IN THE DISTRICT COURT
AT PORIRUA

I TE KŌTI-Ā-ROHE
KI PORIRUA

CIV-2019-091-000435
[2019] NZDC 25687

BETWEEN	DEWS CONSTRUCTION LIMITED Plaintiff
AND	LONGWOOD COURT DEVELOPMENTS LIMITED Defendant

Hearing: 20 November 2019

Appearances: Mr J W Burton for the Plaintiff
Ms C D Batt for the Defendant

Judgment: 19 December 2019

RESERVED JUDGMENT OF JUDGE S M HARROP:
[Plaintiff's Application for Summary Judgment]

Introduction

[1] The Plaintiff, Dews Construction Limited ("Dews") is a construction company based in Upper Hutt. The Defendant, Longwood Court Developments Limited ("Longwood") is an incorporated company based in Wellington whose directors are Logan and Judith Tidey.

[2] The parties entered into a construction contract which was described as Fairfield Subdivision Stage 1. The quotation which was accepted by Longwood on 1 February 2019 was on its face for a fixed sum contract in the sum of $300,000 (excluding GST), including a contingency sum of $24,000 from (excluding GST). The terms of payment included the sentence:

> Variations should be instructed in writing, however this does not affect our right to adjust the final account accordingly.

[3] There appears to be no dispute that the total amount paid by Longwood has been $345,000, including GST, ie. the full amount referred to in the quote which was accepted.

[4] Dews claims considerably further money is payable to it and, pursuant to the Construction Contracts Act 2002, issued a payment claim on 25 June 2019 for $115,513.14 (including GST). Longwood has refused to make any further payment, saying there is no (remaining) contract under which a payment claim could be issued by Dews. Accordingly, it says that the payment claims are invalid because there is no contract to which they are related. However, Longwood did not, as envisaged by the Construction Contracts Act, respond to the payment claim with a payment schedule explaining why the payment claim was disputed in its entirety on that fundamental basis.

[5] On 9 August 2019 Dews filed this proceeding, seeking payment of the $115,513.14, together with interest and costs. It says that sum is recoverable as a debt due pursuant to s 23 of the Construction Contracts Act ("the Act") because it was claimed in a payment claim and no payment schedule was provided by Longwood in response within the time allowed, or at all. Dews has applied for summary judgment, contending that there is no arguable defence to its claim.

[6] Longwood opposes the application for summary judgment on the basis that the work in respect of which there was a contract between the parties has all been done and paid for in full, so that contract has been discharged by the expected performance on each side. It says there were no agreed variations to the work for which the quotation was given. It also says that no additional work beyond that for which the quotation was given has been completed and that the amounts sought to be recovered in this proceeding are for sums in excess of the quoted figure and, in respect of invoices and consequently a payment claim that have not been validly rendered. It says that at the very least there are material facts in dispute as to its liability to pay for the work charged for beyond the contract price.

Summary Judgment Principles

[7] The principles applicable to the determination of an application for summary judgment are well settled and were recently summarised by Associate Judge Osborne (as he then was) in *Giddens v IAG New Zealand Limited*[1]:

> (a) Commonsense, flexibility and a sense of justice are required.
>
> (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.
>
> (c) The Court will not hesitate to decide questions of law where appropriate.
>
> (d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.
>
> (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.
>
> (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.1
>
> (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.
>
> (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 integrity of the summary judgment process.
>
> (i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.
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> (footnotes omitted)

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1 [2016] NZHC 948 at [61].

Discussion

[8] It is not necessary to traverse the rather complicated history of the documentation attached to Mr Dews' affidavit in support of the application for summary judgment. That is because the Stage 1 contract (signed by Mr Mooney, the quantity surveyor acting for Dews) on the face of it provides for a fixed sum contract of $300,000 excluding GST. In a short letter, it expressly refers, twice, to Stage 1 of the project. There is no dispute that Longwood has paid that fixed sum in full.

[9] It also cannot be disputed that, as noted at [2] above, any variations to the contract were expected to be in writing. There is no evidence of any agreed written variation.

[10] Mr Tidey said in his affidavit in support of the opposition to the application for summary judgment (in paragraph 7):

> There were no variations agreed to the quoted figure and also, Dews Construction was never instructed to proceed past Stage 1 of the subdivision.

[11] An affidavit in reply was filed by Mr Mooney on behalf of Dews, but it responds only to the first of Mr Tidey's two assertions in paragraph 7. There is no dispute therefore, on the affidavit evidence from Dews, with Mr Tidey's assertion that Dews was never instructed by Longwood to proceed past Stage 1 of the subdivision. And, as I have noted, on the face of it, Longwood has paid in full for Stage 1.

[12] There was an email on 5 March 2019 from Mr Mooney to Mr Tidey, asking if he could let Dews know if Longwood wanted to commence Stage 2. In his initial affidavit, Mr Dews asserts that he *understands* that later on that day Mr Tidey telephoned Mr Mooney to confirm that Dews was indeed to commence work on Stage 2. Of course, that is hearsay, not being a matter on which he has personal knowledge. Significantly, Mr Mooney, who on the face of it would have personal knowledge of any such telephone discussion and despite filing an affidavit in reply, says nothing in response to Mr Tidey's assertion that Dews was never instructed to proceed past Stage 1 of the subdivision. He does not refer at all to his email of 5 March 2019 to Mr Tidey, nor to whether there was any response to it from Mr Tidey,

let alone does he confirm that there was a positive response confirming that Longwood wanted Dews to commence work on Stage 2.

