IN THE DISTRICT COURT
AT KAIKOHE

I TE KŌTI-Ā-ROHE
KI KAIKOHE

CIV-2018-027-000158
[2019] NZDC 7305

BETWEEN	THE RINTOUL GROUP LIMITED Plaintiff
AND	FAR NORTH DISTRICT COUNCIL Defendant

Hearing: 27 November 2018

Appearances: R Mark for the Plaintiff
G J Christie for the Defendant

Judgment: 18 April 2019

RESERVED JUDGMENT OF JUDGE K B de RIDDER

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[1] The Rintoul Group Limited ("Rintoul") and the Far North District Council ("the Council") entered into various roadworks contracts in 2014. They related to a culvert replacement on West Coast Road, slip repairs on Awaroa Road and Broadwood Road, and slip repairs on Mangakahia Road.

[2] The contracts were subject to the general conditions for contract specified in NZS3910:2003 for the West Coast Road contract, and NZS3910:2013 for the remaining contracts. In his affidavit of 1 November 2018 Mr Swanepoel states that the relevant dispute sections do not differ as between the NZS3910:2003 and NZS3910:2013. Rintoul does not challenge this assertion. It also appears that the other relevant provisions of the two Standards which are relevant to this proceeding do not differ either. For ease of reference I will simply refer to NZS3910:2013 ["the NZ Standard"].

[3] The Council withheld payment to Rintoul of retention monies held by the Council as it said that repairs were necessary to the work carried out under both the West Coast Road contract and the Awaroa Road and Broadwood Road contract.

[4] In respect of the Mangakahia Road slip repair contracts an issue has arisen as to whether or not interest should be payable by the Council to Rintoul in respect of retention monies withheld by the Council.

[5] Rintoul was also required to pay a contractors bond for the Mangakahia Road slip repair contracts. Rintoul now claims interest on the bond from the date it says it was entitled to be released from the bond and to have the bond returned to it.

[6] Rintoul has filed an application for summary judgment against the Council in respect of these six matters.

[7] The Council has filed an appearance under protest, and seeks a stay of the proceedings together with a referral to arbitration.

[8] There is very little if in fact any dispute about the essential background facts relating to this proceeding. However, there is dispute about the applicability of the summary judgment procedure, the Arbitration Act 1996, and the provisions of the Construction Contracts Act 2002.

West Coast Road contract

[9] This contract was entered into on 9 January 2014 and the documents recorded that the contract agreement included the NZ Standard, and the special conditions of contract.

[10] Condition 12 of the NZ Standard provides specific detailed provisions for the issue of payment claims as permitted by s 14 of the Construction Contracts Act and makes further provision relating to payment schedules over and above those set in s 21 of the Construction Contracts Act. Condition 12.3.1 provides that the Council retain retention monies as required under the Special Conditions of the contract. The Special

Conditions of this contract specifically provided for retention monies at the specified rate.

[11] 12.3.2 requires the Council to pay Rintoul any remaining defects liability retention within 10 working days after the date of the Final Completion Certificate for the whole of the contract works.

[12] 12.4 and 12.5 make specific provision for a final payment claim and a final payment schedule, with the final payment claim to be submitted by Rintoul not later than one month after the issue of the Final Completion Certificate or within such further time as the Engineer may allow. 12.6 provides that upon the issue of the final payment schedule the Council ceases to be liable to Rintoul except to pay the amount payable on the final payment schedule together with any retention monies under 12.3.

[13] 13.1.2 and 13.2.1 of the NZ Standard provide a mechanism for referring disputes and differences concerning the contract to the Engineer appointed under the contract. 13.4.1 provides that if either the principal or the contractor is dissatisfied with the Engineer's formal decision, or no formal decision is given within the prescribed time then either party may require the matter in dispute be referred to arbitration.

[14] The construction work was completed on or about 21 August 2014. By email dated 21 November 2014 the Council notified Rintoul of defects in the subsoil. On or about 15 December 2014 the road was sealed without Rintoul addressing the subsoil defects. The Council wrote to Rintoul on 17 December 2004 noting that the sealing had been carried out but assumed that the seal that had been applied was a temporary seal for the Christmas period which would be later rectified with a final seal. On 18 December 2014 Rintoul advised the Council that the seal was final. In February and May of 2015 the Council requested Rintoul return to the site and rectify the outstanding defects including a reseal but Rintoul did not respond to this request.

[15] On or about 21 January 2016 the Engineer authorised an alternative contractor to do the work and the Council used the retentions withheld from payments to Rintoul

to pay this alternative contractor. The sum paid exceeded the retention monies withheld from Rintoul.

[16] On 3 May 2016 Rintoul requested release of the retentions for the West Coast Road contract. It did not dispute the Council's position that there were defects in the work carried out by Rintoul that required remedying.

