

**IN THE DISTRICT COURT
AT HUTT VALLEY**

**CIV-2015-096-000530
[2018] NZDC 4124**

BETWEEN

ENVISAGE CONSTRUCTION LIMITED
Plaintiff

AND

PETER ANTHONY BULMER AND VICKI
JEANE BULMER
Defendants

Hearing: 6 and 7 March 2018

Appearances: M Freeman for Plaintiff
F Collins for Defendants

Judgment: 22 May 2018

RESERVED JUDGMENT OF JUDGE C N TUOHY

[1] This is a claim by Envisage Construction Limited (Envisage) for the sum of \$14,518.48, being the amount of an unpaid invoice dated 9 June 2015 (Staged Payment (xii)) which Envisage issued to the Bulmers under its contract for the construction of their new home.

[2] The Bulmers assert as a defence to the claim that they are entitled to set off against that invoice an earlier Staged Payment they had made of a greater amount (Staged Payment (i)).

[3] Their refusal to pay the invoice caused Envisage to refuse to continue work. As a result, the Bulmers cancelled the contract and employed other contractors to complete the construction of their home. The Bulmers counterclaim for \$23,225.40, being the difference between the total amount they spent to build the house and the lesser fixed price at which Envisage contracted to build it.

Background

[4] The proceeding has some history. Originally Envisage sought and was granted summary judgment on its claim in the District Court. That summary judgment was set aside by Collins J on appeal to the High Court.¹ In his judgment, Collins J helpfully recorded the factual background to the proceeding. The narrative below is largely taken from his judgment.

[5] Mr and Mrs Bulmer owned a vacant piece of land at [address deleted], Lower Hutt. In late 2013 they approached Mr Henderson of Envisage to design a house for their section. On 13 August 2014 the Bulmers and Envisage signed an “intent agreement” under which Envisage agreed to design a house for the Bulmers who in turn agreed to pay Envisage \$10,000 for the house plans.

[6] On 26 June 2014 Envisage submitted a quotation to the Bulmers to build their new home at a fixed price of \$428,348. Variations were made to that quotation on 24 July, 21 October and 29 October 2014. The variations increased the sum quoted to \$468,387. On 30 October 2014 Envisage provided the Bulmers with “Specifications and Contract Information for [a] New Residential Home” (Specifications). The Specifications showed that the fixed price was subject to a considerable number of provisional sums.

[7] On 10 November 2014 the Bulmers and Envisage signed a contract for the building of the Bulmers’ home (the Contract). The Contract was a standard Registered Master Builders Federation Residential Building Contract. Under the terms of the Contract the Bulmers were required to pay a deposit of \$20,000, pay for a number of specified items and make 16 Staged Payments upon “substantial completion” of the matters covered by each Staged Payment.

¹ The question of whether the High Court judgment created an issue estoppel in respect of any relevant matter was considered by Adjudicator Green in a procedural ruling dated 22 May 2017. He found that no matters had been finally determined and thus no basis for issue estoppel, a conclusion with which I respectfully agree.

[8] Envisage commenced construction work in November 2014 and rendered invoices for 12 of the Staged Payments between 10 November 2014 and 9 June 2015.

[9] The invoice sent by Envisage on 9 June 2015 was for the 12th Staged Payment and covered “all interior decoration or coatings”. The amount specified in that invoice was \$14,518.48.

[10] In June 2015 Envisage made a number of adjustments under the Contract to reflect changes to the provisional sums that the Bulmers had agreed to pay directly to various trade persons and suppliers. Those adjustments were recorded on an invoice signed by the Bulmers on 12 June 2015 and reduced the Contract price to \$439,279.

[11] On 16 June 2015 the Bulmers sent a letter to Envisage stating they were withholding payment of the 12th Staged Payment. The Bulmers identified the following four matters which they said justified them not paying the \$14,518.48 invoiced by Envisage:

- (a) The failure to put in place slab edge insulation, valued by the Bulmers at \$8,500.
- (b) The failure to install two attic stairs valued at \$1,000.
- (c) An “allowance for laundry” in the sum of \$1,800.
- (d) An “allowance for appliances” in the sum of \$10,700.

