Construction Service Co (Wellington) Ltd (In Receivership) v Wellington Waterfront Ltd [2006] Adj.L.R. 09/13

JUDGMENT : ASSOCIATE JUDGE D.I. GENDALL. High Court NZ. Wellington Registry. 13th September 2006.

Introduction

[1] The plaintiff seeks summary judgment against the defendant for claims brought under the Construction Contracts Act 2002 ("the Act"). The claims arise from the construction of Waitangi Park in Wellington.

[2] The application is opposed by the defendant.

Background Facts

[3] In July 2004 the defendant as developer let a $13.2 million contract for the construction of the first stage of Waitangi Park to the plaintiff as contractor. The work under the contract, it is said, was to be completed by November 2005.

[4] The formal construction contract was on New Zealand standard form of contract NZS3910:203 General Conditions together with certain Special Conditions of Contract ("the contract"). It was finally signed on 22nd December 2004. The defendant maintains that the reason for the delay in having the construction contract signed was because of difficulties experienced by the plaintiff in obtaining a performance bond.

[5] In the meantime, from about August 2004 work at Waitangi Park had commenced. Difficulties arose not long after that, however.

[6] This culminated in the defendant's engineer on 10 February 2005 issuing a certificate which certified that the plaintiff *"is persistently neglecting to carry out its obligations under its contract with (the defendant) and as a consequence is in default of the contract..."*

[7] As a result, on 24 February 2005 the defendant advised the plaintiff by letter of its intention to either terminate the contract, or to re-take possession of the Waitangi Park site.

[8] Discussions then took place between the parties and on 1 April 2005 a Deed was entered into to vary and reallocate the contract works by way of an assignment of the contract to Waitangi Park Limited (a Fletcher Construction subsidiary), subject in part to the plaintiff meeting certain conditions. Subsequently however, it became clear that those conditions would not be met and the Deed of Assignment did not proceed.

[9] On 6 April 2005 it is acknowledged that Fletcher Construction took over construction management of the Waitangi Park site from the plaintiff.

[10] Then, around 7 April 2005 the defendant met with a number of the plaintiff's subcontractors, and established, to its concern that many of those subcontractors had not been paid.

[11] On 8 April 2005 the plaintiff issued Payment Claim No. 8 under the contract for work completed by it and its subcontractors in March 2005 (but omitting the bulk of an approximately $200,000.00 claim by a subcontractor A.J. Beck).

[12] On 28 April 2005 the defendant issued Payment Certificate No. 8 for March 2005 work.

[13] During May 2005 the defendant made arrangements to settle this Payment Certificate No. 8 by ensuring that the proceeds from payment of this Certificate were directed to the plaintiff's unpaid subcontractors.

[14] On 5 May 2005 the plaintiff submitted Payment Claim No. 9 for its own April 2005 work totalling $288,760.60 plus GST. This Payment Claim was sent to Fletcher Construction.

[15] On 20 May 2005 the defendant issued Payment Certificate No. 9 for the April 2005 work at the site. This Payment Certificate No. 9 was issued by the defendant's engineer and certified for payment of the sum of $614,181.11. At that time the defendant also reissued Payment Certificate No. 8/REV1 to record the payment of approximately $200,000.00 made to the subcontractor A.J. Beck directly.

[16] In the meantime, on 18 May 2005 the defendant had given formal notice to the plaintiff of its intention to resume possession of the Waitangi Park site. This notice stipulated that this was to occur at precisely 12.01pm on 20 May 2005. The notice was given pursuant to clause 14.2.3 of the contract. That clause 14.2.3 states:

> *14.2.3 If the Principal elects to resume possession of the Site under the provisions of 14.2.1 or 14.2.2 it may:*
>
> *(a) Forthwith expel the Contractor without terminating the contract or relieving the Contractor from any of its obligations under the contract; and*
>
> *(b) Complete and remedy defects in any part of the Contract Works remaining to be completed and for that purpose may let contracts for such work or employ any Persons other than the Contractor; and*
>
> *(c) Take possession of, use and permit other Persons to use Materials, Plant, Temporary Works and other things which are on the Site owned by the Contractor and are necessary for completing and remedying defects in the Contract Works; and*
>
> *(d) Require the Contractor to arrange within 10 Working Days the assignment to the Principal or its nominee without payment the benefit of any agreement for the supply of Materials or execution of work under the contract.*
>
> *In any such cases the Contractor shall not be entitled to any further payment until the completion of the Contract Works.*

[17] The plaintiff responded, also on 18 May 2005. Through its solicitors the plaintiff provided a letter to the defendant denying that the defendant was entitled to resume possession of the site. Notwithstanding this denial, the plaintiff does acknowledge that it finally left the Waitangi Park site on 26 May 2005.

