IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2017-009-3165
[2018] NZDC 10472

BETWEEN	WHYTE CONSTRUCTION LIMITED Plaintiff
AND	SELWYN WRIGHT and THELMA ESMA WRIGHT Defendants

Hearing: 22 and 23 May 2018

Appearances: Mr C R Johnstone for the Plaintiff
Mr B H Frampton for the Defendants

Judgment: 22 June 2018

RESERVED DECISION OF JUDGE G S MACASKILL

The plaintiff's claim

[1] The plaintiff claims, pursuant to a fixed price build contract with the defendants dated 24 February 2015, two unpaid progress claims issued in September and October 2015, plus interest. The total amount outstanding, after credit for the deposit paid, is $34,057.94.

Introduction to issues

[2] The defendants' building was damaged by the 2010/2011 Christchurch earthquakes. They lodged a claim with their insurers, a Lloyds-based syndicate of underwriters, against the insurance placed with their brokers, Runacres & Associates Limited of Christchurch. Cunningham Lindsey, loss adjusters, were appointed by the insurers as their agent.

[3] The plaintiff was engaged by the defendants to assist with identifying the damage, scoping and estimating the repairs. Initially, all dealings were through

Ms Blackwell of Runacres, at Mr Wright's direction, and Mr Alex Cruze of Cunningham Lindsey, for the underwriters.

[4] Cunningham Lindsey arranged a building assessment by Engineering Design Consultants, who produced a preliminary detailed engineering evaluation ("DEE") dated 26 August 2013. The plaintiff was directed to prepare a scope of works and pricing, interpreting the DEE report.

[5] On Cunningham Lindsey's instructions, the building contract was prepared in the Certified Builders Association "Fixed Price Short Form". This contract was signed on 24 February 2015. Mr Wright paid a deposit of $7,818.00 to the plaintiff.

[6] Under the build contract, an engineer was required to prepare design details for the building works, as scoped by the DEE report. At that stage, an exemption from the local authority building consent was contemplated. Mr Simcock of TM Consultants Limited was engaged by the plaintiff.

[7] TM Consultants' building evaluation identified a major problem. The damage found was substantially greater than that scoped by the DEE report. In Mr Simcock's assessment, taking into account the original building design, the seismic strength rating was only 7% of new building standard ("NBS"), not 40% NBS, as assessed by Engineering Design Consultants.

[8] Discussions and communications followed. By this stage, the defendants had changed brokers from Runacres to Crombie Lockwood (Mrs Belinda Barclay). Mr Simcock reported on 30 March 2015, recommending additional structural investigation and scoping.

[9] On 2 April 2015, Mr Simcock met Mr Whyte and Mr Cruze at the plaintiff's offices. As part of the consultation, Mr Simcock had separate telephone conversations with Mrs Barclay and Mr Wright. The plaintiff contends that the outcome was that Mr Simcock was instructed to prepare design drawings and documentation to reinstate the building to 34% NBS. TM Consultants prepared a new fee proposal, which was provided to Mrs Barclay on 7 May 2015. I find that it was probably provided to

Mr Wright by Mrs Barclay soon after. The plaintiff contends, and the defendants dispute, that the work contemplated by this proposal and the earlier discussions constituted a Variation of the Works under the build contract.

[10] TM Consultants then prepared the design drawings and documentation and the plaintiff re-scoped and re-priced the works. Given the extent of the building works, a building consent was required. The application was lodged with the Christchurch City Council, through TM Consultants, in early May 2015. A consent was granted on 15 May 2015.

[11] The works did not start. Cunningham Lindsey was directed to engage an engineer to peer review TM Consultants' drawings and documents. At one point, there was a suggestion that the design strength of the building might be taken to 67% NBS, which was well above the level for which it had been designed. In August 2015, Mr Wright applied to the Council to withdraw the building consent.

[12] Two invoices for progress payments were issued by the plaintiff:

(a) Invoice 706282 on 24 September 2015 for $20,511.40.

(b) Invoice 705393 on 31 October 2015 for $11,695.00.

[13] No challenge or objection to either progress claim was made by the defendants within the contractual period of five working days. The plaintiff says that the total now due, after credit for the deposit paid under the build contract by Mr Wright, together with interest pursuant to the building contract, is as set out in Mr Whyte's affidavits sworn on 8 May 2018 and 21 May 2018. In summary, the plaintiffs' claim is:

First progress claim issued 24.09.15	$20,511.40
Less deposit	$7,818.00
Sub-total	$12,693.40
Second progress issued 31.10.15	$11,695.50
Interest to 22.05.18	$9,669.04
Aggregate total	**$34,057.94**

Legal costs and disbursements (excluding preparation) to 07.05.18	$13,481.04
Total claim	**$47,538.98**

Mr Smith, a chartered accountant, confirms the interest calculation. There is no challenge to the calculation, of $9,669.04, to 22 May 2018.

