amount of $14,518.48, being a Staged Payment Claim under cl 6.2 of the Contract.

[14] The Contract was entered into on 22 October 2014 for a fixed price of $468,387.00 (GST inclusive). However, cl 3 provided that this sum was "subject to adjustments provided for in the Building Contract". This was to reflect any variations made, as well as provisional sums and prime costs (referred to jointly as "provisional sums," in the Contract). Provisional sums are defined under cl 10.7 of the 'Specification and Contract Information,' as referring to "work, materials or fittings that [were] not able to be defined at the time of writing [the] specification". The Contract specifies how adjustments are to be dealt with under cl 6.2(D):

> **(D) Adjustments**
>
> The Registered Master Builder may include the cost of adjustments provided for in the Building Contract with any staged payment. In the event that any adjustments have not been invoiced at the time possession of the Works is given to the Owner, such adjustments shall be paid by the Owner within seven (7) Working Days of the date of the Registered Master Builder's invoice for such adjustments.

[15] This provision clearly allows for adjustments to the contract price – including provisional sums – to be included by ECL in "any staged payment".

[16] Under the Contract, all payments are due within seven working days of the date of the payment invoice. The invoice for Staged Payment Claim (xii) is dated 9 June 2015, and it is not disputed but that it was not paid.

[17] Contemporary email correspondence shows that the Bulmers refused to pay due to asserted concerns around work not done and items so far undelivered. They then deducted sums associated with that work, or those items, from the invoiced amount. Those sums were:

- Allowance for slab edge insulation - $8500
- Allowance for attic stairs - $1000
- Allowance for laundry - $1800
- Allowance for appliances - $10,700

[18] The first two sums (slab edge insulation and the attic stairs) do not relate to provisional sums in the Contract. Indeed, attic stairs are not mentioned at all. Moreover, like the laundry and appliances, none of the sums relate to the "All interior decoration or coating" stage payment that the Bulmers refused to pay.

[19] Ultimately, the Contract provides that ECL is the party responsible for adjusting the contract at any staged payment. There is no provision permitting the Bulmers to refuse to pay based either on a credit for future provisional sums or for work yet to be done from "substantially complete" earlier stages.

[20] As proceedings have progressed, the Bulmers have argued that they did not have to pay the stage payment in question because they had already overpaid under the Contract. They point in particular to an alleged overpayment arising out of the parties' 'Intent Agreement' signed on 13 August 2014. Under this agreement, the Bulmers paid $10,000 as a non-refundable staged payment, and in return obtained copyright in their house's design and were under no obligation to engage ECL in the house's eventual build.

[21] The parties disagree as to how much credit the Bulmers should have received off the final contract price. The Bulmers argue for a full $10,000 credit. ECL contends that a $5968 credit, as stated in the final price quote, was the agreed sum.

[22] After signing the 'Intent Agreement' on 13 August 2014, the parties discussed the amount to be credited in email correspondence. In late October, ECL provided the same explanation for the $5968 credit that they have asserted in these proceedings. ECL refused to offer any further credit. Ultimately, on 10 November 2014, both parties signed the building contract, including a quotation clearly setting out a $5968 credit.

[23] Taking all this into consideration, the Bulmer's current stance concerning this credit seems contrived. When the parties were negotiating the building contract, ECL was clear that there would be no more than a $5968 credit. The Bulmers nevertheless signed the Contract. If this matter really was in dispute, the Bulmers could have attempted further negotiations. Alternatively, they could have refused to sign the Contract and taken their house design to another builder. As noted by both parties, the Bulmers paid more initially so they had freedom to contract with other builders and could use the design ECL had provided.

[24] I do not consider that the credit as now asserted by the Bulmers was due. Even if it were, there is no cogent reason for this credit to have suddenly reappeared to reduce the invoiced amount currently in issue.

[25] The Bulmers cite other factors contributing to their belief that they have overpaid under their contract. However, I consider that these are better discussed as possible defences to summary judgment.