[18] The defendant contends, however, that in terms of the 18 May 2005 Notice, it re-took possession of the Waitangi Park site on 20 May 2005, and ejected the plaintiff, but that it kept the construction contract with the plaintiff on foot at that point.

[19] In his affidavit of 27 June 2006 Mr Ian Norman Pike, the Chief Executive Officer of the defendant, deposes at paragraph 24:

> *24. For all these reasons, and given CSC's [the plaintiff's] initial default, WWL [the defendant] elected to retake possession of Waitangi Park, and expel CSC from it on 20 May 2005. That process was not straightforward, as CSC refused to participate in any timely or orderly handover, and made severe physical threats against WWL personnel. CSC eventually left the site on 26 May.*

[20] Matters progressed then and on 2 June 2005 the defendant required assignment of the plaintiff's subcontracts to itself and notified the plaintiff of the cessation of any further payments.

[21] Specifically, this 2 June 2005 letter from the defendant stated in part:

> *On our resumption of the site, you are not entitled to any further payment until the Contract Works are complete. However in anticipation of the assignments being perfected we will pay subcontractors direct.*

[22] From June 2005 work continued on the Waitangi Park site under the control of Waitangi Park Limited, the Fletcher Construction subsidiary. On 16 June 2006 some seven months late, the first stage of Waitangi Park finally achieved practical completion. The defendant says that from certain calculations done now by its quantity surveyors, it is indicated that completion of the first stage of the Waitangi Park work is likely to give rise to excess costs to the defendant over its original contract with the plaintiff in the vicinity of $5 million. The defendant's position is that the plaintiff is liable to pay this amount.

[23] In the meantime, on 4 July 2005 the plaintiff company was placed into receivership. Mr Richard Simpson and Mr Kerry Price were appointed receivers. It is those receivers on behalf of the plaintiff who have brought this proceeding.

[24] In the present summary judgment application before me, the plaintiff pursues amounts said to be owing by the defendant under Payment Schedule No. 9. As to this, the plaintiff puts forward three alternative claims. First, it seeks judgment against the defendant for the full amount of Payment Schedule No. 9 issued by the defendant's engineer which totals $614,181.11 - see paragraph [15] above.

[25] As a second or alternative claim, the plaintiff seeks judgment against the defendant for the sum of $288,760.60 as a debt due in terms of the plaintiff's Payment Claim No. 9 - see paragraph [14] above.

[26] And as a third and alternative claim, the plaintiff seeks judgment for $91,000.00, which it says the defendant, in any event, on its own admission has certified for payment to the plaintiff.

Counsel's Arguments and My Decision

[27] In seeking summary judgment here, the plaintiff relies upon Rule 136 High Court Rules, which states:

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

[28] Under Rule 136 the onus is clearly on the plaintiff to satisfy the Court that the defendant has no defence to the claim.

[29] In ***Pemberton v Chappell*** [1987] 1 NZLR, Somers J said at 3:

> *At the end of the day Rule 136 requires that the plaintiff `satisfies the Court that a defendant has no defence'. In this context the words `no defence' have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See for example **Wallingford v Mutual Society** [1880] 5 App Cas 685, 693; and **Fancourt v Mercantile Credits Limited** [1983] 154 CLR 87, 99; **Orrne v de Boyette** [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.*
>
> And:
>
> *Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident - that is to say, satisfied - that the defendant's statements as to matters of fact are baseless.*

[30] Although the Court must be cautious in summary judgment applications, a Judge is not bound:

> *[t]o accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.*
>
> **Eng Mee Young v Letchumanan** [1980] AC 331 at 341.

[31] Thus, whilst it is for the plaintiff to show that its case is unanswerable, and that the defendant has no arguable defence, the Court ought to assess any defence, or narrative, presented by the defendant in a *"robust and realistic"* manner: ***Bilbie Dymock Corporation v Patel*** (1987) 1 PRNZ 84 (CA) at 85.