In their letter the Bulmers said that they were “withholding payment for these items, because the non-completion [of these items] means that the project [was] materially less complete than it should be for the Staged Payments made to date”.

[12] Envisage responded to the Bulmers’ letter on 16 June. In essence, Envisage disputed the Bulmers’ reasons for withholding payment. Envisage then gave notice on 24 June 2015 that if the invoice for the 12th Staged Payment was not paid in full by 2 July 2015 then Envisage would suspend working on the project until the payment was made.

[13] On 16 July the Bulmers' lawyers requested Envisage resume work. That letter referred to an assessment by a quantity surveyor that the Bulmers had by this time overpaid \$16,298.22 to Envisage. The parties attended mediation but no agreement was able to be reached. On 26 August 2015 the Bulmers gave Envisage notice that they were cancelling the Contract on the basis that Envisage had unlawfully suspended work and wilfully neglected to carry out its obligations under the Contract. The Bulmers engaged other contractors to complete the construction of their home.

The Contract

[14] The standard form contract provided for three different payment options: progress payments, Staged Payments or charge-up payments. Each option had its own page to be completed. The chosen Staged Payment option, in contrast to the other two, required a fixed contract price which was inserted as \$468,387 (the Contract Price).

[15] The Contract form provided for payment of the Contract Price under three headings:

(A) CONTRACT DEPOSIT:	\$20,000
(B) OTHER ITEMS: (as listed in the Special Conditions)	\$36,625 (total)
(C) DWELLING COST:	\$362,960

[16] The form required a calculation to be made in order to fix the figure for the Dwelling Cost. The calculation required the total sums listed under (A) and (B) to be deducted from the specified Contract Price to arrive at the Dwelling Cost. The form further provided for that Dwelling Cost to be paid in 16 Staged Payments, 15 upon substantial completion of specific components of the construction of a dwelling house. Those components were listed in the form and are in the order in which a dwelling house is normally constructed, e.g. the first Staged Payment relates to "*foundations and floor structure*" and the last is "*hardware and tiling*". "*Substantial completion*" means when the item of work is 95% completed. The 16th and last payment is described as "*Final Payment*".

[17] In the form alongside each of the 16 stages is a percentage which together total 100%, e.g. foundations and floor structure: 10%; hardware and tiling: 3%. The final payment has 5% alongside. There is a note at the bottom of the page which provides:

The percentages referred to under (C) above are based upon a single storey house, using standard construction methods and materials, built on flat stable land in an urban location. The percentages may be inappropriate in your contract.

[18] At the end of the list of Staged Payments there is a heading “*CHECK CALCULATION*” to ensure that the total of the figures in (A) and (B) and (C) equates to the Contract Price.

[19] Two important conclusions can be drawn from this page of the Contract augmented by the evidence of the parties. First, the only particulars inserted into this page of the standard form by the parties to the Contract were the specific items listed under Other Items and the dollar amounts required by the form; and wherever the form recommended or suggested a specific sum, it was followed. Thus, the recommended deposit of \$20,000 was adopted and the percentages suggested for dividing the Dwelling Cost into Staged Payments were followed exactly.

[20] Secondly, the specific sums inserted for the 15 Staged Payments to be made on substantial completion of particular components of the dwelling were not calculated by the parties by reference to any agreed or jointly understood pre-estimate of the actual cost of each component of this dwelling. I reach that conclusion not only because of the way in which the standard form moulded the amount of those figures, but also because the evidence was that the Bulmers were not party to the calculations which resulted in the original quotation which formed the basis for the eventual Contract Price. Moreover, the final Staged Payment of \$18,148.10 (5%) was not allocated towards any component of the work.

[21] An independent observer, aware of that context, would conclude that the specific amount of each Staged Payment was not intended to be an agreed measure of the actual cost of the relevant component of the dwelling and thus, in a strict sense, a payment **for** the relevant component; rather, the payments amounted to a method of staging payment of the total Contract Price over the life of the construction project in

a way which maintained some rough relationship to the value of the work completed from time to time. This is the analysis contended for by Mr Freeman on behalf of Envisage.

