IN THE DISTRICT COURT
HELD AT AUCKLAND **CIV 2005-004-003134**

BETWEEN **INSITE DESIGN & DEVELOPMENT LIMITED**

Plaintiff

AND **JOHN SADLER**

Defendant

Date of Hearing: 16 March 2006

Date of Decision: 7 April 2006

Counsel: Mr Michael Keall for the Plaintiff
Mr Ken Prendini for the Defendant

RESERVED DECISION OF JUDGE J D HOLE

Introduction

1. By written agreement dated 11 September 2003 the plaintiff agreed with the defendant to undertake extensive renovations to a dwelling at 31 Orakei Road, Remuera, Auckland. The estimated cost recorded was $1,000,000 including GST.

2. By December 2004 the defendant had expressed to the plaintiff (*inter alia*) that he was concerned that he was being overcharged, that some of the work was substandard, and that the works were taking an excessive amount of time for completion. In a letter dated 4 December 2004 the plaintiff sought details of the defendant's concerns and suggested a meeting. It seems that some of the concerns of the defendant were ongoing. In a letter dated 8 August 2005 from the defendant's solicitors, the various concerns were repeated; but the letter did not contain any estimate of loss which the defendant might have sustained, other than that he was paying accommodation costs of $1,800 per week "since the expiry of the one year period".

3. Clause 41 of the agreement noted that the Construction Contracts Act 2002 applied and then set out how progress payments were to be made and paid; effectively incorporating the provisions of ss 20 to 23 (inclusive) of the Act.

4. By letter dated 23 September 2005 the solicitors for the plaintiff wrote to the solicitors for the defendant enclosing four payment claims in respect of the works totalling $118,164.67 including GST. Each payment claim noted it was made in accordance with s 20 of the Act and referred to attached very detailed invoices. Section 20 was complied with. In accordance with the contract, unless a payment schedule was submitted by the defendant, the claim for $118,164.67 was payable within 10 days after receipt of the payment claim.

5. By letter dated 3 October 2005, the solicitors for the defendant acknowledged receipt of the payment claims. It repeated the complaints about overcharging and substandard work which it suggested "in some instances amount to a complete failure to perform the contract".

It suggested there were additional problems with the house caused by the plaintiff's negligence which would be expensive to rectify. It specifically referred to plumbing errors and stated that it was estimated that rectification of them would cost $6,000. It concluded:

"Mr Sadler instructs that the defects in the renovations to his house will cost more to rectify than the amount claimed by your client. In addition he believes that Insite should reimburse him for all accommodation costs incurred after the one year period in which the project was to be completed, together with reimbursement for scaffolding retained due to unjustified delay by your client.

Mr Sadler instructs that, for the above stated reasons, together with the reasons set out in the writer's letter of 6 August, he is not prepared to pay anything further to your client. On the contrary, he invited In-Site to recompense him as suggested above."

6. As the plaintiff has not received payment of the claim for $118,164.67, the plaintiff has issued summary judgment proceedings against the defendant seeking that sum, plus contractual interest thereon and actual and reasonable costs of recovery pursuant to cl 41(d) of the contract. It claims that as the defendant has not served a payment schedule (as defined in s 21 of the Act) on the plaintiff, the defendant is liable to the plaintiff for the amount claimed under s 23 of the Act and cl 41(d) of the contract.

Issue

7. The sole issue for determination is whether the letter from the defendant's solicitors dated 3 October 2005 amounts to a "payment schedule".

Plaintiff's case

8. The plaintiff has submitted that the letter does not constitute a payment schedule because it fails to comply with the mandatory requirements of

s 21 of the Act. In particular, s 21(3)(a) and (b) have not been complied with.

9. Section 21(2) states:

A payment schedule must-

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

Section 21 (3) states:

If the scheduled amount is less than the claimed amount, the payment schedule must indicate-

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

Defendant's case

10. I deal with the defendant's submissions in a different order from the way they were framed as the first two can be disposed of shortly.

11. The defendant has suggested that regardless of any deficiency which might be found in the letter of 3 October 2005 (which it says was a payment schedule) the reasons given for non payment constitute an arguable defence to the claim and accordingly summary judgment cannot be given. Venning J disposed of a similar submission in ***West City Construction Ltd v Edney*** (CIV 2005-404-001006, 1 July 2005, Auckland registry). After referring to the well known dictum of Somers J in ***Pemberton v Chappell*** [1987] 1 NZLR 1, 3 he said, simply:

"The appellant's claim for summary judgment is based on the payment claim issued by it pursuant to that [Construction Contracts] Act. It must be considered in the context of the Act."

12. It was also suggested that as there was a dispute the matter should have gone to arbitration in accordance with cl 41 of the contract. (He may have meant cl 43). It matters nought. If there was a dispute about the claim, s 21 should have been invoked. The claim itself has never been disputed; rather a set off has been suggested. If the defendant thought there was a dispute, then he could have invoked the arbitration provisions. He did not do so.

