IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CIV 2022-054-523
[2023] NZDC 1320

BETWEEN	HOMEBUILD HOMES LIMITED Plaintiff
AND	COLIN ANDREW BIRCHLER and ROBYN KAYLENE BIRCHLER Defendants

Hearing: 26 January 2023

Appearances: G Mason for Plaintiff
Defendants in Person

Judgment: 10 February 2023

RESERVED JUDGMENT OF JUDGE K D KELLY

Introduction

[1] The plaintiff seeks summary judgment under the Construction Contracts Act 2002 (CCA).

Background

[2] On 10 September 2020 the parties entered into a residential building contract for the construction of a house for the defendants.

[3] Section 1(a) of the general terms of the contract contains a 'Letter of Quote' with a fixed price to complete the house on a level site in accordance with the

preliminary plans and addendum to specifications. The addendum to specification' in section 1(c) of the contract reads:[1]

> IMPORTANT NOTE REGARDING ENGINEERING
>
> This specification does not include additional work required as a result of soft soil or inadequate ground conditions, it also does not include engineers design or resultant works, if required.
>
> This means any engineering design or work to the foundation, or floor, or any engineering design or work to frames and trusses.
>
> If, after the contract is signed, an engineer is required to carry out any work, additional costs will include engineer's costs, labour and materials for the resultant work plus a $500+gst administrative charge.

[4] The addendum also states that engineering for 'Foundation-Design', 'Structural -Design' and 'work specified in the Design', is not included in the contract price. A Geotech Report is also excluded.[2]

[5] Under the heading 'Exclusions', section 1(c) of the contract says further that:[3]

> Unless specifically stated otherwise in this addendum, the below are excluded from the building contract
>
> …
>
> ENGINEERING Engineers design or resultant work that may arise from the section, the design, or council/legal requirements

[6] Relevantly, a proviso to the quote expressly states:[4]

> This FIXED COST QUOTE is subject to the following conditions which may alter the final cost.
> 1. If you make changes which are more costly
>
> …
>
> 3. If your site requires engineer design to foundation, floor or framing resulting in additional materials and/or labour.

[7] Under the heading "Contract Exclusions", the contract also provides:[5]

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[1] Contract, page 16
[2] Contract, page 17
[3] Contract, page 22
[4] Contract, page 13
[5] Contract, page 25

Unforeseen additional costs to the subfloor or foundation due to site slope or conditions are NOT INCLUDED in the contract price.

Other Costs Not Included:

- Civil Engineer's Design Costs
- Civil Engineers Design Requirements for the Floor and Subfloor
- Resource Consent

[8] Finally, cl 16.4 of the general terms and conditions of the contract reads:[6]

> 16.4 The Contract Price does not include engineering work unless otherwise stated and/or a specific engineer's design is included in the contract documents.
>
> 16.4.1 The Owner is liable for any extra costs that may arise from an engineer's design being required after the contract is signed, or from changes required to an existing design.

[9] The quote, however, includes a provisional sum for engineering work which reads:

<u>Engineer work – Sum only as no design done</u>			
Foundation	Sum allowed	$20,000	
Structural: two gables, one portal	Sum allowed	$15,000	
			$35,000

[10] In an email dated 13 May 2021 Ms Victoria Jakobs, a director of the plaintiff advised the defendants that a second deposit invoice was being sent that day. In this email Ms Jakobs also said:

> I also need to give you a heads up on Engineer Foundation costs:
>
> Firstly to clarify the cost of design work and supervision by the engineers are not part of our build contract – so we pass the invoices on to you for direct payment. There will be at least one or two more of these during the build.
>
> [Re:] the cost of engineer work. The sums allowed for in the contract (both for foundations and post) were completed without a design, and as highlighted earlier are going to be inadequate."
>
> …
>
> Foundation: the scope of work is substantially greater than the sum allowed of $20,000, and you need to be prepared for this in your budgeting. I don't have anywhere near full costs – but to give you a heads up, extra costs to date are about $27,000 with many/substantial costs to come. Just one example, concreter, the amount required in the engineer footing to date was more than double that of the standard footing. The extra concrete cost, to date, alone is nearly $4,000.00 more.