The issues

[22] Over the course of the litigation, issues about aspects of the work other than the slab insulation have fallen away. During the course of the hearing, the Bulmers abandoned an effort to establish and recover alleged pre-payments of provisional sums which they had made within Staged Payments.² That was an appropriate concession given the view of the Contract which I have reached.

[23] The issue finally came down to the discrete question of whether the Bulmers were entitled to withhold payment of Staged Payment (xii) when they did. The outcome of both claim and counterclaim depend on that.

[24] I have not separately recorded the submissions of counsel because in one way or another they are all dealt with in the discussion which follows. Nevertheless, I am grateful to both counsel for their submissions which I found helpful.

Discussion

[25] There is no dispute that the interior decoration was substantially complete when Envisage issued its invoice for Staged Payment (xii). Under the Contract payment was to be made within 7 working days. At that time the Contract was subsisting. The question is whether the Bulmers were then entitled to set off the amount of Staged Payment (i) which they had previously paid against that invoice.

[26] Their claim to do so is based on a simple proposition: that at the time the invoice for Staged Payment (i) was issued and paid, the right to claim the payment and the corresponding obligation to make it had not arisen because the foundations and floor structure were not substantially complete; and that, as a matter of law, they were

² A similar argument had previously been rejected by Adjudicator Green in his Determination dated 7 July 2017.

entitled to set off the amount of that payment against any subsequent claim for a later Staged Payment until the foundations and floor structure were substantially completed. It is necessary to examine each of the premises for that proposition.

[27] The first issue is whether the right to claim Staged Payment (i) had arisen when the Bulmers paid it. This depends on whether the foundations and floor structure were then “substantially complete” in terms of the Contract. There is no dispute that the foundations and the floor structure had been completed by that time apart from the slab insulation. Nor is there any dispute that the slab insulation which was to surround the floor slab had not been installed either by the time Staged Payment (i) was made by the time Staged Payment (xii) fell due for payment.

[28] Although Mr Freeman suggested that there was doubt about whether the slab insulation falls within the description “Foundations and floor structure” for the purposes of the Staged Payment regime, I consider that it clearly does. There are two reasons for that: first, the slab insulation was to surround and attach to the floor slab. It would, therefore, physically form part of the floor structure, in the natural meaning of that term, regardless of when it was installed. Secondly, it is included in the specifications of the Contract under the section intitled “Raft/Pod Floor” as being part of the Raft Floor System specified.

[29] The definition of “substantially complete” leaves room for uncertainty. Mr Collins’ submission assumed that “95% complete” meant at the point at which 95% of the total cost of completing the relevant building component had been expended. That is problematic when, as discussed above, there had been no agreement, either pre-contractually or within the Contract, as to the actual cost of each component and no mechanism for assessing the cost or value of work carried out to any particular point.

[30] There are other possible ways of assessing whether a building component is substantially complete viz. by reference to the proportion of the component which has been physically completed or to the proportion of the necessary labour required to complete the component which has been expended to date. Just as with monetary cost

or value, there is no contractual mechanism for assessing either of these alternative measures of completion.

[31] No doubt, in practical terms, it will usually be obvious whether a particular building component has or has not been substantially completed. Where there is a dispute, a robust commonsense decision will have to be made, if not by the parties, then by a mediator or arbitrator appointed under the Contract or, ultimately, as in this case by a Court.

[32] A dispute arose between the parties, prior to Staged Payment (vi) being made, as to what type of slab insulation should be used. It was never resolved. The specifications said no more than “Polystyrene edge insulation”.³ By the time the invoice for Staged Payment (xii) was issued, Envisage was wanting to apply a product called Koolfoam, which Mr Henderson said would have cost around \$3,000 plus GST. The Bulmers asserted that he had agreed to apply a product provided by Texturite which would have cost about \$8,500. The dispute was never resolved.

