IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CIV-2020-009-000240
[2021] NZDC 10506

BETWEEN	TAILORSPACE PROPERTY LIMITED Plaintiff
AND	IDENTIFY CONSULTING LIMITED Defendant

Hearing: 10 September 2020

Appearances: S O Campbell for the Plaintiff
M J Borcoski for the Defendant

Judgment: 1 June 2021

RESERVED DECISION OF JUDGE R E NEAVE

Introduction

[1] Tailorspace ("the plaintiff") is a Christchurch based property developer. It owns a building situated at 79 Hereford Street Christchurch which, prior to the Christchurch earthquakes, contained offices and retail space.

[2] In 2017 the plaintiff commenced refurbishment and re-development of the building with the intention of turning it into a hotel.

[3] In March 2017 the plaintiff obtained a report which identified the presence of asbestos containing material (ACM) in the lift room, basement, transformer room, levels 1 to 6, the rooftop part room, flat room and the basement concrete wall. The report also indicated there was potential for ACM to be located in the switchboards and older style wiring.

[4] Through its project manager Cequent the plaintiff entered into a contract with Identify Consulting Limited ("the defendants"). The contract was formed by a series of emails the relevant extracts of which are as follows:

8 November 2017

Cequent emailed the defendant saying:

> Good to speak with you [earlier], as mentioned could you please provide a fixed price to complete the air monitoring of third party clearances and any other checks we need to clear the building?

10 November 2017

The defendant to Cequent attaching a price breakdown for a fixed price of $46,600 for:

> All third party air monitoring and clearances at 79 Hereford.

14 November 2017

The defendant to Cequent:

> Confirming additional costings if the project should run overtime. Emails dated "I can confirm that should the 79 Hereford project run overtime I can provide daily air monitoring for $2,300 per week excluding GST. Any other additional costs that arise from failed clearances etcetera will be charged to Murphy Brothers as they will be a direct result of poor workmanship."

15 November 2017

Cequent to the defendant:

> I have received approval from Tailorspace to appoint you for the site clearance and air monitoring, congratulations. Can you please coordinate with Tim regarding commencement on site. We look forward to working with you.

[5] In early December 2017 the plaintiff engaged Murphy Brothers Limited, a specialist asbestos removal contractor, to remove all the ACM from the building.

[6] Murphy Brothers Limited carried out the work between December 2017 and September 2018 and were paid the sum of $614,267.93 by the plaintiffs.

[7] During the period that Murphy Brothers Limited carried out its work the defendant carried out inspection and air monitoring of the areas where Murphy Brothers Limited had removed ACM from the building. They issued three Class A clearance reports and certificates for the building dated 16 May, 22 August and 4 September 2018.

[8] Each of the certificates contained a declaration from Mr Standen that:

(a) He had found no visible asbestos residue in the area where the asbestos removal work was carried out at the time of his clearance inspection.

(b) If air monitoring was conducted as part of the clearance inspection the monitoring showed the respirable fibre level did not exceed 0.015 per millilitre.

(c) As far as could be determined from the clearance inspection, the asbestos removal area did not pose a risk to health and safety from exposure to asbestos.

[9] Between December 2017 and September 2018, the plaintiff paid the defendant the sum of $65,222.25.

[10] The plaintiff alleges that after the completion of the work by Murphy Brothers Limited, and certification by the defendant, significant amounts of asbestos were discovered in a subsequent analysis.

[11] The plaintiff alleged that the contract with the defendant was a construction contract and that the defendant was in breach of that contract causing loss to the plaintiff in the sum of $284,441 inclusive of GST together with the costs and interests.

[12] The plaintiff took the issue to an adjudication under the Construction Contracts Act 2002 ("the Act") where it was successful and the Adjudicator awarded it damages for the claimed loss, declined to order interest, and ordered the payment of costs, including the costs of the Adjudicator.

[13] The issue of whether this was a construction contract was raised in the adjudication proceedings and submissions were called for. In a preliminary decision the Adjudicator determined that the agreement was a construction contract and thus he had jurisdiction to deal with the adjudication.

[14] The plaintiff now seeks to enforce that award under the Act.

[15] I am bound to give effect to that adjudication unless I am satisfied that the contract was not a construction contract, which is the defendant's contention.[1]

[16] The sole question in this case is whether or not the agreement between the parties is a construction contract. I am not required to make any determination as to liability under the contract and I do not sit on appeal from the Adjudicator's decision, except to the extent that I may review the findings on whether or not the agreement is a construction contract. That issue also involves consideration of whether the work carried out by the defendant was construction work as defined in the Act.