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[6] Contract, page 49

I felt the need to give you this heads up, as I know you are spending money on extras, and we know you have a budget to work to.

[11] Ms Birchler replied the same day saying:

> You have given us a quote for the house only which is 587,339 less credit changes of 17,343.
> You have allowed 35,000 for engineering.
> Where does all this extra from the builder and steel come into it. You have known our site and what we wanted from the start. This is alarming…

[12] A few minutes later Ms Jakobs replied saying:

> Please read your contract letter of quote and the addendum before coming in. I do know I warned you prior to contract signing about not having engineer design at time of contract. Happy to explain again, but it [is] clearly explained in your contract that we did not have engineer design at time of contract.

[13] On 19 May 2021 the plaintiff sent the defendants an invoice for $11,500.00 for "Variation – Engineered Foundation – Extras to date." A manuscript note on a copy of this invoice in Mr Birchler's affidavit indicates it was paid the same day and notes: "We paid that with the enquiry as to what on earth it is for…".[7] It is not apparent, however, how or when this was queried.

[14] On 23 June 2021 the plaintiff sent the defendants a second invoice for $23,500.00 for "Variation – Engineered Foundation Part 2". A manuscript note on a copy of this invoice in Mr Birchler's affidavit reads: "Same, what is this for? No reply given!"[8] Again, it is not apparent how this was this was queried but it appears that this notation was added almost a year later on 22 April 2022.

[15] Subsequently, on 4 August 2021 Ms Jakobs emailed the defendants saying, amongst other things:

> **With regards to engineer costs for your footing and floor.**
> I am doing an audit of costs to date – given the amount of engineering work involved in your build, I like to double check part way through the work. I will have alerted you to this already, but please expect **significant extra costs** in your footing and floor, compared to the sum allowed in the contract. I have said this before, but I need to reiterate, that without a design, the sum we allow is just that. I note that even compared to the design done, the block wall has needed to be extended along the front of the lounge, once resiting was done and final site levels established.

[7] Birchler affidavit, Exhibit 1-091
[8] Birchler affidavit, Exhibit 1-094

> At this stage, a running total, which includes work to date and invoiced (so may not include work completed but not invoiced), your **running total of extras** on the foundation/floor as a result of engineer design are just under $39,000 – see attached draft settlement statement.
>
> Work still to come: post pads – steel, concrete, labour

[16] On 5 August 2021 the defendants were then sent an invoice for $21,221.52 for "Variations as per Draft Settlement Summary".

[17] The same day, Mr Birchler replied to the plaintiff advising:

> Your last contact re more cost overruns has me sick.
>
> We went to the trouble of giving you a ground topo so you could cost the whole job with what would seem reasonable a provision of cost overruns which should be proportionate to the job.
>
> You have already treated us as a bottomless pit and it stops now.
> If you can't complete this build it is time to say so and we will move on with others.

[18] The following day, 6 August 2021, Ms Jakobs replied as follows:

> This is absolutely not the case.
>
> You chose not to have an engineering design done before the contract was signed, *despite our warnings*. In the contract, we included a sum for engineering – without a design – because we warned you to allow something for this work. Without a design, coming up with a cost is like picking a cost for a Mini or a Rolls Royce. Impossible. I have been very clear and upfront about this *well before a contract was signed*. I have flagged this on multiple times…
>
> The sums that I am presenting to you are cost only. There is no margin on these – ie, Homebuild is making no profit form this work, and the $575 additional management fee in no way covers the many extra hours worked as a result of the engineering.
>
> However it is important to us that you are completely satisfied that what you are being charged is not only fair – but is substantially below what we should be charging.
>
> To achieve this I recommend that you **engage a registered quantity surveyor to measure & cost the work.** We will stand by the outcome of that assessment, given the right to provide evidence should there be variance.

