

**IN THE DISTRICT COURT
AT GISBORNE**

**CIV-2017-016-000003
[2017] NZDC 28604**

BETWEEN PROMAN MANAGEMENT LIMITED
Plaintiff

AND GISBORNE GIRLS' HIGH SCHOOL
BOARD OF TRUSTEES
Defendant

Hearing: 19 June 2017

Appearances: N Witters for the Plaintiff
J M von Dadelszen for the Defendant

Judgment: 15 December 2017

JUDGMENT OF JUDGE W P CATHCART

Summary

[1] The plaintiff contracted with the defendant to build a musical suite at the Gisborne Girls' High School. The agreement was a typical construction contract. It was signed on 3 February 2010. Under the terms of the construction contract, the plaintiff was required to issue progress payment claims which were assessed under the contract by the architect.

[2] The plaintiff pleads it issued the final payment claim, "Payment Claim 10" on 4 February 2011. Under the contract, liability to pay ordinarily arises 10 days after the issuance of the payment claim. That payment has not been made.

[3] The plaintiff pleads a simple breach of contract cause of action. It claims the defendant breached the construction contract by failing to pay Payment Claim 10 issued. It argues the breach is the act of non-payment. The plaintiff contends the cause

of action could not have arisen until the defendant was obligated to pay the final claim and failed to do so.

[4] The defendant applies for summary judgment and, in the alternative, an order striking out the whole of the plaintiff's claim against it. The defendant argues the plaintiff's claim is statute-barred by the six-year rule in s 4(1)(a) Limitation Act 1950.¹

[5] The plaintiff argues that the claim is within time because the cause of action accrued at the very earliest on 14 February 2011 and the proceedings were filed on 14 December 2016.²

[6] There is a significant dispute between the parties as to whether the architect properly issued a Certificate of Practical Completion under the construction contract. The plaintiff asserts the practical completion certificate was not properly certified. The defendant says otherwise.

[7] The resolution of that dispute is relevant because it triggers a contractual process. After the issuing of the certificate, the plaintiff must submit a final payment claim. The architect then assesses the claim and issues a provisional final payment schedule. If the plaintiff fails to submit that claim, the contract requires the architect to make an assessment and forward it to the plaintiff. The plaintiff is then given 10 working days to dispute the assessment failing which the contract process leads to the issuance of a Final Payment Schedule by the architect. The contract then provides that the plaintiff cannot dispute the Final Payment Schedule more than 20 working days after it has been issued.

[8] The defendant argued that this contract process was undertaken and the plaintiff did not dispute what the defendant regards as the Final Payment Schedule issued on 9 September 2011.

¹ Limitation Act 1950 applies to these proceedings because the pleaded cause of action is based on an act before 1 January 2011 and the 1950 Act applied immediately before repeal by the Limitation Act 2010.

² The defendant argued the filing date might have been 22 December 2016, but it is common ground the proceedings were filed in December 2016.

[9] The defendant argues that the limitation clock began to toll when it claims the architect issued the Certificate of Practical Completion on 31 August 2010. Alternatively, the defendant argues the clock began when the local authority issued the code of compliance certificate on 20 August 2010.

[10] However, at the heart of the case lies this dispute as to whether practical completion was certified on 31 August 2010 in accordance with the contract. The resolution of that issue is clearly relevant to the determination as to when the breach of contract cause of action arose. I consider this core factual dispute rendered both the strike-out and summary judgment applications unsustainable.

Background to construction contract

[11] Section 12 of the construction contract sets out the process for obtaining “practical completion” of the work and its effects. Under cl 12.1.2:

If the architect decides that the Contract Works ... have achieved practical completion, the architect must issue a certificate of practical completion of the Contract Works, ... as soon as is practicable, stating the date on which the Contract Works ... achieved Practical Completion. The architect must give copies of the certificate to the principal and the contractor.

[12] The term “practical completion” is defined in cl 12.1.1 as follows:

The Contract Works, or a Separate Section of them, attain Practical Completion when:

- (a) Information and warranties listed in the Specific Conditions which are essential for the Principal’s use of the Contract Works have been supplied;
- (b) everything has been done except for minor omissions and minor defects the Architect and the Contractor agree which:
 - (i) the Contractor has reasonable grounds for not promptly correcting;
 - (ii) do not prevent the Contract Works, or a Separate Section of them, from being used for their intended purpose;
 - (iii) can be corrected without prejudicing the convenient use of the Contract Works or any Separate Section of them.
- (c) everything has been done except the work which the Architect and the Contractor have agreed to defer.

[13] If the certificate is issued, a contractual process is set in motion. It is designed to lead to a default position. Under cl 15.1, the contractor must submit its final payment claim to the architect and send a copy to the principal. If the contractor fails to submit that claim within a specified period, the architect under cl 15.7 must make an assessment and forward it to the contractor. The contractor then has 10 working days in which to notify the architect about any objection to the assessment and the reasons for the objections. If objections are notified the architect makes a written decision under cl 17.

[14] Consequently, the architect issues under cl 15 a Final Payment Schedule. Under cl 15.8, the “Final Payment Schedule cannot be disputed by the Contractor ... more than 20 working days after it has been issued.”