Definitions

[17] Perhaps unsurprisingly, s 5 Construction Contracts Act 2002 describes a construction contract as a contract for the carrying out of construction work. The meaning of construction work is defined in s 6:

> **6 Meaning of construction work**
>
> (1) In this Act, unless the context otherwise requires, **construction work** means any of the following work:
>
> (a) the construction, erection, installation, carrying out, alteration, repair, restoration, renewal, maintenance, extension, demolition, removal, or dismantling of any building, erection, edifice, or structure forming, or to form, part of land (whether permanent or not and whether constructed wholly or partly on, above, or below ground level):
>
> (b) the construction, erection, installation, carrying out, alteration, repair, restoration, renewal, maintenance, extension, demolition, removal, or dismantling of any works forming, or to form, part of land; including—

[1] See section 74 Construction Contracts Act 2002.

(i) any road, motorway, aircraft runway, wharf, docks, harbour works, railway, cableway, or tramway:

(ii) any canal, inland waterway, pipeline, reservoir, aqueduct, water main, well, or sewer:

(iii) any electricity, water, gas, or telephone reticulation:

(iv) any telecommunication apparatus or industrial plant:

(v) any installation for the purposes of land drainage or coast protection:

(c) the installation in any building or structure of fittings forming, or to form, part of land; including heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, security, and communications systems:

(d) the alteration, repair, maintenance, extension, demolition, or dismantling of the systems mentioned in paragraph (c):

(e) the external or internal cleaning of buildings and structures, so far as it is carried out in the course of their construction, erection, alteration, repair, restoration, or extension:

(f) any operation that forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraphs (a) to (d); including—

(i) site clearance, earthmoving, excavation, tunnelling, and boring; and

(ii) laying foundations; and

(iii) erecting, maintaining, or dismantling scaffolding or cranes; and

(iv) prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere; and

(v) site restoration, landscaping, and the provision of roadways and other access works:

(g) the painting or decorating of the internal or external surfaces of any building or structure.

(1A) Construction work includes—

(a) design or engineering work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (d) and (f):

(b) quantity surveying work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (g).

(2) Despite subsection (1), **construction work** does not include any of the following work:

(a) drilling for or extracting oil or natural gas:

(b) extracting (whether by underground or surface working) minerals, including tunnelling or boring, or constructing underground works, for that purpose.

It should be noted that s 6(1A) was inserted into the Act in 2016 by the Construction Contracts Amendment Act 2015.

[18] The plaintiff argues that the removal of the ACM was construction work within the meaning of 6(1)(a). It submits that this is supported by the plain meaning of the words of that section and that the conversion of an existing building into a hotel and the removal of ACM as part of that process amounts to repair restoration or renewal or demolition removal or dismantling of the building, or at least the relevant parts of it. On the face of it, removal of asbestos is already alteration, repair or renewal of a building particularly if it is being connected to something else.

[19] The plaintiff further submits that as Murphy Brothers Limited was clearly involved in construction work in terms of s 6(1)(a) the defendant's work was an integral part of, or it was preparatory to or necessary to render complete, Murphy Brothers Limited's work in that regard.

[20] It further argues that if the removal of the ACM amounts to construction work then the certification process carried out by the defendant is also construction work by virtue of s 6(1)(f). It argues that it is an integral part of, or necessary at least, for rendering complete the ACM removal. Essentially on the basis that unless the work is properly certified the remaining construction work cannot be completed because there remains the prospect of ACM on the building site.

[21] The plaintiff argues that the plain words of s 6(1)(f) do not limit the type of work envisaged to physical works. Although the examples given are of physical work the plaintiff argues that they are just that, examples.

[22] The plaintiff further argues that if Parliament had wished to limit the operation of subsections 6(1)(f) to physical works it would have said so. The plaintiff argues:

> (iii) The plain words of s 6(1)(f) extend to independent testing, clearance and certification of ACM because:
>
> (1) On any plain reading it is an "operation" that is an integral part of, preparatory to, or for the purpose of rendering complete ACM removal work.
>
> (2) The ACM regulatory regime makes clear that ACM removal work cannot occur without independent testing, clearance and certification. In this sense, the work undertaken by Identify was a legal precondition to the validity of the ACM removal work. It is difficult to envisage a case where the s 6(1)(f) works are more "integral" than this.
>
> (3) The case law supports a broad interpretation. However, the interpretation being advocated for here is not broad. It is simply the interpretation that emerges from the plain words of the section.[2]

[23] There is very little case law on the approach to s 6(1)(f). In *Van der Wal Builders v Walker* Christiansen AJ had to determine whether or not there was in fact an agreement which could amount to a construction contract in the first place.[3] His Honour concluded that there was not. However, he went on to consider whether the payment claims could have been subject to the Construction Contracts Act and he held at para [101]:

> "I consider that the Act does not presently authorise claims for payment in connection with construction work preparation or consultancy work in connection with proposed work."