[32] This case raises issues concerning the interpretation of the Construction Contracts Act 2002 ("The Act") and the developing nature of the law under the Act. Both parties here accept that the contract is a "*construction contract*" in terms of s5 of the Act.

[33] The purpose of the Act is described in s3:

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 construction contracts.

[34] In considering the purpose of the Act and the words in s3(a) particularly, the Court of Appeal in George Developments Ltd v Canam Construction Ltd [2006] 1 NZLR 177 at page 185 stated:

The importance of such regular and timely payments is well recognised. Lord Denning MR (quoted in ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Limited*** *(1973) 3 ALL.ER 195 (HL) at page 214 per Lord Diplock) said:*

`There must be a "cashflow" in the building trade. It is the very lifeblood of the enterprise.'

[35] This approach was reiterated by the Court of Appeal again in ***Salem Ltd v Top End Farms Ltd*** (CAI 69/05, 27 September 2005) in the following comments:

*The whole thrust of the Act is to ensure that disputes are dealt with promptly and payments made promptly, because of the disastrous effects that nonpayment has, not only on the head contractor, but also on its employees, subcontractors and suppliers: G****eorge Developments Ltd v Canam Construction Ltd*** *(CA244/04, 12 April 2005) at 41-42. It is relevant to note, for instance, that employers can not set up counterclaims, set-offs, or cross demands as a bar to the recovery of a debt under s23 of the Act, unless the employer has a judgment in respect of its claim or there is not in fact any dispute between the parties in relation to the employer's claim: s79. The fundamental position under the Act is that, if a progress claim is made and the employer does not respond within the period stipulated in the construction contract or, by default, within the time specified in the Act, the amount of the claim becomes payable forthwith.*

[36] Mention of s79 of the Act highlights the practical importance to the construction industry of this provision. It states:

79. Proceedings for recovery of debt not affected by counterclaim, set-off or cross demand

In any proceedings for the recovery of a debt under s23 or s24 or s59, the Court must not give effect to any counterclaim, set-off or cross demand raised by any party to those proceedings other than a set-off of a liquidated amount if -
(a) judgment has been entered for that amount; or
(b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[37] It is important now to consider the mechanics of the progress payment arrangements under the contract between the parties here.

[38] Section 14 of the Act provides that the parties to a construction contract are free to agree between themselves on the mechanism for determining the number of progress payments (being instalment payments and the final payment) under the contract, the interval between those payments, their amount, and the date when each of the payments becomes due. If the parties fail to agree on a mechanism, the Act imposes a statutory mechanism outlined in sections 15-18.

[39] In the present case, the parties specifically agreed on progress payment matters in paragraph 12 of the contract. Payment claims were to be submitted by the plaintiff monthly and the due dates for payment were to be 17 working days after service.

[40] Paragraph 12.2 of the contract deals with progress payment schedules. Paragraph 12.2.4 provides that, no later than 12 working days after receipt of the plaintiff's payment claim, the defendant's engineer (acting as agent of the defendant) is to issue a progress payment schedule showing the scheduled amount certified by the engineer - paragraph 12.2.4(b).

[41] Paragraph 12.2.6 provides that every scheduled amount under paragraph 12.2.4(b) shall be payable by the defendant to the plaintiff as contractor within 5 working days of the date of the progress payment schedule.

[42] I turn now to the statutory regime for progress payments under the Act. Sections 20-24 of the Act set out this detailed regime with the clear intention of ensuring payments are made in a regular and timely way.

[43] Section 20 of the Act stipulates the requirements for a payment claim from the contractor/payee, and s21 sets out the requirements for a payment schedule issued on behalf of the principal/payer.

[44] Sections 22 and 23 of the Act apply when the payer does not provide a payment schedule within the required time. The payer then becomes liable to pay the claimed amount and that amount can be recovered as a debt due - s23(2)(a) of the Act.

[45] Section 24 of the Act applies when the payer does provide a payment schedule within the required time, but fails to pay the scheduled amount by the due date. The payer then becomes liable to pay the scheduled amount, and it can be recovered as a debt due - s24(2) of the Act.

