EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2015-054-521
[2016] NZDC 15368

BETWEEN	PAK HOLDINGS LIMITED (T/A HUMPHRIES CONSTRUCTION) Plaintiff
AND	PROLIANT NZ LIMITED Defendant

Hearing: 15 June 2016

Appearances: A Hazelton for the Plaintiff
A J Steele for the Defendant

Judgment: 17 August 2016

RESERVED DECISION OF JUDGE G M ROSS

An application for summary judgment

[1] The plaintiff (Humphries) and the defendant (Proliant) entered into building contract for the construction of a BSA (Bovine Serum Albumine) plant near Feilding. This product is apparently used in manufacture in the pharmaceuticals industry.

[2] Humphries sets out in its statement of claim of 21 December 2015 the documents which comprise the building contract namely and relevantly:

a) Schedule 1 – special conditions of contract;

b) Schedule 2 – special conditions of contract, other conditions;

c) Schedule of Quantities; and

d) Conditions of contract for building and civil engineering construction NZS 3910:2013.

[3] Humphries claim in its payment claim 13 of 10 April 2015 the sum of $597,906.36 inclusive of GST from Proliant.

[4] Humphries says this claim was not met, but that the contract engineer (a Mr Silvester) ultimately issued a payment schedule, scheduling a sum due for payment by Proliant to Humphries of $568,914.41 inclusive of GST.

[5] This sum was invoiced to Proliant by Humphries on 30 June 2015, of which Proliant paid $500,254.93 including GST. This left a balance due to Humphries of $68,659.46 including GST. This balance itself was subsequently the subject of a final payment schedule and final payment certificate from the engineer.

[6] This balance remains unpaid. In addition to the statement of claim, Humphries moved by an interlocutory application for a summary judgment in its favour. This is on the basis that in terms of the contract and the provisions of the Construction Contracts Act 2002, the sum the subject of a final payment schedule is a debt due to it from Proliant, and that it has no defence to the claim. It also seeks interest and costs in relation to the pursuit of the unpaid claim. The claim is therefore for what is said by Humphries to be a statutory debt.

The application is opposed

[7] Proliant opposes the application. Humphries claim is disputed; Proliant asserts a counter-claim or set-off which exceeds the sum sought by Humphries; and it is pleaded that the provisions of s 24 and s 29 Construction Contract Act 2002 are not applicable in this case.

A breakdown in relations of contracting parties

[8] The parties had a meeting on 27 February 2015. This was approaching the completion date of the contract. By this earlier day though it was clear that some sub-contractors would not have completed their work.
At this meeting, a number of matters were agreed.

- One such issue was that Humphries would continue to work on the site, until the contract completion date (23 March 2015).

- That any work unfinished at that date would be "passed over to Proliant for completion".

- Another issue was that Humphries was to submit a "final payment claim" for all works completed under their contact to the close of business on 23 March 2015.

- Also, Humphries was to provide Proliant with an acknowledgment that all sub-contractors had been paid for and works completed under their contract.

- In respect to any profit margin on uncompleted work, submissions were to be made by the parties to Mr Silvester by 13 March for him to determine the amount payable.

[9] The minutes of the meeting of 27 February 2015 record that:

> The meeting was held to reach agreement over a number of items with respect to Humphries Construction vacating the site and the contract between Humphries and Proliant being terminated.

[10] Humphries claim is that the balance sought is due and owing to Humphries pursuant to s 24(2) Construction Contracts Act 2002, claiming that a scheduled amount in a payment schedule served upon Proliant by a payment claim was not paid before the due date for payment, setting up an entitlement to judgment as a statutory debt. This can only be so if a comprehensive regime is followed. This is for the submission of claims for claimant, and valuation of claims for approval, to an engineer to the contract. The engineer then issues a payment schedule. Proliant can advise of any amendment or deduction in respect of this schedule; and the Engineer supplies the final payment schedule.

[11] The Engineer in this case was Mr Silvester, whose contractual role is set out in para 6.2.1 of the contract which relevantly reads as follows:

6.2.1. The dual role of the Engineer in the administration of the contract is:

(a) As expert adviser to and representative of the Principal giving directions to the Contract on behalf of the Principal and acting as agent of the Principal in receiving payment claims and providing payment schedules on behalf of the Principal; and

(b) Independently of either contracting party, to fairly and impartially make the decisions entrusted to him or her under the Contract to value the work, and to issue certificates.

[12] Part 12 of the contract sets out the contractual provisions setting up the claim, approval, review and payment provisions. The relevant provisions are as follows:

Para 12.2.1 Whereby the Engineer is to assess each of the Contractor's payment claims and may amend them as necessary to comply with the terms of the contract and with his valuation of the work carried out. The Engineer is to provide a Progress Payment Schedule in response to each payment claim not later than 12 working days after the date of service of the payment claim.

Para 12.4.1 Then the contractor, not later than 1 month after the issue of the Final Completion Certificate all within such further time as the Engineer may reasonably allow, shall submit a final account of the Contractor's payment claims in relation to the contract. This one is to be signed by the Contractor and endorsed "final payment claim" and is to be the contractor's final payment claim under the contract. This "final payment claim" is to be served on the Engineer as the agent of the principal, and at the same time a copy of it shall be provided to the Principal.