[15] If the Certificate of Practical Completion was not issued in accordance with the contract the default mechanism for assessment by the architect is not triggered; nor are the contractual consequences which ensue.

Principles governing strike-out application

[16] It is well settled that for a striking out application the Court deals with the case on the footing that the pleaded facts can be proved.³ Also, a conservative approach is taken to strike-out applications. It is a jurisdiction that should be sparingly exercised and only in a clear case. Before the application can succeed it must be clear that the plaintiff cannot succeed on the cause of action or causes of action in question.⁴

[17] Here, the strike out application can be given short shrift. On the face of the pleadings—which must be treated as true—the plaintiff’s cause of action is sustainable. The plaintiff pleads that it issued a final payment claim on 12 August 2011, the balance of which remains owing. The strike-out application plainly cannot succeed in the face of those basic albeit bare pleadings. The defendant’s application thus lacked merit and should not have been advanced.

³ *Attorney General v McVeigh* [1995] 1 NZLR 558 at [566]; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, 645–646.

⁴ *Marshall Futures Limited v Marshall* [1992] 1 NZLR 316 at [322].

The relevant summary judgment principles

[18] As noted already, the defendant seeks summary judgment in the alternative. Affidavits have been filed by both parties. They traverse several matters some of which are collateral facts that remain in dispute. However, what is clear is that both parties hotly dispute the central factual issue about whether the Certificate of Practical Completion was properly issued under the contract.

[19] In summary judgment, a defendant must satisfy the Court the entire causes of action in the statement of claim cannot succeed. Here, there is only one cause of action pleaded. The onus is on the defendant seeking summary judgment to show that the plaintiff's cause of action cannot succeed. I must be left without any real doubt or uncertainty on the matter before summary judgment can be issued. I accept I must decide questions of law where appropriate and should not hesitate to do so. However, I am not permitted to attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

[20] In *Auckland Christian Mandarin Church Trust Board v Canam Construction (1995) Ltd* the High Court held:⁵

[37] So far as summary judgment applications by defendants are concerned, the position is governed by r 12.2(2) of the High Court Rules which provides:

The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

The relevant principles have been set out by the Court of Appeal in *Westpac Banking Corp v M M Kembla New Zealand Ltd*. The defendant must discharge the civil onus that the plaintiff cannot succeed; as with all summary judgments material facts should not be in dispute; the summary procedure would be inappropriate if the judgment can only properly be reached after hearing all the evidence at trial or if there are developing points of law which may require added context and perspective available in a full trial. [Footnotes removed]

⁵ *Auckland Christian Mandarin Church Trust Board v Canam Construction (1995) Ltd* CIV-2008-404-8526, 25 June 2010.

[21] Keane J made similar observations in *Board of Trustees Glen Innes Primary School v Ahead Buildings*:⁶

[13] Where on the pleadings as they are, or could be, and on any evidence given or foreshadowed, a proposition of law advanced by the plaintiff is clearly untenable, that can be a basis for a grant of summary judgment instead of a strike out. But, whichever of these powers is for exercise, everything material must be reliably before the Court. Summary judgment will be inappropriate, the Court continued to say in the *Westpac* case, at [62], where there are disputed issues of fact or where there is a novel question of law. As to the latter, that is no less so on an application to strike out: *Attorney General v Prince & Gardner* [1998] 1 NZLR 262, 267, CA; *Couch v Attorney General* [2008] NZSC 45, [43].

[22] A robust approach is necessary. Judgment can be entered where there may be differences on certain factual matters if the lack of a tenable position is plain on the material before the Court.

[23] Here, the defendant must establish that there are no material facts in dispute which influence the commencement date of the limitation period it argues for. If such facts remain in dispute, the summary judgment procedure is inappropriate. And the resolution of those material facts must await trial.

Concept of cause of action

[24] The meaning of “cause of action” is well-settled and ought not to be analysed further. However, certain submissions by the defendant require this trite law to be reaffirmed.

[25] A cause of action accrues when “all the material facts and elements of the cause of action first come into existence.”⁷ For an action for breach of contract, the cause of action accrues when the breach occurs. That is the ordinary principle in contract. At the time of breach all the elements necessary to establish the cause of action exist. In short, the cause of action crystallises when the contract is broken. The six-year limitation period runs from that point.⁸

⁶ *Board of Trustees Glen Innes Primary School v Ahead Buildings*, HC Auckland, 21/12/2009, CIV-2008-404-7268 at [13], Keane J.

⁷ *Saunders v Bank of New Zealand* [2002] 2 NZLR 270 at [28].

⁸ *Saunders v Bank of New Zealand* [2002] 2 NZLR 270 at [28].

[26] The defendant retorted that the plaintiff's argument the cause of action did not crystallise until the defendant breached the contract by failing to pay, is not correct law. The defendant submitted that a cause of action may arise before any quantum can be identified. It called in aid the hypothetical motor vehicle accident cause of action as an analogy. But, in those cases limitation periods ordinarily run from the date of the accident which is the tort event with quantum being fixed later. That is not the type of action pleaded here.

