

**IN THE DISTRICT COURT
AT PUKEKOHE**

**CIV-2016-057-000043
[2016] NZDC 11431**

BETWEEN RELIABLE FOUNDATIONS NZ
LIMITED
Plaintiff

AND STEVEN JAMES BLAKE
Defendant

Hearing: 22 June 2016

Appearances: G J Mowbray for the Plaintiff
No appearance for the Defendant

Judgment: 29 June 2016

**RESERVED DECISION OF JUDGE R McILRAITH
On Application for Summary Judgment by the Plaintiff**

[1] Reliable Foundations NZ Ltd (Reliable Foundations) seeks summary judgment against M Blake in the amount of \$58,884.77, plus interest and costs. The claim is pursuant to a guarantee given in favour of Reliable Foundations by Mr Blake in relation to the indebtedness of NZ Home Builders (Auckland South) Ltd.

[2] This application proceeded before me at the Manukau District Court, in the absence of Mr Blake. The application was scheduled to be heard at 2.15 pm. I allowed until 3.00 pm for Mr Blake to attend and for appropriate enquiries to be made as to his whereabouts. Despite those enquiries, including checking with the Pukekohe District Court (where Mr Blake had previously filed submissions in person), no contact with Mr Blake was made. I decided to proceed with the matter in his absence, after satisfying myself that he had been provided with a notice of hearing that clearly set the date, time and place for hearing of this application.

[3] Mr Blake has filed a statement of defence, with a supporting affidavit, opposing the application for summary judgment. He has also filed extensive submissions in accordance with a Court timetable. I have had regard to those submissions and discussed those with Mr Mowbray, counsel for Reliable Foundations.

Background

[4] There is no dispute that:

- (a) NZ Home Builders (Auckland South) Ltd and Reliable Foundations entered into an arrangement on 9 June 2015. Mr Blake signed this as the customer and as a Director of NZ Home Builders (Auckland South) Ltd. This application form included within it an acknowledgement by the customer of the receipt of standard terms of sale and agreed that all contracts between Reliable Foundations and the customer would be deemed to incorporate the standard terms of sale. Those standard terms of sale were attached to the application form.
- (b) The terms of sale included provisions at clause 2 regarding pricing and payment. Relevantly, they provided that Reliable Foundations would invoice the customer for services completed on a monthly basis and that invoice would be payable by the customer by 20th of the month following the date of the invoice (clause 2.5).
- (c) On the same day, Mr Blake executed a personal guarantee in favour of Reliable Foundations. In this, he unconditionally and irrevocably guaranteed to Reliable Foundations the due and punctual payment of all monies which may be owed by the customer to Reliable Foundations.

[5] Between 9 June 2015 and September 2015, Reliable Foundations provided services to NZ Home Buildings (Auckland South) Ltd and issued invoices totalling \$58,884.77. Additional invoices had been rendered previously and significant payments had been made by NZ Home Builders (Auckland South) Ltd. I am satisfied that this is the amount that was and remains outstanding. Reliable Foundations has sought payment of this amount from Mr Blake, pursuant to this guarantee.

Summary Judgement Principles

[6] The basic principles which apply to an application for summary judgment have been clearly established in decisions of the Court of Appeal, such as *Pemberton v Chappel*¹, *Grant v New Zealand Motor Corporation Limited*², and *Westpac Banking Corporation v MM Kimbler New Zealand Limited*³.

[7] The plaintiff must satisfy the Court that the defendant has no arguable defence to the claim brought against it. Although the Court should adopt a robust approach, nevertheless summary judgment may be inappropriate where the ultimate determination turns on a judgment which can only properly be reached after a full hearing of all evidence. The approach was very succinctly summarised in *Jwarda*⁴ :

“In essence, the court must be persuaded that on the material before the court, the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant”.

This Application

[8] Mr Blake opposes the application for summary judgment. In doing so, he raises four issues:

- (a) That the amount claimed by Reliable Foundations is incorrect;
- (b) That Reliable Foundations has failed to issue a Payment Claim under the Construction Contracts Act 2002;
- (c) That Reliable Foundations has not co-operated with a Deed of Administration relating to NZS Home Builders (Auckland South) Ltd;
- (d) That Reliable Foundations made errors when completing work on a foundation in March 2015 and that the cost of remedial work exceeds the amount claimed.

[9] As noted above, I am satisfied that the amount claimed is correct.