[26] I conclude that there was a breach of contract by the Bulmers. ECL was entitled to invoice the Bulmers upon substantial completion of the Staged Payment Claim (xii) work. This was done in accordance with the terms of the Contract. Mr and Mrs Bulmer failed to pay this invoice within the specified time. Thus they breached the Contract.

ECL's Suspension, and the Bulmer's Cancellation

[27] The Bulmers say that by purportedly suspending the Contract for non-payment of the 9 June 2015 invoice, and refusing to do further work until they were paid, ECL repudiated the contract. The Bulmers say that this repudiatory conduct entitled them, as the innocent party, to cancel the Contract.

[28] ECL asserts that its suspension was valid, and seeks summary judgment on liability, to the effect that the Bulmers repudiated the contract.

[29] Clauses 69 to 73 of the Contract set out ECL's rights to suspend work under the Contract for failure by the Bulmers to pay any invoiced amount. In particular, cl 69 states:

> **Suspension of work for non-payment**
>
> 69 Where the Owner fails to pay any invoiced amount by the due date for its payment the Registered Master Builder may suspend work under the Building Contract provided written notice is served on the Owner. If the Owner has not paid the invoiced amount within five (5) Working Days after the date of service of the notice to suspend the Registered Master Builder may immediately suspend work.

[30] As set out above, ECL issued the invoice for $14,518.48 on 9 June 2015. The Bulmers failed to pay this within 5 working days. ECL's position is that pursuant to cl 69 it was therefore entitled to suspend work under the Contract. ECL emailed Mr and Mrs Bulmer on 24 June 2015, clearly stating that if the relevant invoice was not paid in full by 2 July 2015 then work would be suspended immediately.

[31] The Bulmers argue that there were no grounds to suspend work, because the invoiced amount had been legitimately disputed in a letter dated 16 June 2015. The crux of the Bulmer's position was later set out in a letter sent by their lawyer on 16 July 2015: "If payment is genuinely disputed then we consider that you are still required to continue with the contract works".

[32] The parties then attended mediation through the Masters Builders process, but were unsuccessful in reaching a resolution.

[33] On 26 August 2015 the Bulmer's lawyer wrote purporting to terminate the Contract under cl 67 of the Contract. The cited reasons for termination were:

> (a) Failing to return to site and proceed with the works to reasonable diligence, despite being given a notice requiring you to do so within ten (10) working days;
>
> (b) Wilfully neglecting to carry out the obligations under the contract, despite having been given written notice providing ten (10) working days to do so.

[34] In short, ECL's position is that it was entitled to suspend the contract for non-payment. As a result, ECL says that the Bulmers had no basis on which to cancel the contract, and their behaviour amounts instead to a repudiation. ECL says that it remained willing to lift the suspension and complete the contract once payment of the invoice was made.

[35] The Bulmer's position is that they were entitled to cancel the contract due to default by ECL under cl 67 of the Contract. Because there was a genuine dispute over the invoice, they say ECL was not entitled to invoke the suspension provision.

Decision

[36] Clause 69 of the Contract is clear: ECL is entitled to suspend the work for non-payment once the requisite notice was given. There are no caveats on this provision. To read into the contract, as the Bulmers suggest, an implied term which provides that a failure to pay will only arise if the amount is "either undisputed or certified as being due" undermines the suspension regime. It would mean that builders are required to continue expending funds on construction notwithstanding that they have not yet been paid in accordance with the Contract.

[37] Once suspension validly occurred, no basis for cancellation as asserted by the Bulmers existed. In those circumstances, the Bulmer's cancellation was invalid, and amounted to a repudiation of the Contract.

[38] For completeness, I recognise that s 24(2)(b) of the Construction Contracts Act sets out the circumstances in which a builder can serve a notice of suspension on the other party for failing to pay any scheduled amount owing. Equally, I recognise that the ability to serve a notice of suspension is not available in cases of residential

contracts, as stipulated by s 10 of the Act as it existed prior to 1 December 2015. However, this is not a situation where Mr and Mrs Bulmer refused to pay the amount listed under the payment schedule, because the scheduled amount was nil. The situation here is governed by the terms of the contract. In the circumstances as they unfolded, the Contract entitled ECL to suspend, and did not entitle the Bulmers to cancel.