[14] There is no challenge to the work done or to quantum. The defence is that there was no variation of the build contract and no liability.

Assessment of Mr Wright's evidence

[15] Mr Wright gave evidence on behalf of himself and his wife. This was given in the form of an affidavit, sworn on 21 May 2018, and oral evidence given at the hearing.

[16] Mr Wright said that the agreement of 24 February 2015 was the only agreement he had entered into with the plaintiff and he had not subsequently agreed to any variation of that agreement or any substituted agreement.

[17] The principal issue for determination in this case is whether the plaintiff has proved the alleged variation on or about 2 April 2015, despite Mr Wright's denial.

[18] I found Mr Wright to be an unreliable witness as to the facts, for these reasons:

(a) When he was cross-examined as to the provisions in the contract, it became apparent that he had not taken the time before signing it to master its provisions. For example, he had no working knowledge of the provisions relating to variation of contract or as to the payment of progress claims.

(b) Despite his opposition to the plaintiffs' claim, he had not grasped the key points at issue. He said in his affidavit (paragraph 15) that he had been made aware that the plaintiff was apparently not able to carry out the repair work for the price which had been agreed and was seeking

an agreement for re-scoped repairs at a significantly higher contract price. That understanding is not supported by any evidence.

(c) He claimed that he had not understood that the initial work undertaken by Mr Simcock of TM Consultants was work necessary for the execution of the contract by the plaintiff and was specifically provided for in the contract.

(d) He claimed that had not understood until the hearing that Mr Simcock had concluded that the work contemplated by the original contract simply could not have been carried out because it would not have complied with the building code. Having regard to all the evidence, this claim is unlikely to be true.

(e) Mr Wright's evidence was demonstrably wrong in material particulars, such as when he received documents from Mrs Barclay and had meetings with her. When challenged about his versions of events, he was usually reluctant to yield, even when confronted with contemporaneous records and communications made by other persons, including Mrs Barclay. Yet he was not able to offer any contemporaneous notes or other records of his own to support his position.

(f) When cross-examined about matters that ought reasonably to have been within his knowledge, Mr Wright appeared evasive. For example, when questioned about the defendants' settlement with their insurers, he disavowed personal knowledge of the negotiations carried out by his lawyers. Those negotiations included the inconvenient fact that the defendants' liability to pay the plaintiff formed a part of the claim and, it seems, part of the settlement sum.

The authority of the defendants' brokers

[19] It was the defence case, in respect of which Mr Wright's evidence was offered in support, that his brokers and, in particular, Mrs Barclay, did not have the defendants'

authority to enter into any agreement on their behalf. Mr Wright clearly knew that Mrs Barclay was involved in the discussions with the plaintiff and Mr Simcock. The brokers were so involved, he knew, because the defendants were taking advantage of the claims administration service they provided and, in that role, they were acting as the defendants' agent.

[20] It was clearly within the brokers' ostensible and actual authority to agree to any variations of the build contract that appeared reasonably necessary to carry it forward. By leaving Mrs Barclay in that position of apparent authority, the defendants cannot now be heard to say that she did not in fact have their authority. Mr Wright is estopped by his conduct from denying that Mrs Barclay had that limited authority. That is not to say that Mrs Barclay had apparent authority to agree to a substantial change in the scope of the works under the build contract or to the contract price.

The involvement of the defendant's insurers

[21] The involvement of the defendants' insurers is also relevant. Mr Wright knew that the discussions included Mr Cruze, acting on behalf of the underwriters, who were ultimately paying the bills. He took no steps to exclude Mr Cruze from the discussions, to limit his involvement in them, or to disassociate himself from any assent that Mr Cruze's active involvement implied.

The relevance of the defendants' insurance claim

[22] Mr Johnstone contended that the fact that the defendants used the product of Mr Simcock's work in re-scoping the work for the defendants in the negotiations with the insurers can be taken as an indication or recognition of his assent to the variation. I agree.

[23] It is also relevant that the defendants included the plaintiff's claim in their claim against their insurers and recovered it. This conduct is at least inconsistent with their denial of liability to the plaintiff. It indicates that in making the claim for indemnity, settling the claim and accepting payment, the defendants recognised their liability to the plaintiff.

Mr Simcock's evidence

[24] On 2 April 2015, Mr Simcock and Mr Whyte met with Mr Cruze of Cunningham Lindsey at the offices of the plaintiff to discuss TM Consultants' building evaluation and review of the DEE report.

[25] In Mr Simcock's assessment, the DEE made assumptions about the strength of the building. Those assumptions were based on the building's age and general construction and not on the original plans (which were not available), nor on a site inspection. This meant that the repair work could not be carried out without a building consent and a building consent would not have been granted for the works contemplated by the contract. It was necessary, therefore, to materially change the scope of the works.