13. The principal submission for the defence was that the letter of 3 October 2005 did amount to a payment schedule and that there was sufficient information in it to indicate how the zero scheduled amount was calculated. Further, if necessary, the letters of 4 December 2004 and 8 August 2005 could also be enlisted in aid of obtaining a calculation of the scheduled amount.

Discussion

14. Section 19 of the Act defines "Scheduled amount" as *an amount of progress payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim".* In this case, it is accepted by both parties that the scheduled amount indicated in the letter of 3 October 2005 was zero.

15. Section 5 Interpretation Act provides that an enactment must be interpreted from a consideration of its text and in the light of its purpose. By the use of the word "must", s 21 is mandatory in its application. However, s 21(3) does not say that the payment schedule must state the manner of calculation: rather it must indicate it. In ***Solidcrete Technology Ltd v First Pacific Investments Ltd*** Auckland District Court, CIV 2005-004-224 Judge Joyce considered the expression

"indicate" and after a review of authorities noted that the Court of Appeal in ***George Developments Ltd v Canam Construction Ltd*** (12/4/05, CA 244104) had concluded that "*the key is the provision of sufficient information to make clear the manner in which the amount claimed has been calculated. If the response is an adequate response to the degree of particularity of the payment claim then the claimant should have no cause to complain. The enquiry is contextual.*" I observe that the Court of Appeal did not suggest that there needed to be some correlation between the mode of payment in the payment claim and the scheduled payment; although I accept context is relevant. In this case, given the high degree of specificity in the payment claims, I think that for there to be a requirement that the scheduled amount to be calculated in a like manner would be well beyond what is contemplated in the Act. I read Judge Joyce's comment as suggesting one test as to the adequacy of a scheduled payment calculation: and agree. However, it is not an exclusive test.

16. A consideration of the purpose of the legislation is helpful when considering if the 3 October 2005 letter is a payment schedule. The Court of Appeal has twice recently enunciated it:

> "*....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 non-payment has, not only on the head contractor, but also on its employees, subcontractors, and suppliers:* ***George Developments Ltd*** *(supra)* "***Salem Ltd v Top End Homes Ltd*** (CA 169/05, 27 September 205 at [11]).

17. As the letter of 3 October 2005 refers to the 8 August 2005 letter, it can be argued that any calculation in the earlier letter was intended to be incorporated in the latter letter. The earlier letter refers to a claim for accommodation incurred by the defendant resulting from an alleged delay in completion of the works. It refers to a sum of $1,800 per week

commencing one year after the commencement of the works. However, nowhere is there precise information as to when the works started. If the works commenced on the date of the contract, viz 11 September 2003, then as at 3 October 2005 the accommodation claim can be calculated as being approximately 55 weeks at $1,800 per week: $99,000. In addition, the 3 October 2005 letter refers to a plumbing rectification claim of $6,000. These are the only matters quantified in the two letters and they total $105,000; which does not justify a zero scheduled amount. To reach a zero scheduled amount one has to assume that the other complaints justify the difference.

18. In ***West City Construction*** (supra at paras 43 and 44) Venning J was sceptical about the concept of a formula for the calculation of a scheduled amount being sufficient. In this case, such information as is available as to the defendant's alleged losses is inadequate for the application of a formula. The accommodation claim suffers from the defect that the commencement date has not been identified; nor, indeed is there any indication as to how the sum of $1,800 per week has been reached. The plumbing rectification claim of $6,000, also, has all the hallmarks of a guess.

19. As Judge Joyce said in ***Solidcrete*** at para 64, the statute does not countenance a payment schedule that may be a sham or device to avoid or delay payment. I agree: the tenor of the Act is to provide for payment claims being met promptly and the prevention of their being held up by specious unspecified counterclaims or set offs. I doubt that the purpose of the Act is achieved by an unpaid payee being forced to undergo the sort of tortuous exercise which I undertook in para 17 to work out how much is being deducted from its payment claim. In this case the problem faced by the defendant is compounded by the inadequacy of information

as set out in para 18. Finally, in this case it is material to observe that to require a strict adherence to s 21 does not significantly disadvantage the defendant whose remedies for his various complaints are still available to him notwithstanding that he must meet the payment claim of $118,164.67 now. If he does not like this result, he has little cause for complaint: all he needed to have done to achieve a result in his favour now was to have complied with s 21 and properly quantified his perceived losses.

Conclusion

20. By memorandum counsel for the plaintiff has provided the Court with details of the interest calculation provided for in cl 7 of the contract. Likewise up-to-date costs are provided. No memorandum objecting to the calculations has been received from defendant's counsel so I assume the figures in the memorandum are accepted.

21. There is summary judgment for the plaintiff against the defendant for $118,164.67 plus costs and disbursements of $10,019.13 and interest of $15,648.82.

Signed at Auckland on the 7th day of April 2006 at 12.25 ~~am~~/pm.

Judge J D Hole