[27] Here, the bare breach of contract claim crystallises the moment there is a failure to pay what is owed. The limitation period runs from that point; the moment the contract was broken. It is at that point the cause of action accrues. The defendant's arguments on this point are misconstrued.

The material fact in issue that renders summary judgment inappropriate

[28] As noted already, the defendant argues that the architect issued a valid Certificate of Practical Completion under the contract. If valid, it set in motion the default mechanism under the contract. It says this process took place which led to the architect issuing a Final Payment Schedule which was never disputed. And thus, no money is owed.

[29] The defendant argues on those claimed non-disputed facts the earliest commencement of the limitation period can be marked out in two clear ways. First, it argues the period commenced on the date the Certificate of Practical Completion was issued. Alternatively, it argues the period commences on the date the code of compliance certificate was issued by the local authority.

[30] The defendant relied on a series of High Court construction contract cases which adopted these demarcation markers to fix the commencement of the relevant limitation period. I deal with reliance on those cases below.

[31] In *Glen Innes Primary School v Ahead Building*,⁹ the claim related to alleged building defects. The contractor built a new school hall for the Glen Innes Primary School. A code of compliance certificate was obtained. The hall, however, proved not to be water-tight. It ceased to be usable because it posed as a risk to health and safety.¹⁰ The High Court held the latest date from which the six-year limitation period could have run was the date on which the certificate of code of compliance was given. The contract claim thus was time barred.

[32] However, the nature of the claim in *Glen Innes Primary School* was based on defective work which happened before the issuance of the code of compliance certificate. That type of claim is conceptually different from the plaintiff's bare breach of contract debt claim asserted here.

[33] The same conclusion applies to the second case relied upon by the defendant: *Auckland Christian Mandarin Church Trust Board v Canam Construction (1995) Ltd*.¹¹ In that case, the contractor built a church building for the plaintiff. Water leakage problems were discovered. Amongst the settled causes of action, the plaintiff pleaded breach of contract against the contractor for failing to construct the church in accordance with good building trade practices.

[34] In *Canam*, the High Court held the date of practical completion fixed the date at which the substance of the contractor's contractual obligations came to an end. Alternatively, the Court held even if the date of practical completion did not fix the end date of those obligations, they ceased when the code of compliance certificate was issued.

[35] However, the nature of the claim in *Canam* related to an allegation of defective work under the construction contract. All the claimed defect work was completed

⁹ *Board of Trustees Glen Innes Primary School v Ahead Buildings*, HC Auckland, 21/12/2009, CIV-2008-404-7268, Keane J.

¹⁰ *Board of Trustees Glen Innes Primary School v Ahead Buildings*, HC Auckland, 21/12/2009, CIV-2008-404-7268, Keane J at [1]-[2].

¹¹ *Auckland Christian Mandarin Church Trust Board v Canam Construction (1995) Ltd* CIV-2008-404-8526, 25 June 2010.

prior to the issuance of the completion compliance certificate. Again, this is conceptually different from the nature of the claim made by the plaintiff here.

[36] I accept the purpose of the Construction Contracts Act is to improve contractors' cash flows¹² without technical quibbles being raised by those against whom claims are made.¹³ But, in this case, if the issuance of the Certificate of Practical Compliance was not in accordance with the contract the severe default mechanism is not triggered.

[37] This material fact remains in issue. I am not satisfied the plaintiff's dispute of that fact is spurious or plainly contrived. Also, I am not satisfied the dispute must be categorised as a pure question of contractual interpretation. In my view, it is a mixed question of fact and interpretation and thus not suitable for resolution by summary judgment. Accordingly, resolution of that issue must await trial.

[38] For the following reasons, this analysis applies equally to the plaintiff's alternative argument the last possible date from which the cause of action accrued was the date the code of compliance certificate was issued.

[39] The code of compliance certificate was issued on 20 August 2010. It was in typical form. It states that the authority was satisfied on reasonable grounds that the building work complied with the building consent. The issuance of the certificate signals that the construction work was completed, subject to some minor matters, and that the building could be occupied.

[40] The issuance of this certificate will be a high hurdle for the plaintiff to cross to avoid a time barred claim. But, occupation of the building—on the basis the construction work has been independently certified as substantially complete—is different from the issue as to whether the owner still owes money for all work done under the contract. If the Certificate of Practical Completion was not issued in accordance with the contract, the plaintiff's non-payment debt action survives the

¹² *George Developments v Canam Construction* (2005) 18 PRNZ 84 (CA) at [41]-[43]; *Sol Trustees Ltd v Giles Civil Ltd* [2014] NZCA 539 at [23]-[25].

¹³ *George Developments v Canam Construction* (2005) 18 PRNZ 84 (CA) at [41]-[43].

issuance of the code of compliance certificate. The core factual dispute thus affects this alternative argument.

Conclusion

[41] The defendant's applications to strike out and seek summary judgment against the plaintiff on the limitation period point are dismissed. The parties are to file memoranda in relation to costs.

W P Cathcart
District Court Judge