[26] During the meeting, or immediately after it, Mr Simcock spoke by telephone, separately, with Mr Wright and with Mrs Barclay. Mr Simcock discussed his concerns about the building's strength, the implications of the building's use and the need for additional strengthening works to effect the repair. He explained that this would require further investigation, including invasive checks to the foundations and its tilt slab panel connections, if the original building construction drawings could not be located.

[27] I accept Mr Simcock's evidence that he described those aspects to Mr Wright, Mrs Barclay and Mr Cruze. I reject Mr Wright's denial that any of this was explained to him. Mr Wright did accept that Mr Simcock called him and, under cross-examination, admitted that the strengthening of the building was discussed. I conclude that Mr Simcock made Mr Wright aware of the work that had to be done if the matter was to be progressed and that Mr Wright did not express any dissent or indicate that he did not consent. If he did not expressly consent to it, he did so implicitly. If he did not specifically turn his mind to the question whether this amounted to a variation of the contract, that is immaterial. The matter is to be considered on the basis of his conduct.

[28] Mrs Barclay and Mr Cruze clearly understood the additional steps to be taken by TM Consultants. Mr Simcock emailed Mrs Barclay the same day, setting out the specific tasks to be undertaken by TM Consultants and the plaintiff, with time of the essence. Mr Simcock's email records the agreed outcomes of the meeting, incorporating the telephone discussions, for TM Consultants, through the plaintiff, to undertake the steps set out in the email at paragraphs numbered 1-6. Mr Simcock described the communication as effectively a "site instruction".

Subsequent conduct

[29] The defendants' subsequent knowledge that the work was being carried out and lack of objection is consistent with their consent to the work. The fact that the work was continuing to their knowledge is evidenced (inter alia) by the fact that, on 7 May 2015, Mr Simcock provided an update to Ms Barclay and that, on 14 May 2015, Mrs Barclay posted to the defendants the plaintiff's scope and pricing that incorporated the TM Consultants' design. There was no protest when, on 24 September 2015, the first progress claim was issued or on 31 October 2015, the second progress claim was issued. As late as 28 April 2016 the defendants' lawyers, Saunders & Co, wrote to Cunningham Lindsay in terms that recognised that the plaintiff was still actively involved:

> It is in all the parties' interests to have a clear and common understanding of the result of the settlement of the insurance claim, the proposed cessation of the involvement of Whyte Construction Limited, in the application for settlement funds.

Was there an agreement?

[30] Having regard to Mr Wright's own experience, I am satisfied that he understood the significance of what was being proposed and the implications. The build contract could not be performed because of the deficient engineering assessment upon which it was based, as supplied by Mr Wright. This was the defendants' problem and the work proposed was to be done in their interests. While there was no formal written instruction from Mr Wright, or from Mrs Barclay or Mr Cruze, the evidence proves that there was agreement that TM Consultants would proceed with the work for the defendants. That agreement must be viewed as a variation to the build contract.

Formality as to variation

[31] I accept Mr Johnstone's submission that, for the purposes of the build contract, the services to be carried out by TM Consultants constituted a variation. Those services were outside of the building works expressly or impliedly provided for in the Schedule. Clause 6.1 of the contract expressly accommodates the circumstance of the inability to record a variation in writing with estimated cost, and provides that the failure does not disqualify the builder from its entitlement to be paid for the variation works. I accept that the time constraints and the nature of the work meant that it was not practicable to record the variation in writing.

[32] Furthermore, in all the circumstances of the case, it would be unconscionable to permit the defendants to rely on clause 6.1 when the defendants consented to the work being done, were aware that the work was being done, have had the benefit of it and when they have been indemnified for the plaintiff's claim by their insurers.

Status of contract

[33] Neither party argued that the building contract was terminated by agreement or by law at any time relevant to the plaintiff's claim and it is unnecessary for me to make any determination as to its status.

Conclusion

[34] I conclude, on the balance of probabilities, that, on 2 April 2015, the defendants, by Mr Wright and their agents, agreed that TM Consultants would perform the additional investigation and design work set out in Mr Simcock's email of that date. That agreement was a variation to the building contract.

Outcome

[35] The plaintiff is entitled to judgment for:

(a) The sum of $34,057.94

(b) Interest to 31 May 2018 $9,669.04

(c) Legal costs and disbursement to 7 May 2018 (exclusive of preparation for and conduct of trial).

[36] The plaintiff is also entitled to:

(a) Legal costs for preparation for and conduct of the trial on a solicitor/client basis, pursuant to clause 20.10 of the build contract.

(b) Any additional costs incurred on the defendants' counterclaim, which was not pursued at trial.

(c) Witnesses' expenses as fixed by the Registrar.

(d) Any other disbursements reasonably incurred as fixed by the Registrar.

[37] If there are any issues as to the form of the judgment, or as to interest and costs, if counsel cannot agree, either party may file and serve a memorandum and the opposite party may reply within 14 days.

GS MacAskill
District Court Judge