[46] And, as I have noted in paragraph [36] above, under s79 of the Act, in proceedings for recovery of a debt under s23 or s24 of the Act, the Court is directed not to give effect to any disputed counterclaim, set-off or cross demand (except for an amount awarded by a judgment).

[47] I turn now to consider the plaintiff's present alternative claims for which summary judgment is sought.

Plaintiff's First Claim

[48] The plaintiff contends first, that Payment Claim No. 9 under paragraph 12 of the contract was a payment claim within the meaning of s20 of the Act, and second that Payment Certificate 9 given under paragraph 12.2.4 of the contract was a payment schedule within the meaning of s21 of the Act.

[49] According to the plaintiff, the defendant has failed to pay the scheduled amount under Payment Certificate 9 and it follows that the plaintiff is entitled to recover this as a debt due pursuant to s24(2) of the Act.

[50] Section 24 of the Act states:

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 progress 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 service 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.

[51] The plaintiff contends that these statutory requirements are satisfied, and judgment should be given for the amount of Payment Schedule 9 which totals $614,181.11.

Plaintiff's Second (Alternative) Claim

[52] The plaintiff's second alternative claim refers to Payment Claim 9. This claim is advanced in the alternative in case the Court accepts (as the defendant contends it should) that Payment Certificate 9 was not issued in response to the plaintiff's Payment Claim 9. The defendant asserts that Payment Certificate 9 was not issued in response to the plaintiff's Payment Claim No. 9, but was issued in response to the first payment claim submitted by Fletchers, who by that time were involved with the site.

[53] This is strongly disputed by the plaintiff, but, in any event, if it is accepted by the Court to be the case, then the plaintiff argues that, as a minimum position its Payment Claim 9 issued for $288,760.00 has been left unanswered by the defendant.

[54] In this event, s22 of the Act applies, and the plaintiff says it is entitled to recover the $288,760.00 as a debt due pursuant to s23.

[55] Section 22 of the Act states:

22. Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress 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.

[56] The plaintiff says that it has served a proper payment claim on the defendant, and the defendant has not within either the time specified in paragraph 12.2.4 of the contract, (twelve working days) or the 20 working day period noted in s22, provided its payment schedule. In terms of s23(2) the consequences are that the plaintiff may recover from the defendant as a debt due the unpaid portion of this claim. According to the plaintiff, no part of this $288,760.00 has been paid to the plaintiff. Hence the plaintiff as its second alternative claim seeks summary judgment for this Payment Claim 9 totalling $288,760.00.

Plaintiff's Third (Alternative) Claim

[57] The plaintiff's third alternative claim relates to Payment Schedule 9. In this claim the plaintiff says that at the very least it must be entitled to $91,000.00 on the basis that the defendant itself has acknowledged (at paragraph 26 of the 27 June 2006 affidavit of Michael Hannaway filed on behalf of the defendant) that in Payment Certificate 9 $91,000.00 of the amount certified is due to the plaintiff.

Specifically at paragraph 26 of his affidavit Mr Hannaway acknowledged:

Through WPL (Fletchers) WWL (the defendant) paid subcontractors for the work during April, and retained the $91,000.00 (excluding GST) balance otherwise due to CSC (the plaintiff). (emphasis added)

[58] The plaintiff's position, therefore, is that in any event, the defendant has acknowledged that $91,000.00 as the *"balance otherwise due to the plaintiff'* is payable, and as a debt due it remains unpaid.

[59] In general terms, the broad submission from the plaintiff is that the present case represents as clear an example as possible of claimed and scheduled progress payment amounts becoming payable and due in terms of both the contract and the procedures under the Act, but despite this, those amounts still remaining outstanding.

[60] Essentially, the plaintiff maintains that the present situation provides an unmistakable demonstration of the type of situation that Parliament intended to prevent when passing the Act. According to the plaintiff, after 24 February 2005 when the defendant had given notice to the plaintiff that it intended to either terminate the contract or to resume possession of the Waitangi Park site, the defendant then permitted the plaintiff to continue working on the site and incurring expenses for that purpose throughout March, April and some of May 2005. The defendant then decided to eject the plaintiff from the site, and the plaintiff says that the defendant's assertion that the plaintiff has no further right to payment for work performed by it during this period is unsupportable, wrong and unfair.