[17] On 31 January 2017 Rintoul lodged a payment claim for the retention monies pursuant to the Construction Contracts Act 2002. The Council did not issue a payments schedule in the time prescribed by the Act. Accordingly, Rintoul now seeks summary judgment in accordance with the default provision in s 23 of the Construction Contracts Act.

Awaroa Road/Broadwood Road Contract

[18] This contract was entered into on 19 December 2014. Conditions 12 and 13 of the NZ Standard also applied to this contract.

[19] By July 2015 an issue had arisen regarding what the Council said was Rintoul's failure to complete outstanding work for the two projects and on 10 August 2015 Rintoul were given five working days to complete the work. By email dated 21 August 2015 the Council advised that as all outstanding items had not been acknowledged, organised, or completed within the timeframe requested by the Council it intended to engage in another contractor to complete the work. There is no evidence however that the Council did engage another contractor.

[20] The Engineer to the contract issued a Certificate of Practical Completion for the work on 19 October 2015. Prior to that however the Council had requested Rintoul to complete outstanding defect work, and repeated that request by email dated 16 November 2015. Rintoul disputed that it was required to carry out further work and did not do so. On 13 February 2017 Rintoul served a payment claim on the Council claiming the sum of $36,052.23 (plus GST) being the balance of the contract price, variations, and release of retention monies. The Council did not issue a payment schedule in response nor pay the sum claimed.

[21] Rintoul now seeks summary judgment for the sum of $10,258.38 being the retentions plus GST being only part of the sum specified in the payment claim.

Mangakahia Road contracts

[22] The parties entered into three separate but connected contracts for three separate slip repairs.

[23] All three agreements included the same provisions for retention monies at the specified rate. 12.7 of the NZ Standard makes provision for the payment of interest "on all scheduled amounts shown as payable in the Payment Schedule and remaining unpaid after expiry of the time provided for payment".

[24] The special conditions of contract stipulated a defects liability period of 12 months for the purposes of condition 11 of the NZ Standard. Two of the three contracts also required Rintoul to provide a bond.

[25] The Engineer to the contracts certified practical completion for the slip repair contracts dated 31 May 2016 thus providing for the defect period to expire on 31 May 2017. In June 2016 the Council issued a notice certifying release of the sum of $16,490.83 being monies retained for one of the contracts. On 23 August 2016 the Council issued two similar notices for payment of retentions of $3,619.56 and $6,710.45 respectively. But it appears that the Council did not pay on these notices.

[26] In the meantime a dispute had arisen concerning two of the slip repair contracts and that matter proceeded to arbitration. The Arbitrator found in favour of the Council and issued an interim award as to quantum on 14 October 2016 and a final award on 24 November 2016.

[27] Rintoul appealed the arbitration award in the High Court and by decision dated 9 March 2017 Rintoul's appeal was dismissed, and the awards entered as judgments.

[28] On 29 March 2018 Mr Christie emailed Mr Mark a reconciliation schedule in which the Council set out its calculation of a set off of the sums owed to Rintoul against the amount of the outstanding arbitration award and costs. Subsequently the

parties exchanged correspondence in which Rintoul claimed release of the retentions and the Council advised of disputes relating to the contracts and confirming its intention to apply set off of any sums owed to Rintoul against the outstanding award. The Council also referred to the arbitration provisions in the contracts and expressed its view that all matters should be determined in arbitration. Rintoul also notified that it claimed interest on the retention sums from the end of the defect period of 31 May 2017.

[29] The various issues between the parties were not resolved and subsequently these proceedings have issued.

[30] In his affidavit of 1 November 2018 in house counsel for the Council states that in relation to the Mangakahia Road contracts the Council has now paid all outstanding retentions payable to Rintoul together with interest from 31 March to 1 November 2018 after the application of the set off, and is paying the remaining balance on the retention monies on the West Coast Road contract after allowing for the shortfall between the initial retention and the sum paid to the ultimate contractor.

Plaintiff's submissions

[31] Mr Mark refers to the case of *Zurich Australian Insurance Limited v Cognition Education Limited*[1] which also involved an application for summary judgment and a referral to arbitration. In that case the Supreme Court emphasised the determinative provision being Article 8(1), Schedule 1, of the Arbitration Act 1996 and ruled that, where there were competing applications for summary judgment and a referral to arbitration the Court was required to grant a stay unless the Court found that the arbitration agreement was null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

[32] Mr Mark submits that in this case, there is no dispute regarding the plaintiff's claims and therefore the application for a stay cannot succeed and the plaintiff's claim for summary judgment should succeed. With respect to the West Coast Road and

[1] [2015] 1 NZLR 383

Awaroa Road/Broadwood Road contracts, the plaintiff relies upon the valid payment claim served on the defendant for which no payment schedule was served by the Council thereby entitling Rintoul to summary judgment in accordance with s 23 of the Construction Contracts Act. Therefore the plaintiff says there can be no dispute.