[19] This email, like all emails from the plaintiff has the footer "*BUILDING Quality Home at Better Prices* NO MARK UPS // NO BIG MARGINS // TIGHT COST CONTROLS // TRADE DISCOUNTS PASSED ON TO YOU".

[20] A manuscript note on a copy of this email in Mr Birchler's affidavit, in relation to Ms Jakobs saying that the defendants were warned to allow something for engineering, reads: "We did, we allowed the 35K your experienced self supported" and: "your best advice that 35K would be fair est.".[9]

[21] Ms Birchler emailed Ms Jakobs back about an hour later saying:

> We need you to get all the sums together. The cost of metal and concrete etc. We need a meeting please and get some confirmation of a finished price. We can not and do not want any more surprises. We need absolute! With all your years experience you must have had engineering experiences before that have been of similar costs. Surely we are not the only ones who have portal posts. Surely you have done these cages before.
>
> We need to see the engineers design for these. Honestly that time allowed to make these is not acceptable.
>
> We need a meeting please ASAP this afternoon is good.
>
> We can't work out your spreadsheet.

[22] Ms Jakobs, in turn, replied about 90 minutes later saying amongst other things:

> What I can tell you from my experience is this:
>
> - Without a design, it is not possible to be anywhere near accurate (as warned)
> - With an engineer's design, even, it is not possible to be exact: as the scope of work can and does change, and it is difficult to quantify anyway.
> - You are ONLY paying the actual (our) trade price materials and labour.
> - We are only doing and charging for work specified by engineers as required to be carried out. No margin.
>
> As I said in my previous email, if you have doubts in our veracity, then commission registered quantity surveyor to back cost. Note that the design does not completely reflect work carried out (as above, things change on site) and we are seeking an amended design to reflect more closely the scale/length of the block wall. Engineer design does not factor in actual slope on site either.

[23] On 7 September 2021 Ms Jakobs again emailed the defendants. Mr Birchler responded the same day by adding his comments to the email (shown below in italics).

> **Engineer extra costs:** Now that the pads are down more costs are coming in, so you will soon receive another invoice for engineer work. *Robyn has the spread sheet to help us work through this.*

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[9] Birchler affidavit, Exh 2-004

> Note that whilst I am happy to answer questions, as already advised, this will not change the costs. The invoices for additional engineering work being sent to you are direct/hard costs for engineer required work to be carried out. I have already explained that the sum allowed in your contract was without a design, could not be accurate, and is not sufficient. We have already invited you to cross check our costs by getting the work professionally quantity surveyed. *Whilst the cost are a concern it is the way we cannot reconcile them that seems to be our main conflict. It would appear that whilst we knew that a concise quote was not done, we do expect that with your experience would best guess these to be a reasonable + or – taking account of the topo done for that purpose amongst other reasons for the topo work. We need to understand where this is heading cost wise so as not to blow our budget and ability to fund.*
>
> The initial invoice is well overdue and accruing interest (as per terms of contract), which at this stage I have not enforced. But I do need to prompt[ly] receive payment for work completed and already paid for by us. *Hardly fair on account of request made soon after receiving this for an explanation. We suppose this meeting to plan thru this.*

[24] A number of exchanges followed on various aspects of the build.

[25] Against that background, on 10 November 2021 the plaintiff issued a payment claim under the CCA for $45,136.26 (GST incl) for "Variations as per attached Summary Statement 10th November 2021." The due date for payment was 17 November 2021.

[26] No formal payment schedule was made by the 17 November 2021.[10]

Application for summary judgment

[27] On 20 September 2022 the plaintiffs served a statement of claim and interlocutory application for summary judgment on the defendants seeking orders that the defendants pay:

(a) the debt due of $45,613.[26];[11]

(b) interest at the contractual rate of 10% from the date due (17 November 2021);

(c) the contractual late payment fee of $250.00; and

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[10] The defendants submit that their various challenges to invoices for engineering work constitute a payment schedule for the purposes of s 21 of the CCA

[11] While the application refers to this debt due as being $45,136.<u>21</u> this appears to be a slip given that the payment claim is for 45,613.<u>26</u>

(d) actual and reasonable costs pursuant to s 24(2)(a)(ii) of the CCA).

