IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2007-488-000144

	BETWEEN	HALLS EARTHWORKS LIMITED (IN LIQUIDATION) Plaintiff
	AND	DONOVAN DRAINAGE AND EARTHMOVING LIMITED Defendant

Hearing: 17 and 18 July 2007

Counsel: D Grove for plaintiff
R Bowden for defendant

Judgment: 18 July 2007 at 1530

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

Solicitors: David Shanahan & Associates, PO Box 1801, Whangarei for plaintiff
Urlich McNab Kilpatrick, PO Box 633, Whangarei for defendant

[1] The plaintiff seeks summary judgment against the defendant for a reduced sum, namely $122,680.26 plus interest at 7.5% per annum from 28 February 2007.

[2] The claim is reduced from the amount set out in the statement of claim of $200,775.17 plus interest and costs.

[3] The claim arises from a subcontract between the plaintiff company and the defendant company arising from the contract between the defendant company and Blitzen Investments Limited. Blitzen Investments Limited was developing the "Ocean View Estate" (ex Tropicana Motel) at Whangarei Heads Road on the shores of Whangarei Harbour. The work to be performed included the supply and installation of drainage services and concrete footpaths.

[4] The plaintiff's claim is based on the service of a schedule pursuant to s 20 of the Construction Contracts Act 2002. That schedule claims the amount of $200,775.17. The plaintiff alleges that the defendant failed to respond as required by s 21 of the Construction Contracts Act 2002. As a consequence, the defendant is liable to pay the claimed amount as at 27 February 2007 by the operation of s 22(b)(ii) of the Construction Contracts Act 2002.

[5] The defendant opposes the application. Two specific grounds appeared in the notice of opposition dated 10 April 2007 and filed on 11 April 2007. They are as follows:

a) The defendant has already paid the entire amount awarded by the adjudicator, Mr JC LaHatte, in terms of his award dated 13 November 2007; and

b) That on 27 February 2007 the defendant served, by fax and post, to the addresses supplied on the claim, a schedule of payments required by s 21 of the Construction Contracts Act 2002.

[6] The application for summary judgment had its first call scheduled for 16 April 2007. Counsel helpfully conferred and filed a joint memorandum dated

13 April 2007, advising the Court of a timetable for reply affidavits and seeking the allocation of a ½ day fixture after 7 May 2007. Based on counsel's consent memorandum, I issued a minute allocating this ½ day fixture and requiring documents to be filed in terms of r 251A.

[7] On 9 July 2007 the defendant filed three documents. The first is an application for leave to cross-examine Mr AL Halls, the plaintiff's director. The second is an amended notice of opposition. The third is a further affidavit of Mr C Daniel.

[8] The amended notice of opposition introduces a further ground. It alleges:

> That the award of the adjudicator, Mr JC LaHatte, and dated 13 November 2006 was occasioned by fraud on the part of the defendant, its directors and/or agents.

That contains a mistake. The intention is to allege an allegation of fraud on the part of the plaintiff and its director and agents. I amended the document to reflect that position with the agreement of both counsel.

[9] Mr Grove opposed both the application to cross-examine and the application to amend the notice of opposition by adding the new ground which I have set out in [8] of this judgment.

[10] Extensive documents have been filed, allegedly to deal with an issue which the defendant seeks to pursue. In short, that issue is that the subcontract between the plaintiff and defendant was a *measure and value contract* and that the true consideration excludes any allowance for *preliminary and general and margin*. The evidence explains that the term *preliminary and general* is widely used in the New Zealand construction industry. It is an allowance to cover the costs of operating a construction business such as insurances, programming costs, site staff, office overheads, utility costs, telephones, temporal works, health and safety, small tools and so on. The reference to margin is simply a reference to profit margin.

[11] There has already been a finding adverse to the defendant in relation to its contention that the contract was *a measure and value contract*. That arose as a result

of the plaintiff serving a notice of adjudication under the Construction Contracts Act 2002 resulting, ultimately, in the appointment of an adjudicator, Mr JC LaHatte. Mr LaHatte issued his determination in respect of the specific relief sought by the plaintiff, namely, that it was entitled to receive from the defendant the sum of $108,688.87 plus GST for preliminary and general and margin allowance under the subcontract. Mr LaHatte also found that the parties had agreed:

> A fixed price contract and that the plaintiff would be entitled to be paid the amount agreed.