¹ *Pemberton v Chappel* [1987] 1 NZLR 1

² *Grant v New Zealand Motor Corporation Limited* [1989] 1NZLR 8

³ *MM Kimbler New Zealand Limited* [2001] 2 NZLR 298

⁴ *Jwarda Holdings Limited v Cullen Investments Limited* CA 248/02, 5 June 2003

[10] With regard to the issue of a Payment Claim under the Construction Contracts Act 2002 (Act), Mr Blake submits in his written submissions filed in advance of the hearing that, given s 9 of the Act says it applies to every construction contract in New Zealand, Reliable Foundations was only able to require payment in accordance with the provisions of s 20 of the Act. He further submits that this must be so, as a payer may respond to a Payment Claim under s 21 by providing a payment schedule. He submits that NZ Home Builders (Auckland South) Ltd was deprived of that opportunity.

[11] On behalf of Reliable Foundations, Mr Mowbray submitted that the Act provides a mechanism for parties to a construction contract to obtain payment. It does not, however, prevent parties agreeing their own terms of payment (s 14) and does not make mandatory that a payee issue a Payment Claim (s 20). I agree. In circumstances such as the present, where the parties have agreed to a payment method, then Reliable Foundations was entitled to issue invoices in the manner provided in its terms of sale. In addition, while I note that Mr Blake has raised this issue in the statement of defence and opposition to the summary judgment application, this issue was not raised at any time previously. It is noteworthy that the company paid a significant number of invoices from Reliable Foundations prior to the invoices which remain outstanding and no issue was taken with the mode of invoicing.

[12] Mr Blake deposes in his affidavit that NZ Home Builders (Auckland South) Ltd has entered into a Deed of Company Arrangement (DOCA) with its creditors. This is registered with the Companies Office. In his submissions, Mr Blake notes that while Reliable Foundations did not vote for the DOCA, the resolution was passed in accordance with the law, so that all creditors, including Reliable Foundations, are bound by it. As a result, he submits that it is inappropriate for Reliable Foundations to pursue him personally under the guarantee, given the DOCA and the effect that this course will have upon both himself and potentially other creditors of the company.

[13] In response, Mr Mowbray submitted that Reliable Foundations is entitled to pursue Mr Blake under his personal guarantee. He relies upon a decision of this Court in *Atlas Resources Ltd*.⁵

[14] I have been provided with a copy of the DOCA between NZ Home Builders (Auckland South) Ltd and the Deed Administrators, dated 16 November 2015. At recital B, it is recorded that creditors voted at the Watershed Meeting on 23 October 2015 to have NZ Home Builders (Auckland South) Ltd execute a DOCA. At C, it is recorded that the DOCA binds all participating creditors.

[15] A participating creditor is any creditor with an admitted claim. The DOCA records at 3.1 that all participating creditors are bound by the DOCA, subject to section 239 ACT of the Companies Act 1993.

[16] Clause 8 of the DOCA provides for a moratorium in favour of NZ Home Builders (Auckland South) Ltd in relation to all claims against the company. This moratorium does not, however, purport to prevent any claim against other than the company.

[17] The same issue arose in the *Atlas Resources* case. Could a creditor seek to enforce its personal guarantee in circumstances where a DOCA was in place? In that decision, the learned Judge analysed extensively the relevant provisions in the Companies Act 1993. The outcome was that the creditor could indeed do so. I can see no reason to depart from the approach taken in the *Atlas Resources* case. Accordingly, I am satisfied that Reliable Foundations is not prevented by the terms of the DOCA from enforcing the guarantee, given in its favour by Mr Blake.

[18] In relation to the remedial works which Mr Blake says are required to be property at 421 Upper Queen Street, Pukekohe, I agree with Mr Mowbray's submissions. Mr Blake has provided no evidence to support the estimated cost of remediation. He has provided no independent evidence to support the claim that the work is substandard or that Reliable Foundations is at fault. Once again, time delay is noteworthy. The first time that Mr Blake raised this issue in writing was one year

⁵ *Atlas Resources Limited v Aull*, DCR [2011]101

after the event. I accept Mr Mowbray's submissions that Mr Blake's evidence in relation to this issue lacks credibility and fails to provide sufficient evidence of a genuine set-off that could amount to a defence.

[19] I am satisfied that the issues raised by Mr Blake do not constitute an arguable defence to the claim by Reliable Foundations. Accordingly, Reliable Foundations is entitled to judgment for the total of the outstanding invoices unpaid of \$58,884.77, plus interest under the terms of sale and costs.

Judge R McIlraith
District Court Judge