Do the Bulmers otherwise have a valid defence?

[39] Before summary judgment will issue, ECL must satisfy the Court that the Bulmers have no arguable defence. The Bulmers here raise several defences:

(i) ECL overcharged the Bulmers under the building contract;

(ii) The Bulmers overpaid ECL and the amount overpaid sets-off or exceeds the amount claimed by ECL;

(iii) The Bulmers have had to pay other contractors to complete the work that should have been done in the building stages which the Bulmers paid ECL for, and those costs set-off or exceed the amount claimed by ECL.

(iv) The Bulmers terminated the contract due to non-performance, and the difference in costs to complete the building contract using other contractors will set-off or exceed the amount now claimed by ECL.

[40] These defences mirror the Bulmer's counterclaim, in which they plead, *inter alia*, overpayments made under the building contract. It is convenient to consider both together.

[41] The Court of Appeal, in *Grant v NZMC Ltd* [1989] 1 NZLR 8 at 12, found that:

> The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross claim-claim to account.

[42] The Court of Appeal further determined that an arguable set-off will prevent the entry of summary judgment.

[43] However, in this case I conclude that no arguable defence, and no arguable set-off, has arisen, for the following reasons.

[44] As already noted, I do not think any defence or set-off based upon the asserted $10,000 'credit', arising from the earlier Intent Agreement, is tenable.

[45] The major difficulty with the Bulmer's defence and set-off claims is that they are all built upon the Bulmer's asserted entitlement to cancel the contract. But I have concluded that they were not so entitled and in the absence of a valid cancellation by the Bulmers, all the asserted defences, and claims to set-off, fall away.

[46] For example, the Bulmers cannot set-off the cost of work that was uncompleted from earlier stages: the Contract clearly provided for payment at the "substantial" completion of each stage and there is no suggestion that uncompleted work would not have been completed in the ordinary course of events had construction continued. ECL has continually maintained that the Contract has only ever been suspended. Simply stated, the Bulmers are not entitled to a set-off for work that ECL says it is still prepared to, and agrees that but for the suspension it is still contractually obligated to, carry out. Similarly, the Bulmers are not entitled to a set-off for work that they have employed other contractors to complete, in that circumstance.

[47] The Bulmer's claim for set-off regarding pre-paid provisional sums cannot stand in light of a Contract that could still be completed. Mr Bulmer states in his affidavit that:

> Envisage Construction has continually refused or ignored the point we have tried to make that we have overpaid and are due a refund because we have already paid a significant portion of the PS/PC sum items which his company did not perform.

[48] Any apparent overpayment only emerges because the Bulmers chose wrongfully to repudiate the Contract when they did. ECL's assessment that the Bulmers "seek to challenge the detailed payment provisions of the contract" is apt.

[49] The Bulmers cite *MacLean v Stewart*[12] and *Hampseed v Durham Developments Ltd*[13], for the general proposition that building disputes are notoriously fact specific. However, in the latter case, the Court of Appeal stated that a party is entitled to summary judgment in a building dispute where there is no material showing any defence to their claim. I conclude, for the above reasons, that that is the case here.

Result

[50] There was a breach of the Contract by the Bulmers by their failure to pay ECL's June 2015 invoice. There being no defence to ECL's application for summary judgment in the amount of that invoice, there will be summary judgment as sought by ECL.

[51] The Bulmer's purported cancellation of the Contract was a repudiation of the Contract. There being no defence established, there will be summary judgment on liability as sought by ECL accordingly.

[52] The Bulmer's counterclaim assumes valid cancellation of the Contract. It relies upon grounds already rejected when deciding ECL's application for summary judgment. For the reasons set out in that discussion, the counterclaim cannot succeed and is summarily dismissed.

[53] If the parties cannot agree as to costs and disbursements, memoranda can be filed in the usual way.

AIM Tompkins
District Court Judge

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[12] (1997) 11 PRNZ 66 (CA)
[13] (1998) NZLR 265 (CA)