[33] Even at the lower figure, the cost was about 10% of Staged Payment (i) although, as explained above, the amount of that payment cannot be seen as either the actual or the agreed cost of the foundations and floor structure. It is, however, some form of very rough guide. Apart from that the slab insulation was a discrete and necessary component of the floor slab (which was heated). Taking the robust approach necessitated by the lack of any more specific mechanism, I consider that without the installation of the slab insulation, the foundations and floor structure were not substantially complete.

[34] It follows that when Staged Payment (i) was claimed and paid, there was no contractual obligation to pay it.

[35] The second premise of the Bulmer’s proposition is that they were entitled to set off the amount of that Staged Payment against any subsequent valid claim for a later Staged Payment.

³ At cl 13.2.

[36] The judgment of Collins J certainly suggests that that automatically follows.⁴ Mr Freeman submitted that that did not follow. He argued that the making of the payment amounted to either an acknowledgment that there was no dispute that the relevant work was substantially complete to the satisfaction of both parties or was a waiver of the requirement for substantial completion to occur before that payment would be made.

[37] He also argued that, in the context of the scheme of the Contract, it was illogical and unworkable for the owner to be able to revisit the basis of an earlier Staged Payment and use that as a reason to decline to make a later Staged Payment. He pointed out that the builder remained under an obligation to install the slab insulation and that, whenever he did so, the Bulmers would still pay no more in total than the Contract Price.

[38] The conceptual basis for the claim to set off the earlier payment was not explored in any depth in the submissions of either party (or in the High Court judgment). Essentially, it is an equitable claim in unjust enrichment for restitution of money paid under a mistake. The mistake was the Bulmers' mistake in paying Staged Payment (i) on the basis that the foundations and floor structure had been substantially completed when they had not been. That mistake was induced by Envisage's presentation of an invoice for the payment.

[39] The principle was succinctly expressed in the decision of Robert Goff J in *Barclay's Bank Ltd v W J Simms, Son & Cook (Southern) Ltd*:⁵

If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.

[40] However, the principle is subject to certain restrictions where the claim relates to a payment made under a contract. First, if the parties have made express or implied provision in their contract which excludes any claim in unjust enrichment then the contractual provision prevails.⁶ There is no such express provision in the Contract.

⁴ See Paragraph 41 of the judgment.

⁵ [1980] QB 677 at 695.

⁶ *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EW HC 214 (Comm).

[41] An argument can be made that the Staged Payment regime of the Contract itself provides an automatic mechanism for recovery of Staged Payments made earlier than the Contract required. That is because the Final Payment is not required until all the work is completed. In any event, the obligation to complete all the work contracted to be carried out subsists until it has been. These could be seen as an implied provisions excluding any claim for unjust enrichment of the type which is made here.

[42] There is however, another more direct restriction which leads to the same result. Payments made under a contract which is subsisting cannot be recovered.⁷ However once the contract has come to an end (other than by performance), a claim in unjust enrichment may be available providing the requirements for liability are present. This is so even if the contract came to an end by virtue of repudiation by the party making the claim in unjust enrichment.⁸

[43] Applying those principles to this case, the following conclusions emerge:

- (a) At the time the Bulmers refused to make Staged Payment (xii), the Contract was subsisting. For that reason, they had no claim in unjust enrichment to the return of Staged Payment (i), even though that payment was made under a mistake of fact.
- (b) Therefore, at that time and until the Contract was terminated, they had no right to a set off in respect of that claim.
- (c) Envisage was, therefore, within its rights in invoking clause 69 and suspending work.
- (d) The Bulmers were not entitled to cancel the Contract for Envisage's refusal to return to work. The cancellation, therefore, amounted to a repudiation of the Contract by them.

⁷ *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 549; *Diamandis v Wills* [2015] EWHC 312 (Ch) at [84].

⁸ *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 at 928-932, 935-937; *Newlands Shipping and Forwarding Ltd v Toba Trading F2C* [2014] EWHC 661 (Comm) at [75]; see generally *The Law of Unjust Enrichment*, Goff & Jones, 9th ed (2016) at Paras 3-10 to 3-40.