[28] The application is supported by an affidavit from Christina Fiora May-Jakobs, director of the plaintiff dated 19 January 2023.

[29] The grounds of the application are that:

(a) the plaintiff served the defendants with a payment claim for $45,136.26 pursuant to s 20 of the CCA; the defendants did not serve the plaintiff with a s 21 CCA payment schedule within five working days;

(b) the defendants have not paid the claimed amount of $45,136.26;

(c) the claimed amount of $45,136.26 is a debt due to the plaintiff by the defendants pursuant to s 24 of the CCA; and

(d) the defendants have no defence to the plaintiff's claim.

Defendants' opposition to application

[30] The defendants filed a notice of opposition on 21 December 2022. This notice is supported by an affidavit of Colin Andrew Birchler, dated 20 December 2022.

[31] The application for summary judgment is opposed, essentially because:

(a) the defendants say that they are being unfairly invoiced for unaccountable and unverified extra's, specifically costs in excess of the $35,000 estimate;

(b) the defendants offered to pay the $45,136.26 payment claim on a without prejudice basis pending justification;

(c) the plaintiff's actions have caused the defendants not to be able to complete their home within the fixed price cost; and

(d) stop work requests were ignored by the plaintiff.

Plaintiff's submissions

[32] The plaintiff submits that a valid payment claim has been issued compliant with s 20 of the CCA and that no payment schedule has been provided by defendants complying with s 21 of the CCA. As a result, it is submitted that the payment claim is

now a debt due in accordance with ss 22 and 23 of the CCA and that by virtue of s 23(4) of the CCA summary judgment should be entered in favour of the plaintiff, as payee, for the unpaid portion of the claimed amount[12] and the actual and reasonable costs of recovery. [13]

Defendants' submissions

[33] The defendants submit that there are disputes about the build and cumulatively, these disputes constitute defences to the claim made by the plaintiff.

[34] First, the defendants submit that the sum of $35,000 was included in the Letter of Quote by the plaintiff, and that sum is reasonable and sufficient for the engineering work that was required. The defendants say that the invoices which they have paid already, along with invoice which is the subject of the payment claim, is excessive and that they cannot reconcile how the total of these invoices comes to approximately $100,000.00 for work that was deemed to reasonably cost $35,000.00.

[35] It is submitted that the plaintiff has repeatedly ignored their requests for proof about their costings and that this "is hardly our fault." These invoices, the defendants say were disputed from the outset on receipt of the first invoice nine days after the pegs were laid and digging started.

[36] The defendants say that they cannot make sense of how the $45,136.26 was arrived at, and that it is "vague and empty of logic" and that they are in the dark as to what the plaintiff is invoicing them for. The defendants say further that a quantity surveyor's report which they have obtained establishes that they have paid enough for the engineering, such that the payment claim sought is "bogus".

[37] The defendants say that the central matter in dispute is the lack of an "accountable, reconcilable validation of what items have been logged to the engineering cost centre".

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[12] CCA, s 23(2)(i)
[13] CCA, s 23(2)(ii)

[38] The defendants also submit that there are defects in the build; that they have been left with an incomplete build because the work was stopped by the plaintiff; and that they are out of pocket due to cost overruns. No counter-claim, however, has been made in respect of these alleged defects or cost over runs.

[39] The defendants acknowledge that they were told to provide a payment schedule but say that they had not done so because of disputes about the build. They say that every invoice other than that to which the payment claim relates has been paid, and that their various email challenges to the invoices for engineering work constitute, or are akin to, a payment schedule for the purposes of the CCA.

Decision and Reasons

[40] Whether the plaintiff is entitled to summary judgment turns on the relationship between summary judgment and the CCA.

Summary judgment principles

[41] The principles governing summary judgment applications are well established.

[42] Rule 12.2 of the District Court Rules 2014 provides that:

> The court may give judgment against the defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular part of any such cause of action.