[24] His Honour did not consider s 6(1)(f).

[25] In *MacRitchie v Trustees Executors Ltd*[4] Judge Harrop had to determine whether preliminary work carried out by the plaintiff preparatory to the repair and refurbishment of a leaky home amounted to construction work.

---

[2] See paragraph 5(b) Mr Campbell's submissions
[3] *Van der Wal Builders v Walker,* HC Auckland, CIV-2011-004-083, 26 August 2011.
[4] *MacRitchie v Trustees Executors Ltd*, District Court Wellington, CIV-2009-085-359, 12 August 2009.

[26] His Honour considered that the proposed remediation work on the property was obviously construction work falling within the words repair, restoration, renewal or maintenance in s 6(1)(a). His Honour went on to say at paras [25] - [31]:

> [25] I further consider that it is clearly within the plain meaning of something "preparatory to" work of that kind for Mr MacRitchie to carry out the investigations and consultation that he was authorised to undertake, as Mr van Lier's letter of 13 October 2008 shows. I acknowledge that the examples of preparatory or related work which are provided in s 6(1)(f) all relate to physical work. I also acknowledge that s 6(1)(f) is limited to "any *operation* that … is preparatory to". Both of these pointers suggest physical rather than non-physical work. However, I consider the word "*operation*" to be broad in purview. I also note that the five examples given are merely said to be *included* in the work which is covered. The definition is therefore not limited to those five examples, nor does the sub-section contain a catch-all provision, limited by reference to that type of work. In short, I consider it is within the plain meaning of "*is preparatory to*" [work of the kind within s 6(1)(a)] to carry out the sort of preliminary work which TEL undoubtedly asked Mr MacRitchie to undertake.
>
> [26] The approach I take is reinforced by the fact that there are two express exclusions in s 6(2) of the Act for work that would otherwise have been within the meaning of s 6(1). It would have been very easy for Parliament to say, even just for the avoidance of doubt, that construction work did not include the non-physical work which Mr Jagose says the Select Committee wanted to see excluded. It did not do so and one might well conclude from that, if the Parliamentary deliberations are to be considered, that the Select Committee's approach was not shared by the full Parliament. However, I have come to the clear view that I do not need to look beyond the statutory wording because I consider the meaning is clear on the face of the legislation.
>
> [27] As the Supreme Court says, one must also cross-check the plain meaning against the statutory purpose. Here the purpose of the legislation as set out in s 3 of the Act is:
>
> **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.

[28] While these provisions may not in themselves speak to what is and is not intended to be a construction contract, there can be no doubt that the legislation was intended to achieve, and indeed has achieved, a dramatic change in the "*balance of power*" between those letting contracts to carry out construction work and those carrying it out. The purpose of the legislation has been interpreted by the Courts as better securing the cash flow of the contractors. Against that background those, a determination that the words "*preparatory to*" includes non-physical work would advance, or at least is not inconsistent with, that purpose. Parliament's purpose would arguably be hampered by a definitional debate about whether work that was clearly preparatory to construction work was or was not to be sufficiently linked to it to be covered, especially given the interim nature of determinations under the Act.

[29] My conclusion about the purpose is reinforced by what the Court of Appeal said in *George Developments Limited v Canam Construction Limited* [2006] 1 NZLR 177. As Mr Cleary submitted (and I accept the case deals with a different point, the legitimacy of a payment claim), I consider that the Court's comments, at least indirectly, do provide support for the approach I have taken.

[30] The Court said:

> [55] On the inclusion of extension of time costs, we adopt the New South Wales approach … Although the definition of construction work in s 6 of the Act refers to physical work, the force and thrust of the Act cannot be limited to claims for physical work actually done as opposed to costs which inevitably arise from carrying out the work. This might include: insurance costs, interest, costs of preparing a programme or an extension of time entitlement. As long as the construction contract provides for the payee to be paid the claimed amount in consideration of its performance of construction work (whether or not the entitlement is contingent on a factor such as the extension of time being granted), the payee is entitled to make a claim for payment in a payment claim. If the payer's stance is vindicated, the particular amount will not have to be paid the other amounts claimed in the payment claim or invalidate the payment claim as a whole. It is not necessary that every amount claimed in the payment claim can be linked directly to a physical task involved in the construction of the building or structure. The Act was specifically intended to avoid artificial distinctions. Cash flow was intended to be protected by the Act and it is to be interpreted so as to achieve its object of speeding up payments.
>
> [56] This approach was echoed by *Quasar*, where the Court distinguished between an amount claimed under a provision in the construction contract and a claim for damages for breach which is not referable to a provision in the contract. We too adopt the same reasoning. We reject the suggestion that the Act and its protective processes are to be interpreted in a restrictive and confining manner.