[61] Before me, counsel for the plaintiff suggested the situation in the current case was not unlike that alluded to by Harrison J in ***Willis Trust Company Ltd & Anor v Green & Anor*** (HC AK, CIV-2006-404-809, 25 May 2006), a situation which counsel said the Act was designed to guard against. In Willis Trust Harrison J stated at paragraph 20:

...the statute was designed to protect a contractor through a mechanism for ensuring the benefit of cashflow for work done on a project, thereby transferring financial risk to the developer. The scheme of the Act is to provide interim or provisional relief while the parties work through other, more formal, dispute resolution procedures.

And at paragraph 65:

This regime is consistent with the statutory regime of interim measures designed to secure prompt payment and transfer financial risk from the contractor to the principal. Parliament would not have been unfamiliar with the practice favoured by some developers of using threats of set-offs or counterclaims, whether justified or not, to keep contractors indefinitely out of their money, or to force them into accepting final payments in amounts substantially less than their contractual entitlements.

Defendant's Opposition

[62] I turn now to consider the defendant's principal arguments in opposition.

[63] As a starting point, counsel for the defendant referred to s14 of the Act, which permits the parties to a construction contract "*to agree between themselves on a mechanism for determining ... the amount of each of those (progress) payments (and) ... the date when each of those (progress payments) becomes due.*" (Absent such agreement, counsel for the defendant properly acknowledged that in terms of s17-18 of the Act, each payment is to be of an amount calculated by reference to work carried out during the period, and is to become due and payable 20 working days after the claim is served).

[64] In the present case, the defendant argues that the contract based on NZS3910:2003 did establish an alternative payment mechanism.

[65] The contract while ordinarily requiring payment of a calculated sum (clause 12.2.4) within 5 working days of the date of the payment schedule (clause 12.2.6) also provided that:

a) *The defendant as principal may pay unpaid subcontractors directly by deduction from sums otherwise payable to the contractor in terms of clauses 12.2.8 - 12.2.9; and*

b) *In circumstances in which the defendant as principal resumes possession of the site on the contractor's default, the contractor in terms of clause 14.2.3 shall not be entitled to any further payment until the completion of the contract works.*

[66] As to paying unpaid subcontractors, clauses 12.2.8 and 12.2.9 established a mechanism whereby the defendant could check on the state of payments to subcontractors and if defaults had occurred, could choose to pay subcontractors direct by deduction from monies otherwise payable to the plaintiff as contractor. Here, the defendant says that it had good cause to ensure that such a self-help mechanism existed and was able to be relied on. This was because, in terms of s72 of the Act, unpaid subcontractors were entitled to suspend work until paid, and the defendant had a particular reason to wish to avoid any unnecessary delays on the part of these critical subcontractors, as it needed the project finished in time for the scheduled Wellington Arts Festival in February 2006.

[67] It follows from this, according to the defendant's evidence provided to the Court, that all but $91,000.00 of the $614,181.11 certified for payment in Payment Schedule No. 9 was paid to various subcontractors of the plaintiff, to ensure they would continue to work on the site. This was entirely justified and proper, according to the defendant, because the evidence before the Court clearly shows first, that there was a significant history of defaults on the part of the plaintiff in paying its subcontractors, and secondly, the defendant had received no proper response from the plaintiff to its repeated requests for information concerning these defaults. As I have noted, the defendant says that payments to subcontractors accounted for all but $91,000.00 of the $614,181.11 certified for payment under Payment Certificate No. 9.

[68] The defendant's second contention in opposition to the plaintiff's claim relates to paragraph 14.2.3 of the contract. The terms of this paragraph are set out at paragraph [16] of this judgment.

[69] As to this, the defendant argues that because a progress payment includes *"any final payment under the contract"*, clause 14.2.3 is part of the agreed payment mechanism between the parties and supplants in the particular circumstances in which it arises the determination in clause 12.2.6 of the contract or otherwise of when payments are due.

[70] The defendant contends that clause 14.2.3 was plainly intended to override clause 12.2.6 where a principal such as the defendant here, resumes possession of the site on default by the contractor.

[71] The defendant says that is evident from the provisions contained in clause 14.2.4 of the contract. These provide an alternative final accounting mechanism quite separately from the final payment claim and schedule provisions set out at clauses 12.4 and 12.5 of the contract.