[12] It is common ground that Mr LaHatte's determination is a determination pursuant to s 48(1)(a) of the Construction Contracts Act 2002. It is therefore binding on the plaintiff and defendant by virtue of s 60 of the Construction Contracts Act 2002.

[13] The defendant's new allegation of fraud is a belated attempt to achieve the outcome which I have referred to in [10] of this judgment. For reasons which I shall explain in this judgment, it does not provide a specific answer to the plaintiff's claim in this proceeding. It follows therefore that, if it does not provide a proper basis for defence to this proceeding, there is no justification for the permitting of cross-examination of a deponent as to the nature of the contract and as to that party's knowledge of the nature of the contract and actions taken as a result.

[14] Cross-examination is not, ordinarily, appropriate in summary judgment applications. The reasons were explain by McMullin J in *Ian Buckeridge Transport Ltd v Paku* (1987) 1 PRNZ 80 at 82:

> If there is no material on the papers to raise an arguable defence then crossexamination is not likely to put one in existence, and a defendant should not be allowed to raise by crossexamination what he has been unable to do or has neglected to do by affidavits sworn for that purpose. Conversely if a defence is apparent on the papers, there will be no need for crossexamination at all.

In *Hurle v Eder* (1997) 11 PRNZ 361 the Court declined leave to cross-examine because it would have effectively resulted in a mini trial, without necessarily enabling the final determination of the matter. The Court of Appeal in *Kidd v van Herren* (1997) 11 PRNZ 422 explained that in relation to interlocutory applications

something abnormal, uncommon or out of the ordinary was required before cross-examination should be allowed. That does not arise in this case for reasons which I will explain. That is because the alleged fraud, namely the obtaining of the award of the adjudicator, Mr JC LaHatte, by an action of the plaintiff or its directors is not pivotal to a determination of the plaintiff's claim as pleaded in its statement of claim before me. Accordingly, I refused the application to cross-examine Mr Hall.

[15] This is an application for summary judgment.

[16] The principles applicable when summary judgment is sought are well-established. Rule 136 of the High Court Rules requires that the plaintiff satisfy the Court that the defendant has no defence. That was explained by the Court of Appeal in *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 as follows:

> 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.

[17] The Court added at 4:

> 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. ...

[18] And, further, at 4:

> Where the only arguable defence is a question of law which is clearcut and does not require findings of disputed facts or the ascertainment of further facts, the Court should normally decide it on the application for summary judgment, just as it will do on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence.

[19] The Court also commented on the position where a defence is not evident on a plaintiff's pleading and said at 3:

> If a defence is not evident on a plaintiff's pleading I am of the opinion that if the defendant wishes to resist summary judgment he must file an affidavit in answer raising an issue of fact or law and give reasonable particulars of the matter which is claimed ought to be in issue. In this way a fair and just balance will be struck between the plaintiff's right to have the case proceed to judgment without tedious delay and the defendant's right to put forward a real defence.

[20] That position was further reinforced in *AGC (New Zealand) Ltd v McBeth* [1992] 3 NZLR 54 at 59 where the Court said:

> Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.

[21] Hypothetical possibilities in vague terms, unsupported by any positive assertion or positive documents advanced by a defendant will not frustrate the obligations on a plaintiff to discharge the onus of proof: *SH Lock (NZ) Ltd v Oremland* HC AK CP641-86 19 August 1986.

[22] The Court of Appeal in *Tilialo v Contractors Bonding Limited* CA 50-93 15 April 1994 raised a caution, however, at 7 of the judgment and said:

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[23] Rule 136 does create a residual discretion although as expressed by Casey J in *Pemberton v Chappell* at 5 it is difficult to conceive:

> Of circumstances where the Court should not give judgment for the plaintiff … It can only be a discretion of the most residual kind.

[24] The discretion was the subject of comment in *Jowada Holdings Ltd v Cullen Investments Ltd* CA 248/02 5 June 2003 at [30].

[25] The plaintiff's claim is that it served on the defendant on 28 January 2007 a schedule pursuant to s 20 of the Construction Contracts Act 2002 claiming the amount of $200,775.17 including interest up to 27 February 2007. The plaintiff alleges that its payment claim complies in all respects with the requirements of s 20.

[26] The defendant does not dispute the service of the payment claim. The defendant raises no issue concerning the claim's compliance with s 20 of the Construction Contracts Act 2002.