> [31] It seems consistent with these observations that preparatory work to be carried out prior to any physical work, even in circumstances where the contemplated physical work is not ultimately carried out, is nevertheless properly included in a payment claim as being construction work which is part of a construction contract.

[27] The other specific cases referred to by the plaintiff did not assist.

[28] The plaintiff's arguments in respect of the issue of interpretation of the statute are as follows:

> 21 Ultimately every case is unique and must be interpreted against the legislation. As one former Canadian Chief Justice has noted, "Judges must … reduce the legislative general down to the situational particular". In *Commerce Commission v Fonterra Co-op Group Ltd*, the Supreme Court stated, "[i]t is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose".
>
> 22 Parliament has seen fit to include within the definition of "construction contract" any "operation that forms an integral part of, or is preparatory to or is for rendering complete, work of the kind" referred to in the preceding subparagraphs (a)-(d). That is a definition that should not be given a restrictive meaning.
>
> 23 If Parliament had intended to confine the Act solely to physical works, it could have done so simply. It did not confine the definition in this way. Nor is confinement to physical works the intention of Parliament. Section 6(1A) of the Act (discussed below) has been enacted to make abundantly clear that the Act is not limited to physical works.
>
> 24 The question is whether the work involved in this claim falls within the s 6(1)(f) definition. It is helpful to understand some constituent parts of that definition:
>
> (a) The ordinary meaning of "operation" is "the action or process of operating" and "operate" is defined as meaning "function or control the function of". The normal definition of operation is not limited to physical construction. An operation can involve a pricing operation, a supervision operation, a testing operation, an inspection operation etc.
>
> (b) Next is the meaning of "integral". That term is ordinarily defined as "necessary to make a whole complete; fundamental". Something will be integral if it is fundamental to a process. As will be demonstrated below, clearance inspections and the work Identify carried out was practically and legally fundamental to the removal. In *Dixon (Inspector of Taxes) v Fitch's Garage Ltd*, Brightman J similarly held

> that, "An integral part' is, I apprehend, something that is necessary to the completeness of the whole".
>
> (c) The ordinary meaning of the phrase of "preparatory to" is "as a preparation for". The term prepare is defined as meaning to "make ready for use or consideration".
>
> (d) Finally, the ordinary meaning of the word "render" in this context is "cause to or become".
>
> 25 None of the above terms are defined in a limited or restrictive way. They are given broad bent. They are not defined in the Act in a way that indicates they should be given an interpretation that is anything but their plain meaning. There is no basis which can be derived from the text of the act upon which the non-physical works may be exercised from the definition.
>
> 26 Nor is the interpretation advocated for by Tailorspace inconsistent with the purpose of the Act; the clear intention of Parliament as manifested in the four corners of the Act is to have an inclusive definition and a liberal approach to what amounts to a construction contract.

[29] One of the problems for the plaintiff is the introduction of s 6(1A) in 2015. It is doubly interesting because this amendment post-dates Judge Harrop's decision in *MacRitchie*. However I will return to this issue in discussion of the defendant's submissions.

[30] The plaintiff goes on to note that the regulatory regime governing the removal of ACM makes it apparent that the kind of work undertaken by Murphy cannot legally occur without an independent testing party. In essence the plaintiff's argument is that the certification of the work is an integral part of it. As noted above, if the work is not properly carried out nothing more can obviously be done on the property. Given the current regulatory regime an employer carrying out work on a site where asbestos had been located, in the absence of some form of certification that the asbestos had been properly removed, would undoubtably be liable under the Health and Safety regime.

[31] I do not think it can be seriously argued that the ACM removal carried out by Murphy Brothers was not construction work. Section 6 is not particularly happily drafted, but it seems clear to me the work was part of the alteration, repair, restoration, or renewal of the building. The section does not say in whole or in part, but I think it must be clearly envisaged, that providing work of this nature is carried out on a

building it cannot be limited, given the purposes of the legislation, to work done in respect of the whole of the building.

[32] Even if it were not work covered by s 6(1)(a) given the fact that no construction work on the building would be able to be carried out, once ACM was discovered, the removal of the asbestos would clearly be the kind of work contemplated by s 6(1)(f).