[72] The defendant maintains that pursuing a result under the payment claim and schedule process is an entirely fruitless exercise if clause 14.2.4 is to be given any weight.

[73] The defendant argues that once a contractor is in default and expelled pursuant to clause 14.2.3, payment under the contract is suspended and amounts unpaid are retained for the final wash-up, even though this may be to the detriment of other creditors of the contractor.

[74] Thus, on the defendant's election in this case to resume possession of the site on or about 20 May 2005, payment of any monies then due to the plaintiff (and the defendant contends at best this would be the $91,000.00 balance) was suspended for inclusion in the final wash-up pursuant to clause 14.2.4 of the contract.

[75] According to the defendant, it follows that the Court cannot therefore be satisfied that there has been any failure to pay amounts properly due to the plaintiff as contractor either in terms of s24(1)(d) or s23(1)(b) or the Act. This is because those sections refer to certain consequences if the defendant as payer fails to pay *"the whole, or any part, of the ...amount on or before the due date for the pry payment to which the payment claim relates"*. The defendant says that quite simply, clause 14.2.3 provides that at that point any balance progress or final payment to be made to the plaintiff is not yet due. It is specifically deferred "until completion of the contract works". And, that final wash-up on completion of the contract works, on the facts here, is yet to occur.

[76] Taking a broad overview, the defendant concludes that the Court should be slow here to allow the plaintiff to use the processes contained in the Act as what it describes as a tool of oppression against the defendant. The defendant says that the plaintiff has put the defendant to extraordinary lengths in having the Waitangi Park contract finally completed, and at considerable additional cost. Under these circumstances, the defendant argues that it has acted in an entirely proper fashion in both:

a) Making payment to the plaintiff's long outstanding subcontractors direct under paragraphs 12.2.8 and 12.2.9 of the contract; and

b) When the defendant resumed possession of the site, deciding to retain the balance of the progress payment provided for in Payment Schedule 9 until the final contract wash-up in strict accordance with the provisions of clause 14.2.3 of the contract.

My Decision

[77] At the outset I remind myself that as this is a summary judgment application, the plaintiff has the onus to satisfy the Court that the defendant has no fairly arguable defence to its claim - ***Pemberton v Chappell***.

[78] The starting point here, in my view, must be s24(4) of the Act which, as I have noted at paragraph [50] above, provides that:

(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.

[79] Those circumstances are that a payee must first serve a payment claim on a payer, the payer then provides a payment schedule to the payee, the payment schedule indicates a scheduled amount that the payer proposes to pay to the payee, and specifically:

(d) The payer fails to pay the whole, or any part, of the scheduled amount on or before the due date for the pro gr ess payment to which the payment claim relates. (emphasis added)

A similar provision is set out in s23(4) of the Act.

[80] Here, for summary judgment to be entered in favour of the plaintiff as payee, the Court must be satisfied that the plaintiff's case that the defendant as payer has failed to pay a progress payment amount on or before its due date for payment is unanswerable. Notwithstanding that, and the need for a cautious approach to be taken to summary judgment applications, it is clear that a Court must assess any defence mounted by the defendant in a robust and realistic manner - ***Bilbie Dymock Corporation.***

[81] As I have noted, the principal defence argued before me by the defendant is that in terms of clause 14.2.3 of the contract the due date for payment of Payment Claim No. 9 and Payment Certificate No. 9 has not as yet arrived. That payment, if it is to be made at all when all the final wash-up calculations are made under clause 14.2.4, is deferred until completion of the contract works.

[82] In my view, there is substance in this argument for the defendant. The parties accept that the defendant resumed possession of the site either on 20 May 2005 or at the latest on 26 May 2005. Consequent upon this occurring, I am satisfied that it is reasonably arguable that the dates for payment of any moneys under the contract were deferred. On this it is useful to restate the operative part of clause 14.2.3 of the contract:

In any such case (of the principal electing to resume possession of the site and expelling the contractor) the contractor shall not be entitled to any further payment until the completion of the contract works. (emphasis added)

[83] As I see it, there is a reasonable argument for the defendant first, that this is precisely the situation which has occurred here, and secondly, that it has resulted directly from the plaintiff's delays and defaults as contractor under the contract. The defendant's position is that it had absolutely no alternative but to resume possession of the site in May 2005, and to employ the Fletcher Construction subsidiary Waitangi Park Limited to take over the contract work. On the basis of the material before the Court, in my view there appears to be some substance in this claim.