[43] As the Court of Appeal said in *Krukziener v Hanover Finance Ltd*:[14]

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3. The court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as, for example, where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at

[14] *Krukziener v Hanover Finance Ltd* [2008] NZCA 1982; [2010] NZAR 307 at [26]

> 341. In the end the court's assessment of the evidence is a matter of judgment. The court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[44] As Associate Judge Osborne (as he was then) subsequently said in *Gidden v IAG NZ Limited*:[15]

> The starting point for a plaintiff's summary judgment application is … that the plaintiff 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.
>
> I summarise the general principles which I adopt in relation to this application:
>
> (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.
>
> (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

[15] *Gidden v IAG NZ Limited* [2016] NZHC 948 at [60] – [61] (citations omitted)

> the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

The Construction Contracts Act 2002

[45] The purpose of the CCA is also well established. The CCA applies to all construction contracts entered into on or after 1 April 2003. There is no dispute here as to whether the contract in question is a construction contract as defined in the CCA.

[46] The purpose of the CCA is set out in s 3 which provides as follows:

> **3 Purpose**
>
> The purpose of this Act is to reform the law relating to construction contracts and, in particular,—
>
> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.

[47] Subpart 3 of Part 2 of the CCA sets out the procedure for making and responding to payment claims:

> **20 Payment claims**
>
> (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.

(3) A payment claim must be accompanied by—

(a) an outline of the process for responding to that claim; and
(b) an explanation of the consequences of—
  (i) not responding to a payment claim; and
  (ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

(4) The matters referred to in subsection (3)(a) and (b) must—

(a) be in writing; and
(b) be in the prescribed form (if any).

21 Payment schedules

(1) A payer may respond to a payment claim by providing a payment schedule to the payee.

(2) A payment schedule must—

(a) be in writing; and
(b) identify the payment claim to which it relates; and
(c) state a scheduled amount.

(3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—

(a) the manner in which the payer calculated the scheduled amount; and
(b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and
(c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the payment to which the payment claim relates if—

(a) a payee serves a payment claim on a payer; and
(b) the payer does not provide a payment schedule to the payee within—
  (i) the time required by the relevant construction contract; or
  (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

23 Consequences of not paying claimed amount where no payment schedule provided

(1) The consequences specified in subsection (2) apply if the payer—

(a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
(b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the payment to which the payment claim relates.

(2) The consequences are that the payee—

(a) may recover from the payer, as a debt due to the payee, in any court,—

(i) the unpaid portion of the claimed amount; and
(ii) the actual and reasonable costs of recovery awarded against the payer by that court; and

(b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.

(3) A notice referred to in subsection (2)(b) must state—

(a) the ground or grounds on which the proposed suspension is based; and
(b) that the notice is given under this Act.

(4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

24 Consequences of not paying scheduled amount in manner indicated by payment schedule

(1) The consequences specified in subsection (2) apply if—

(a) a payee serves a payment claim on a payer; and
(b) the payer provides a payment schedule to the payee within the time allowed by section 22(b); and
(c) the payment schedule indicates a scheduled amount that the payer proposes to pay to the payee; and
(d) the payer fails to pay the whole, or any part, of the scheduled amount on or before the due date for the payment to which the payment claim relates.

(2) The consequences are that the payee—

(a) may recover from the payer, as a debt due to the payee, in any court,—
(i) the unpaid portion of the scheduled amount; and
(ii) the actual and reasonable costs of recovery awarded against the payer by that court; and

(b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.

(3) A notice referred to in subsection (2)(b) must state—

(a) the ground or grounds on which the proposed suspension is based; and
(b) that the notice is given under this Act.

> (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

[48] In *Salem Limited v Top End Homes Ltd*, the Court of Appeal said of Subpart 3 of Part 2 of the CCA:[16]

> What is plain is that ss 20 to 23 of the Act are designed to facilitate regular and timely payments between the parties to a construction contract. If a property owner does not respond to a payment claim by serving a payment schedule, then the contractor is entitled to recover the amount of his claim as a debt due. Put colloquially, the payer is under an obligation to pay first and argue later. This, we are satisfied, is the intention of the legislation. No doubt it reflects the philosophy referred to earlier that cashflow is the very life blood of the building industry. Contractors (and their sub-contractors in turn) are entitled to be promptly paid where they have invoked the payment regime under the Act and the payer has not responded as the Act requires.