- (e) Envisage having elected to accept the cancellation, neither party was required to perform any future obligations under the Contract.⁹
- (f) The Bulmers' counterclaim for damages for the additional amount expended by them in completing their house must fail because it was them, not Envisage, who repudiated the Contract.
- (g) The Bulmers are now entitled to maintain their claim of equitable set off as a defence to Envisage's claim

[44] In order to establish a claim in unjust enrichment, there are four matters which must be established:

- (a) Has the defendant benefited or been enriched?
- (b) Was the enrichment at the claimant's expense?
- (c) Was the enrichment unjust, in that it falls within one of the recognised grounds of restitution?
- (d) Are there any defences or bars to the claim?¹⁰

[45] It is clear from the discussion above that the first three of those are established. Mr Freeman's argument as to the effect of the Bulmers' payment of Staged Payment (i) raises the potential defences of waiver and estoppel.

[46] I am not persuaded that either of them are available. The evidence of Mr Bulmer was that he realised the slab insulation had not been installed only about the time of the issue of an invoice for Staged Payment (vi). He raised it immediately then with Envisage and pressed for its installation as soon as possible, indicating his intention to deduct the cost from future Staged Payments. The only reason he did not do so until Staged Payment (xii) was because discussions were continuing regarding

⁹ Section 42(1)(a) Contract and Commercial Law Act 2017.

¹⁰ *Bank Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 per Lord Steyn.

the nature of the product and the timing of its installation. There is nothing in his conduct after knowledge which amounted to waiver.

[47] Nor are the terms of the Contract such as to suggest that mere payment of a Staged Payment amounted to an irrevocable acknowledgement that the payment was correctly made. The lack of any contractual mechanism for assessment of or agreement about the point at which “substantial completion” had been achieved militates against any finding that mere payment amounts to an estoppel. This is particularly so when there is no real dispute that the event which would have triggered entitlement to Staged Payment (i), substantial completion of the foundations and flooring structure, had not occurred.

[48] The only matter which remains to be decided is the amount of the set off for the slab insulation. As recorded above, this is in dispute.

[49] Since the specifications did not specify the type of polystyrene insulation to be installed, it was initially open to Envisage to install any product which met that description and was fit for purpose. However there is clear evidence in the emails between the parties between 12 April 2015 and 3 June 2015 and the transcripts of site meetings during that period that Mr Henderson agreed to use Texturite at an anticipated cost of up to \$8,500, even though in arriving at his fixed price for the Contract he said he had costed the work at \$2,000 plus GST. After making that agreement he sought to change the material to the cheaper Koolfoam product applied by himself.

[50] I consider that prior to that the parties had reached a contractually binding agreement that the product to be used would be Texturite’s, after which it was no longer open to Mr Henderson to substitute a cheaper product.

[51] The amount that the Bulmers actually spent on installing the slab insulation using a different product again was \$7,521 GST inclusive. I consider that this sum should properly be set off against Envisage’s valid claim for payment of Staged Payment (xii). The end result will be judgment for Envisage in the sum of \$6,997.48 in respect of its claim. The Bulmers’ counterclaim is dismissed.

Costs

[52] Envisage is also seeking indemnity costs pursuant to clause 63 of the Contract on every stage of the extensive litigation which has led to this judgment, including on an arbitrator's adjudication which took place after the High Court appeal but prior to the hearing before me. It seems likely that the sums in issue for costs will greatly outweigh the sum awarded to Envisage in this judgment. The parties must be given the opportunity to present submissions on costs in the light of this judgment.

[53] I therefore ask for written submissions on costs which are to be filed according to the following directions:

- (a) Envisage to file its submissions within 14 days of the date of this judgment.
- (b) The Bulmers to file their submissions in response within a further 7 days.

[54] Following receipt of both sets of submissions, I will decide whether to deal with costs on the papers or whether an oral hearing is necessary.

C N Tuohy
District Court Judge