[84] And, I accept too that it is reasonably arguable here that clause 14.2.3 of the contract was intended to override the prescriptive general payment provisions in ss22 and 24 of the Act and paragraph 12.2.6 of the contract.

[85] That this clause 14.2.3 of the contract in part established an alternative mechanism for payments under the contract is clearly arguable. And in terms of s14 of the Act, I find a reasonable argument exists to support the defendant's position that the parties here have *"agreed between themselves on a mechanism for determining ... the date when each of those (progress payments under the contract) becomes due".*

[86] Despite submissions from the plaintiff to the contrary, in my view this is not a situation where contracting out of the provisions of the Act, prohibited by s12, has occurred. The Act clearly applies here, but I am satisfied that as s14 of the Act envisages, the parties have agreed under their contract on express terms for each payment, and in particular the payment situation where the plaintiff as contractor is in default and expelled.

[87] It follows, therefore, that when the defendant elected to resume possession of the site around 20 or 26 May 2005, in terms of paragraph 14.2.3 of the contract, the plaintiff was not entitled to any further payment until all contract works were completed. As I see it, a rationale for this provision necessarily follows from paragraph 14.2.4 of the contract. This provides that when the contract works were to be finally completed, a full wash-up of all costs would be undertaken and:

The engineer shall enquire into the cost to the principal of completing the contract works and certify accordingly. Should the amount certified exceed the cost to the principal had the contract works been completed by the contractor, the difference between the two amounts shall be certified by the engineer and paid by the contractor to the principal.

[88] There is no evidence before the Court to establish that this final wash-up has occurred yet.

[89] And, I am satisfied too that s79 of the Act (noted at paragraph [36] above) is not relevant to considerations in the present summary judgment application. The plaintiff has not shown here that any "debt" arising under the contract is due and outstanding from the defendant at this point.

[90] Under all these circumstances, in my view, the defendant has done enough here to establish what I see is a properly arguable defence to the plaintiff's claim. This is to the effect that from around 20 May 2005, in terms of clause 14.2.3 of the contract, the plaintiff was not entitled to any further payment under the contract until completion of the contract works and the final wash-up, and that has not yet occurred.

[91] That is enough to dispose of the plaintiff's summary judgment application here. It is dismissed.

[92] For the sake of completeness, however, I mention briefly the second defence advanced by the defendant in opposition to the summary judgment application. This is to the effect that the defendant has paid all bar $91,000.00 of Payment Certificate No. 9 to the plaintiff's unpaid subcontractors. The defendant in the evidence advanced on its behalf contends that this repeats the situation which had arisen earlier with Payment Certificate No. 8 under the contract. Then, the defendant also made substantial payments to the plaintiff's unpaid subcontractors from the amount certified for payment in that Certificate.

[93] Bearing in mind these aspects, I am persuaded by the argument advanced before me by counsel for the defendant that clauses 12.2.8 and 12.2.9 of the contract clearly established a process entitling the defendant first to check on the position with regard to the plaintiff's payments to its subcontractors, and secondly, if defaults had occurred, after appropriate warning to choose to pay those subcontractors direct by deduction from monies otherwise payable to the plaintiff as contractor.

[94] From the evidence before the Court, the defendant has done enough to show that any summary judgment claim from the plaintiff to the large portion of Payment Certificate No. 9 represented by these payments made to subcontractors must be rejected.

[95] This still leaves, however, the sum of $91,000.00 of Payment Certificate No. 9 as a balance acknowledged by the defendant as "otherwise due to the plaintiff'. Notwithstanding this, the third alternative claim by the plaintiff to this $91,000.00 must fail. The $91,000.00 is arguably a payment not yet due under the contract for the reasons I have outlined at paragraphs [78] to [91] above.

Conclusion

[96] It will be apparent from what I have outlined above that the plaintiff's summary judgment application must fail. The application is dismissed.

[97] Costs are reserved.

Minter Ellison Rudd Watts, Wellington for Plaintiff Chapman Tripp, Wellington for Defendant
Appearances: D. Chan and S. Dalziell for Plaintiff P. Jagose and J. Keane for Defendant