[13] As to variations to the contract in relation to Stage 1, Mr Mooney says:

> … Mr Tidey says that no variations were agreed in the contract. This is incorrect. There were a number of variations agreed. Usually we would either agree these on site verbally, or by phone.

[14] He goes on to explain by way of example some of the variations which he says were agreed in this way and which were later referred to in a spreadsheet attached to the payment claim.

[15] There is obviously a dispute about whether any variations were agreed, but there is no evidence of any written variation as contemplated by the contract. At the very least this is a genuine and material dispute which is impossible to resolve on a summary judgment application.

[16] In summary, my review of the facts as contained in the affidavits reveals:

1. On the face of it, the only contract between the parties, ie. that in relation to Stage 1, has been performed on both sides and is therefore at an end; and

2. There is a dispute about whether there were any agreed variations to that Stage 1 contract and accordingly about whether any payment can properly be sought from Longwood in respect of any variations. There is no evidence of a Stage 2 contract having been entered into. In any event, Longwood says that the work that has been done by Dews was all supposed to be done under the umbrella of the original (unvaried) Stage 1 contract and therefore is within the total price of $345,000, which it has paid in full.

[17] On the face of these findings the application for summary judgment must be dismissed. The question of whether or not the Plaintiff has a valid claim for further

payment from Longwood can only be determined on the basis of evidence at trial, including cross-examination.

[18] Mr Burton submitted that the whole purpose of the Construction Contract Act procedure is to establish a "pay now, argue later" regime and that because the payment claim was not met with a payment schedule as the Act requires, there is no basis for an arguable defence. I accept that submission, as a general proposition.

[19] Ms Batt's response is that for a payment claim to be valid under the Act it must, however, be referable to an identifiable construction contract. That is, she submits, and I agree, self-evident from and explicitly stated in ss 20(1) and (2) of the Act, particularly s 20(2)(b). Sections 20(1) and (2) provide:

> **20 Payment claims**
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> (1) A payee may serve a payment claim on the payer for a payment,—
>
> (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
>
> (b) if the contract does not provide for the matter in the case of a progress payment, at the end of the relevant period referred to in section 17(2); or
>
> (c) if the contract does not provide for the matter in the case of a single payment expressly agreed under section 14(1)(a), following the completion of all of the construction work to which the contract relates.
>
> (2) A payment claim must—
>
> (a) be in writing; and
>
> (b) contain sufficient details to identify the construction contract to which the payment relates; and
>
> (c) identify the construction work and the relevant period to which the payment relates; and
>
> (d) state a claimed amount and the due date for payment; and
>
> (e) indicate the manner in which the payee calculated the claimed amount; and
>
> (f) state that it is made under this Act.
>
> …

[20] Ms Batt referred me to the observations of an Associate Judge Matthews in *Jamon Construction Limited v Bricon Asbestos Limited.*[2] That case involved the slightly different, but analogous, context of an application to set aside a statutory demand. It is not necessary to discuss that case, because I accept without hesitation, from the terms of s 20(2)(b) alone, that if there is an arguable defence that there was no identifiable valid or subsisting contract under which a payment claim could be issued, then there must also be a genuine argument about whether there is a defence to a claim based on failure to respond to it with a payment schedule. A payment claim can be no more valid that the contract pursuant to which it purports to be issued. In the event there is no identifiable contract and therefore no valid payment claim, then there is no obligation for the recipient to respond with a payment schedule, as would normally be required and the consequences of not doing so simply do not accrue.

[21] Here the payment claim simply refers to the contract as "37a Fairfield Road Sub-division". It does not identify whether it is stage 1 of that contract, or not.

Conclusion

[22] On the affidavit evidence supplied on this summary judgment application, I am for the reasons discussed satisfied there is, at the very least, an arguable defence to what would otherwise, on its face, appear to be a straightforward undisputed claim under the Act involving a payment claim without a payment schedule in response.

[23] For completeness, I note there was evidence from Mr Tidey about several alleged failures of performance by Dews. Given the conclusion I have reached there is no need to discuss these. However, had my conclusion been otherwise to grant the application, these assertions would not, however valid they might in fact be, have provided an arguable defence to the claim, because they are denied by Dews: see s 79 of the Act.

[24] For these reasons, I dismiss Dews' summary judgment application and reserve costs.

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2 [2015] NZHC 1926 at [39] and [43]; Ms Batt noted that this judgment has been cited with approval by Associate Judge Smith in *Oceania Football Confederation Inc v Engineered Solutions and Systems Ltd* [2019] NZHC 1439.

[25] Pursuant to Rule 12.12 of the District Court Rules 2014, I am required to give directions as to the future conduct of the proceeding in mode of trial. As is often the case, these matters were not discussed at the summary judgment hearing. I therefore direct that the Registrar arrange, in consultation with counsel, a first Case Management Conference to discuss the future course of the proceeding. That may be before any civil-designated judge.

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Judge S M Harrop
District Court Judge

Date of authentication: 19/12/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.