[27] What is in issue is whether the defendant provided a payment schedule which complies with s 21 of the Construction Contracts Act 2002 and which was served within the time limit imposed by s 22(b)(ii). It is common ground that the contract made no specific provision for service of a payment schedule. For that reason, s 22(b)(ii) applies and the last day for compliance with the plaintiff's payment claim was 27 February 2007.

[28] The defendant's evidence is that a payment schedule was faxed to telephone number 09 437 3910 by its shareholder and financial controller, RI Donovan. The telephone number, however, was disconnected on 1 February 2007 with the result that the fax could not be received. The defendant has produced no fax confirmation report.

[29] Section 80 of the Construction Contracts Act 2002 sets out the means by which notices may be served. The only applicable provision is that which is contained in s 80(d), namely:

> **80 Service of notices**
>
> (d) the notice or document is sent in the prescribed manner (if any).

[30] The Construction Contracts Regulations 2003 provide in reg 9 for additional modes of services. Subrule 2 is applicable to the circumstances of this case. It provides:

> **9 Additional modes of service**
>
> (2) A notice or document sent by fax under subclause (1)(a) is, in the absence of proof to the contrary, served or given if the fax machine generated a record of the transmission of the notice or document to the fax machine of the recipient, and the date of the record is taken to be the date of receipt of that notice or document.

[31] What is apparent is that there has been no service of a payment schedule by the defendant which complies with any of the modes of service set out in s 80 Construction Contracts Act 2002 or those prescribed.

[32] Section 23 sets out the consequence of not paying the claimed amount where no payment schedule is provided. For the purposes of this case the consequences are

as specified in s 23(2) namely that the plaintiff may recover from the defendant as a debt to the plaintiff in any Court the unpaid portion of the claimed amount and the actual and reasonable costs of recovery awarded against the defendant by the Court in which the claim was made.

[33] The circumstances surrounding the cancellation of the plaintiff's telephone number arise by virtue of the plaintiff having been placed into liquidation on 30 January 2007. I have mentioned the fact that s 80 provides various methods for service of notices under the Construction Contracts Act 2002. The defendant chose, in the first instance, to attempt service of its payment schedule by fax. It is surprising that the defendant did not take advantage of the advice given to it in a letter faxed to it by Mr Sweeney, who was acting as adviser for the plaintiff, on 31 January 2007. That letter gave advice to the defendant of the appointment of the liquidators and that there were two places which could be treated as addresses for service for the plaintiff company, one being Mr Sweeney's company and the other being the solicitors for the liquidators. In each case, a fax and telephone number and postal address was provided. In short, the defendant had various options available to it for the service of its payment schedule. It failed to comply in a timely way with the requirements of s 22(b)(ii) and therefore must suffer the consequences which are set out in s 23.

[34] The above analysis answers the second ground of opposition, which I have referred to in [5] of this judgment. That ground simply cannot be sustained on the evidence provided.

[35] This proceeding is a proceeding pursuant to s 23 for recovery of the debt being the claimed amount. That position, then, requires a consideration of s 79 of the Construction Contracts Act 2002. Section 79 provides:

> **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 section 23 or section 24 or section 59, 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.

[36] It is common ground that neither (a) or (b) of s 79 apply in this case.

[37] The defendant's case has, at all times, been that it should not pay any of the sums claimed in the payment claim served on it on 28 January 2007. There is simply no foundation for the proposition advanced as the first ground for opposing summary judgment as set out in [5] of this judgment. There is no evidence of any payment being made in satisfaction of the claim served on 28 January 2007.

[38] The first ground is simply an attempt to relitigate the finding of the adjudicator as to the nature of the contract. Whether there is a justification for that is not a matter that provides a specific answer or defence to the debt which arises by virtue of the service of the payment claim and the failure to provide a payment schedule in response. If it did, it would frustrate one of the purposes of this legislation.

[39] In *Marsden Villas Ltd v Wooding Construction Ltd* HC AK CIV 2006-404-002136 25 May 2006 Asher J said the purpose of the Construction Contracts Act 2002:

> [9] The purpose of the Act is set out in s 3 which reads:
>
> > **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.
>
> [10] The Law Commission Paper which led to the legislation, *Protecting Construction Contractors* stated that the Act was "... to have as its purpose the ensuring of prompt cashflow to contractors ..." (p 11).
>
> [11] A little earlier in the report it was put more graphically:

> The basic intention is that instead of the cashflow being held up for weeks, months and years, pending a final solution, a decision, described as being "quick and dirty" will be given to resolve the cashflow situation, leaving a final determination of financial rights and obligations to be arrived at later.