[49] In *C J Parker Construction Ltd (in liq) v Ketan & Ors too,* the Court of Appeal further explained:[17]

> Part 2 of the Construction Contracts Act 2002 (the Act) provides a regime to facilitate regular and timely payments between the parties to a construction contract. It contains, in ss 19 to 24, a procedure that allows a party to a construction contract who is entitled to a payment under the contract (defined in s 19 of the Act as "a payee") to recover a payment by making a payment claim and the party to the contract who is liable for that payment (defined in s 19 as "a payer") to respond by means of a payment schedule. ...
>
> The consequences of failures by the payer to provide a payment schedule within a specified time and to pay the whole or any part of the claimed amount before the due date for payment, include that the payee may recover from the payer, as a debt due, the unpaid portion of the claimed amount and the costs of recovery.

[50] Put bluntly, the Act focuses more on procedure than on proof and establishes a draconian 'sudden death' regime if its payment procedures are not complied with.[18] The scheme of the Act is to entitle a payee to prompt payment where the amount claimed is not disputed and to provide dispute resolution procedures for disputed claims."[19]

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[16] *Salem Limited v Top End Homes Ltd* CA169/05, 12 December 2005 at [22]
[17] *C J Parker Construction Ltd (in liq) v Ketan & Ors* [2017] NZCA 3 at [1]- [2]
[18] *C J Parker Construction Ltd (in liq) v Ketan & Ors,* above n 17 at [16] citing *Marsden Villas Ltd v Wooding Construction Ltd* [2006] 1 NZLR 177 (CA) at [17]
[19] *C J Parker Construction Ltd (in liq) v Ketan & Ors,* above n 17 at [16]

[51] Moreover, the Court of Appeal said in *George Developments Ltd v Canam Construction Ltd*,[20] and confirmed in *Demasol Limited v South Pacific Industrial Limited* that: "…any analysis of the CCA "must be undertaken with the purpose of the Act in mind" and that a "technocratic" or "formalistic" interpretation would undercut Parliament's intent that cashflow in the construction industry be maintained."[21]

[52] In addition to ss 20 -24, s 79 of the Act makes it clear that in any proceedings for the recovery of a debt under s 23, the Court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings except in limited circumstances (which do not apply here). While there is no counterclaim, set-off, or cross-demand raised by the defendants in this case (which would otherwise render summary judgment inappropriate), s 79 reinforces the scheme of the Act that the payer is under an obligation to 'pay first and argue later' as the Court of Appeal put it in *Salem Limited v Top End Homes Ltd* (to which reference has already been made).

[53] Put simply, in the case of payment claims under the CCA, subpart 3 of part 2 of the CCA provides the mechanism by which those claims can be disputed. In the absence of the defendants availing themselves of that mechanism, there will be no proper foundation for the defences raised by Mr Birchler in his affidavit in support of the Notice of Opposition. In such circumstances, the mechanism in the CCA, if complied with by the plaintiff means that the defendants will lack a tenable defence to summary judgment.

[54] The only remaining issues then, are whether the payment claim complies with the CCA and whether the defendants' emails constitute a payment schedule for the purposes of the CCA.