Defence contentions

[33] One of the reasons I have taken some time in issuing this judgement is that for the defence Ms Borcoski has mounted an interesting and, at least superficially, a very attractive argument. She argues that the work carried out by Murphy Brothers was not work described in s 6(1)(a) and nor is it work described in s 6(1)(e) and even if it were the extending definition in s 6(1)(f) would not apply to it. As noted above s 6 is not an easy section to construe and I have had to give the matter close consideration.

[34] I understood her to accept at the hearing that the removal work carried out by Murphy was work described in s 6(1)(a), i.e. construction work but that the defendant's work was not. She submits that the parties made no reference to construction work in the agreement. That is undoubtedly so but the fact the parties may not have turned their minds to the issue is of no moment if the statue applies to the agreement.

[35] However, in her written submission she submits that the work described in s 6(1)(a) must be in respect of the structure. She further submits that the removal of the ACM from the building prior to work which would qualify under s 6(1)(a) is not counted as construction work. It is not work on the structure. She further argues that given the terms of s 6(1)(f) the removal of ACM is not encompassed by that section either. She submits given the specific matters which are expressly stated as being included as integral or preparatory work it must be the case that such work would not be regarded as construction work unless it were expressly included. She submits that if the type of work in s 6(1)(f) would not otherwise be included in s 6(1)(a) then neither can the removal of the ACM.

[36] To put it in reverse, that if the removal of the ACM is construction work, then all the specific examples listed in s 6(1)(f) would also be construction work and thus

the para (f) would be rendered redundant. The only construction that can be put on the para (f) is that the work would not have been regarded as construction work unless it were included in para (f). I am bound to observe that is an attractive argument.

[37] Ms Borcoski also submits that the amendments made in 2015 further support the argument. Just as removal of ACM would not otherwise be construction work because an express extension was clearly required to bring in design or engineering work the certification steps taken by the defendant are outside the ambit of the Act. Again, perhaps it is better to put it in reverse, namely that the type of work incorporated by s 6(1A) is of the same kind of work as the work carried out by the defendant. Section 6(1A) would have been pointless if the work were already covered by s 6(1)(a) or (f). She therefore argues that if the work required to bring work of the type in 6(1A) and the Act require legislative amendment in the absence of any such amendment the work carried out by the defendants does not fall within the scope of the Act. She refers to various reports prior to the enactment amendment in support of that argument.

Analysis

[38] The plaintiff argues that those reports prepared prior to the 2015 amendment are of no assistance and indeed should not be relied upon where the meaning of the legislation is plain on its face.

[39] In essence the plaintiff submits that s 6(1A) was merely intended to be an extending definition to cover those services which might not otherwise meet the s 6(1)(f) definition. Essentially a belt and braces exercise to avoid doubt.

[40] The problem is that it is difficult to envisage a situation in which design or engineering work or quantity surveying work could not be regarded as an integral part of, or preparatory to the works set out in paragraphs (a) to (d). Given the fact that the work must be carried out in respect of or is at least inextricably connected to work of that kind it is difficult to see how it could be anything other than preparatory to such works. On the other hand it is very hard to understand what meaning s 6(1A) has unless it is to include in the section the kind of non-physical work that would not otherwise be included.

[41] However, at the end of the day it is necessary to construe the Act in a way which gives effect to its purpose having regard to the plain meaning of the words of the Act. I have regard to para [55] of the Court of Appeal's decision in *George Developments Ltd v Canam Construction Ltd* (supra) quoted above in the extract from Judge Harrop's decision in *MacRitchie v Trustees Executors Ltd*.[5]

[42] It seems to me that removal of ACM is properly regarded as alteration, repair, restoration or renewal or maintenance of a building. One is bound to observe rhetorically: what else could it be? If that is so, it is undoubtably the case that the certification work carried out by the defendant was an integral part of and or rendered complete the removal of ACM work. Even if the removal of the asbestos is one stage removed from s 6(1)(a) it must be connected by s 6(1)(f) and as a matter of logic so must the defendant's work.

[43] Notwithstanding the clumsiness of the drafting of s 6 and the arguable inconsistencies that the introduction of s 6(1A) appears to have introduced I am driven to accept that the plain meaning of the statute envisages that the work to remove the asbestos is covered by s 6 and thus the certification work carried out by the defendant is encompassed by s 6(1)(f).

[44] Once that is accepted it follows that the work carried out was construction work, and the Adjudicator having found in favour of the plaintiff in this respect, I must therefore give effect to that decision.

[45] Therefore, it follows that judgment must be entered as requested by the plaintiff.

R E Neave
District Court Judge

Signed this day of 2021 at am / pm

[5] See para [26] above.