[12] In *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 716 the House of Lords quoted Lord Denning in the Court below:

> [t]here must be 'cashflow' in the building trade. It is the very lifeblood of the enterprise.

This was quoted with approval by the New Zealand Court of Appeal in *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 at [41].

[13] In *Gilbert-Ash* the House of Lords allowed the appeal against Lord Denning's decision. Lord Reid commented at p 699 that in a range of judgments the English Court of Appeal had come near to laying down a general rule that not only in cases between an employer and contractor, but also in cases between contractor and sub-contractor, sums due under an architect's certificate must be paid at once without waiting for determination of claims for set-off. This line of authority was disapproved by the House of Lords, at least as it related to contractor and sub-contractor.

[14] The effect of the New Zealand Construction Contracts Act 2002 was to strongly confirm that such a regime which protected and encouraged cashflows was right for cases between the principal and contractor. The intention was to improve the head contractor's ability to obtain payment, by setting up a quick and mandatory payment process. In enacting such legislation, the Legislature set aside the long-established conservative contractual approach to construction contracts which emphasised freedom of contract. The history of these cases is described in Hon. R Smellie CNZM QC, *Progress Payments and Adjudication*, paras 1 – 15. The Act has "emphatically vindicat[ed] Lord Denning's approach" (Smellie, para 31.)

[15] Consistent with the Law Commission Paper, the General Policy Statement which was set out at the beginning of the Explanatory Note accompanying the Bill reads as follows:

> This Bill is intended to facilitate prompt and regular payments within the construction industry.

[16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain timeframe and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The

> substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.
>
> [17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, and the quick resolution of disputes. The processes that it sets up are designed to side-step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cashflow.

[40] The summary of the purposes of the Act is the reason why Mr Grove acknowledged to me that the entry of judgment in this case would not provide an estoppel if there was a proper foundation for a claim by the defendant of over-payment or, for that matter, fraud in obtaining the determination of the adjudicator. The reason is, if there is a foundation for such matters, that may still be the subject of a determination in proceedings brought by the defendant.

[41] It is appropriate that I comment on the additional ground of opposition which is set forth in [8] of this judgment. Mr Grove opposed the amendment. He advised that if it was allowed he would nevertheless wish to proceed with the fixture. Accordingly, I have allowed the amendment so that, at least, the basic ground advanced can be considered and in the way it is advanced to see if it might provide a ground for opposing summary judgment in this case.

[42] I have already recorded that the plaintiff's claim does not rely, on a jurisdictional basis, on the award of the adjudication of Mr JC LaHatte. It simply is founded upon the application of ss 20, 21, 22 and 23 of the Construction Contracts Act 2002 as I have set out. An analysis of the basis of the fraud claim will therefore not assist the defendant in this case. It is important, particularly having regard to the way the allegation was made and the time at which it was made, that I refer to the

approach which must be followed when a claim based on fraud is advanced. I adopt the summary of position set out by Harrison J in *Paper Reclaim Limited v Aotearoa International Limited* HC AKL CIV 2004-404-004728 14 February 2005.

> [17] It has been said by many Judges, and on many occasions, that a claim based on fraud is extremely serious. It must be properly particularised and proven to a high standard, commensurate with the severity of the allegation. In the context of an attempt to impeach a judgment on the ground of fraud, the same principles apply – "particulars of the fraud must be exactly given" (*Jonesco v Beard* (supra) per Lord Buckmaster at 300, applied in *Ongley v Brdjanovic* [1975] 2 NZLR 242 by Beattie J at 244, and in *Shannon v Shannon* [2002] 3 NZLR 567 by Potter J at para 51). It follows, in my judgment, that when filing an application to set aside a judgment a plaintiff alleging fraud must have an evidential foundation sufficient to establish a prima facie or arguable case (*cf. Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44 (PC) at 51C). The probative value and admissibility of its evidence must be apparent at that stage.
>
> [18] There is no room for a provisional or equivocal claim, based on suspicion, to be bolstered by fishing expeditions through the problematical process of interrogatories and discovery. I agree with Randerson J when rejecting Mr Judd's submission:
>
> > ... that, in a proceeding of this kind, the Court is obliged, in accordance with traditional strike out principles to treat the plaintiff's allegations in the statement of claim as true. That is undoubtedly the general principle in cases where a strike-out application is brought on the ground first in R186(a). Generally, the Court does not go into the evidence ... [although it] is not necessarily required to assume the correctness of factual allegations obviously put forward without any foundation.
>
> [19] Where a fraud proceeding of this kind is brought, the Court is being asked to entertain a collateral attack on a solemn and considered judgment of this Court outside the ordinary processes of appeal. There is an obligation on the plaintiff to produce some probative evidence to support its claim when the defendant applies to strike out...