[33] With respect to the claims relating to the Mangakahia Road contracts it is submitted that as the defects liability period expired in May 2017 interest is payable on the retention monies withheld by the Council until the date of payment.

[34] Similarly, Rintoul claim that the bond should have been released on the expiry of the defects liability period in May 2017.

Defendant's submissions

[35] The Council notes that all the contracts contain arbitration provisions which require disputes that are not resolved by way of a formal decision by the Engineer to the contracts to be referred to arbitration.

[36] With respect to the West Coast Road contract the Council maintains that there were defects with the work and, as Rintoul failed to return to the site and rectify the defects, the Council had to authorise another contractor to do the work, the cost of which exceeded the retention money held by the Council on this contract.

[37] Whilst acknowledging that no payment schedule was provided in response to the payment claim made by Rintoul on 31 January 2017 the Council note that there are no cashflow issues as the work was conducted in 2014 and the payment claim was not lodged until three years later in 2017. It argues that as there is a dispute it must be resolved by way of arbitration.

[38] The Council maintains a similar argument in respect of the Awaroa Road and Broadwood Road contract. Although acknowledging the Council failed to provide a payment schedule in response to Rintoul's payment claim of 13 February 2017, again there is no cashflow problem and the payment claim was not lodged until two years

later in 2017 against a background of a dispute between the parties as to outstanding defects the Council says existed.

[39] With respect to the Mangakahia Road contracts the only issue is the date from which interest is to apply. The Council maintains that it only applies to any outstanding monies after the set off applied by the Council on 31 March 2018. Prior to that date, the money owed by Rintoul to the Council as a result of the arbitrator's award which was confirmed by an appeal to the High Court, remained outstanding.

[40] The Council argues that Rintoul's claims against the Council are the subject of an arbitration agreement, that agreement is not null and void, inoperative, or incapable of being performed, and that the Council is acting bona fide in asserting that there is a dispute. On that basis, applying the case of *Zurich Australian Insurances Limited v Cognition Education Limited* the proceedings must be stayed pursuant to Article 8(1) of Schedule 1 of the Arbitration Act 1996.

Discussion

West Coast Road and Awaroa Road/Broadwood Road contracts

[41] The correspondence contained in the Council's evidence clearly indicates that the Council raised a dispute with Rintoul in respect of both contracts. In respect of the West Coast Road contract the Council applied a set off of the sum paid to the alternate contractor instructed by the Council to repair what it says was the defective work carried out by Rintoul against the retention monies held, but that still left a shortfall to the Council. In respect of the Awaroa Road/Broadwood Road contract it appears that the Council simply retained the retention money until the set off applied relating to the arbitral award in March 2018.

[42] It appears that neither party formally invoked the dispute provisions contained in the NZ Standard, nor sought to invoke the adjudication provisions of the Construction Contracts Act. There is no evidence that Rintoul complied with the provisions in the Standard at 12 in relation to providing a final payment claim, and there is no evidence that a final completion certificate was issued.

[43] I note the comments of the Court in *Williams Investment Group Limited v Kings New Developments Limited*[2] at [26] where the Court commented that the considerations applicable to retentions are different to those applicable to other progress payments. Rintoul's assertion that there can be no dispute because of a default provision of the Construction Contracts Act does not stand scrutiny. Given the length of time between the work completed and the issue of the payment claim for the retention monies there was clearly no cashflow issue. In those circumstances, it is not appropriate to set aside what was clearly a notified dispute by the Council and invoke the default provision of s 23 of the Act.

[44] Although the statement of claim in respect of the Mangakahia Road contracts seeks payment of the retention monies I understand that the only issue outstanding now is from what date the interest on unpaid monies should be calculated, being from the end of the defects period which was 31 May 2017 as asserted by the plaintiff, or as from 31 March 2018 when the Council set off the sums owed by it to Rintoul against the unpaid arbitral award against Rintoul. The plaintiff makes no mention whatsoever of the arbitral award in its pleadings which is surprising as that is a highly material fact.

[45] Neither Rintoul or the Council have pointed to any specific provision in the NZ Standard, or the special conditions of contract which provides for or allows for such a set off. But given that the arbitral award related to two of the same contracts and remained unpaid after the defects period it is at least arguable that interest should not accrue until after the set off was applied. That is clearly an issue which is disputed between the parties, but is capable of determination by arbitration.

[46] This relates equally to the issue of interest claimed on the bond which was withheld by the Council and not released. In particular is interest on the bond a scheduled amount in accordance with 12.7.

[47] In summary, I am satisfied that the requirements of Article 8(1) in Schedule 1 of the Arbitration Act are all present with respect to these five contracts. Therefore, applying the case of *Zurich* the disputes should be referred to arbitration.

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[2] DC Tauranga, CRI-2007-070-001323 11 August 2008

Result

(a) The plaintiff's proceedings in this Court are stayed.

(b) The disputes raised by the proceedings are to be referred to arbitration.

K B de Ridder
District Court Judge