[55] I am satisfied that the payment claim made the plaintiff satisfies the requirements of s 20 of the CCA. It is in writing. It contains sufficient details to identify the construction contract to which the payment relates, namely the Residential Build Contract entered into by the defendants. The construction work and the relevant

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[20] *George Developments ltd v Canam Construction Ltd* [2006] 1 NZLR 177 at [41 and [52]

[21] *Demasol Limited v South Pacific Industrial Limited* [2022] NZCA 480 at [31]

period to which the payment relates is set out in a summary statement of variations for the period to 10 November 2021. The summary statement indicates the manner in which the plaintiff calculated the claimed amount and reads:

<u>Invoiced 10 November</u>	**$45,136.26**
<u>Engineering Extras – Foundation & Floor</u>	
Engineer Footing work extra to Sum allowed	$34,239.84 As at 10 November 2021
Plumbing & Drainage revision – to underslab	$1,903.86
Roofing – Variation to T Rib	$3,010.56 *30/9 New Price (inflation)
Portal – Manufacture and Install	$5,982.00 CR Engineering costs only

[56] The claimed amount is clearly stated as is the due date for payment being 17 November 2021, being five working days after the date of delivery of the payment claim by the plaintiff to the defendants as set out in section 2(c) ─ the specific terms of the contract.[22] The payment claim also states that it is made under the CCA.

[57] The payment claim is also accompanied by the required written information about the process for responding to the claim; the consequences of not responding to the claim; and that the payment schedule may indicate that the defendants agree to pay less than the payment claimed. The defendants were advised that amount that they could propose to pay could be 'nothing'.

[58] On the other hand, the defendants' emails disputing the amount claimed do not comply the statutory requirements for payment schedules. The only emails that are within the time prescribed by s 23(b)(ii) of the Act are emails dated 16 November 2021. None of these emails refer to the payment claim, or state a scheduled amount (that is a lesser sum that they were prepared to pay),[23] or any reasons about why that lesser sum is appropriate.

[59] In an further email to the plaintiff dated 24 November 2021 in which the defendants challenge various costs (including about roofing), they say:

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[22] Contract, at page 40

[23] Defined in s 19 as an amount of a payment specified in a payment schedule that the payer (i.e. the defendants) propose to pay to the payee (i.e. the plaintiff) in response to a payment claim.

> I also have a different opinion as to what this charge actually is in respect to the fact we had to send the guttering contractors away because the painting of the fascia was not complete. At this point and without prejudice we will pay the xtra's invoice minus the charge over the quoted and the without prejudice that the xtra's being charged in respect of the over-runs to foundation and portal work of which we cannot obtain from you info just what cost what. This matter most likely will have to be in limbo until we obtain final claims from your systems.
>
> We note that the roofer said he had other work he was happy to do when he was told of the same problem. Either way for both of them, we had no option but to halt their work so that the prescribed painting work was attended too.
>
> I believe this to be the most appropriate means of continuance at this time.
>
> [We] take these actions in good faith and upon your acknowledgment the payment being made without prejudice we will action the bulk of that invoice.

[60] Aside from the condition nature of this offer and that the charges for the foundations and portal work appear to have been excluded from the without prejudice offer, the email does not expressly set out what amount the defendants were agreeing to pay. In any event, the offer is outside the statutory period in s 21(3) of the CCA.

[61] For these reasons, this email does not constitute a payment schedule for the purposes of the CCA.

[62] Where the defendants consider they have a claim against the plaintiff, the CCA does not in and of itself preclude this but as noted above, the scheme of the CCA is to 'pay first and argue later'. For the reasons stated, under the CCA the defendants are obliged to pay the payment claim and the defences set out in the Notice of Opposition do not provide a tenable defence in respect of that obligation.

Result

[63] In summary, I am satisfied that the defendants have no defence to the plaintiff's claim under the CCA.

Orders

[64] For the reasons stated, summary judgment is entered for the plaintiffs for:

(a) the debt due of $45,136.26 as per the plaintiff's statement of claim;

(b) interest at the contractual rate of 10% per annum from the due date of payment (17 November 2021) to the date payment is received in full;

(c) the late payment fee of $250.00 payable pursuant to the building contract;

(d) actual and reasonable costs of recovery of the debt due pursuant to s 24(2)(a)(i) of the Construction Contracts Act 2002.

[65] Leave is granted to the plaintiff to file a further memorandum recording the actual and reasonable costs of recovery of the debt, these costs to be determined by the Registrar.

K D Kelly
District Court Judge