[43] To the extent that the defendant seeks to challenge the adjudicator's decision, I have already referred to s 60. For completeness' sake, I note that there have been no judicial review proceedings in respect of that determination. I was told that there are proceedings extant in the District Court which are effectively stayed by the operation of s 248(1)(c) of the Companies Act 1993. Whether those proceedings should continue is no doubt a matter that the defendant can discuss with the liquidator of the plaintiff in the first instance and, if not satisfied with the result,

could pursue an appropriate application to the Court. In doing so, if the defendant is to pursue the allegation of fraud, care must be taken to observe the position that I have set out. There is certainly no justification for my analysing the matter further in this judgment.

[44] Mr Bowden undertook an extensive analysis of the background documents. His purpose, as I have already recorded, was to endeavour to establish that there is a sound foundation for the proposition that the adjudicator's finding that the contract was a fixed price contract was wrong. He recognised that the defendant's task, however, must go beyond that. In short, he recognised the necessity for the challenge to go beyond simply disclosing an error in the adjudication decision. What is required is that the error is brought about by the fraudulent conduct of the plaintiff.

[45] In *Shannon v Shannon* 17 PRNZ 587 the Court of Appeal examined the fraud exception to the principle of finality of a judgment. The Court confirmed the stringent requirements that must be met before a judgment can be set aside on the basis of fraud. There must be:

a) Evidence newly discovered since trial;

b) Evidence that with reasonable diligence could not have been found by the time of trial;

c) Evidence so material that its production would probably have affected the outcome of the trial; and

d) Where perjury is alleged, evidence so strong that it would reasonably be expected to be decisive at the re-hearing.

The Court emphasised that the new evidence relied upon should be put before the Court at the strike out stage.

[46] Mr Bowden's analysis was based on the actual documents, that is the schedules of quantities and contract schedules and the payment claims. All of that material was available to the parties at the time of the adjudication and, indeed, at the

time when the payment claim, which is the foundation for the current proceeding, was issued. The fact that the defendant's expert had not seen the material does not assist the defendant's position. The inference is that the very same submissions that were advanced to me could have been advanced at the time of the adjudication. Indeed, a consideration of the adjudicator's report indicates that some such submissions were advanced. That leads me to the conclusion that what has been placed before me does not provide a sound foundation for the attack which the defendant seeks to make. That, then, is sufficient to dispose of this additional ground of opposition to the application for summary judgment in this case.

[47] I acknowledge that Mr Bowden submitted that the existence of such a defence may justify the exercise of the residual discretion to not enter summary judgment pursuant to r 136 of the High Court Rules. That there is such a residual discretion I have already referred to, although it is of very limited scope. What is apparent in the current context, however, is that the whole purpose of the Construction Contracts Act 2002 would be lost in a case such as the instant one if a contractor is denied a judgment. Parliament has set the appropriate policy that is to be applied in these cases. In my view, there is no proper case for the exercise of the residual discretion in this case. Further, the fact that defendant may have missed serving its payment schedule only by a matter of a few days would not justify the exercise of the discretion on the facts placed before me.

Quantum

[48] The plaintiff seeks summary judgment for a sum less than that which is set out in the payment claim. That arises because the plaintiff does not pursue two items referred to in the payment claim, namely costs incurred and general damages and the GST on both. That they are not pursued is understandable and certainly does not provide any doubt or disclose any basis for not entering summary judgment in respect of the balance of the claim.

Judgment

[49] Accordingly, I enter summary judgment for $122,680.26 plus interest at the rate of 7.5% per annum from 28 February 2007 to the date of judgment.

Costs

[50] In accordance with counsel's request, I reserve costs. If agreement cannot be reached, memoranda in support, opposition and reply shall be filed and served at seven-day intervals. The Registrar shall refer same to me for decision.

JA Faire
Associate Judge