Para 12.4.2 The time for payment being due (subject to 12.5.6) is 45 Working Days after the date of service of the final payment claim.

Para 12.5.1 Clause 12.4.2 is subject to the Engineers obligations under 12.5.1, by which the Engineer is to assess the final payment claim, amend if necessary, and provide a Final Payment Schedule in response to the final payment claim not later than 35 working days after the date of

service of the final payment claim. Then, not later than 20 working days after the service of the Final payment claim, the Engineer is to provide a final payment schedule to the contractor and a copy to the Principal, which is to be on a provisional basis only until the expiry of 35 working days after the date of service, after which time the sum for which the Engineer has certified as the contractor's Final Payment claim (12.5.1) (d)) shall become the scheduled amount unless within that time a replacement Final Payment Schedule is provided under 12.5.3.

Para 12.5.2 The Principal is entitled to notify the Engineer in writing (copy to contractor) of any amendments or deductions that it seeks to make from the sum certified by the Engineer.

Para 12.5.3 Where the Principal has notified the Engineer and Contractor of any amendments or deductions, then within 35 working days after the date on which the Final Payment Claim was served on him, the Engineer shall provide a replacement Final Payment Schedule, which is to include that the advice that the Final Payment Schedule supersedes the Final Payment Schedule provided for under 12.5.1 above.

[13] Clearly, the position is not so rigorously clear-cut in this case. Between February and August 2015 there were a plethora of emails to and from and between Humphries and Proliant, and their representatives. Primarily they were between Mr Dekker (a director of Humphries); Mr Chapple (Humphries quantity surveyor); Mr Lewis (General Manager of Proliant); Mr Chisholm (a contract or project manager of Total Property Strategies (NZ) Ltd, engaged by Proliant). Then there is Mr Silvester as well, and Mr Humphries, who I understand to be a director of Humphries.

[14] The significance of these emails in the context of this opposed summary judgment application is best seen if they are set out in columnar form and in chronological order.

Item No.	Date	From	To	Subject Matter
1	10.4.15	Chapple (Humphries)	Silvester (Engineer)	Progress claim 13 with details. Sum sought $597,906.36. But already reduced to $565,636.21 by deletion of item 2 plus GST ($280,161.00 plus $4,209.15, total by which reduced $32,270.15).
2	10.4.15 (Phone call)	Silvester	Chapple	Seeks removal of item, being margin on value of work to complete.
3	13.4.15	Chapple	Chisholm (Proliant)	As per item 1, including details.
4	23.4.15	Chisholm	Chapple	Request to clarify claim details – nine separate points and variation orders
5	28.4.15	Chapple	Chisholm	Amended payment claim. Time period raised. Agreement sought on items not disputed to free payment schedule for progress to payment on those. Supporting details attached to email. Despite the payment claim seeking reduced payments of $560,918.91 as a result of negotiation Chapple/Chisholm, it is yet dated 20.4.15

6	30.4.15	Lewis	Chisholm	Dealing with outstanding issues and setting them out in columnar form, on an item by item, pay or no pay basis, as prepared by Chisholm for Proliant, subject to Humphries agreement, total to pay shown as $343,421.39 (excluding GST).
7	1.5.15	Chapple	Lewis	Returns earlier email of 23.4.15 now reduced as to issues, but with Proliant responses to it and now further Humphries comment in red, highlighted in yellow, on behalf of Humphries Chapple requires all correspondence to now go through John Silvester and seeks to have claim 13 resolved as soon as possible.
8	1.5.15	Lewis	Chapple	Advising response and details unacceptable to Proliant, referring to corporate/legal department.
9	20.5.15	Silvester	Humphries Lewis Chisholm Dekker	Email and cover letter, “decisions on disputed items of claim 13”.
10	21.5.15	Lewis	Silvester Humphries Chisholm Dekker	Proliant acceptance of Mr Silvester’s decision for claim 13 subject to four conditions.

11	22.5.15	Lewis	Chapple	Query one of conditions in item 10 above re confirmation of payment to sub-contractors. Asks if invoice coming today for his approval for payment as "leaving for USA tomorrow".
12	22.5.15	Dekker	Lewis Silvester Humphries Chisholm Chapple	Humphries not issuing invoice today "due to clarification needed to items in the claim."
13	22.5.15	Chapple	Silvester Dekker	Response to 9 above, issue by issue, whether there is agreement or not on these matters. No invoice yet as disagreed matters need to be resolved.
14	15.6.15 (10.52 am)	Silvester	Lewis Chisholm Chapple Dekker	Reviewed decision on disagreed items in claim 13.
15	15.6.15 (3.26 pm)	Silvester	Lewis Chisholm Chapple Dekker Glideaway (Door manufacturer)	After meeting on site re Glideaway Doors (previous week); discussion – agreement recorded as to outcome; details of outcome.

16	19.6.15	Lewis	Silvester Chisholm (copied to Humphries)	Proliant's acceptance of four out of five matters in item 15; Proliant raises eight outstanding issues; advises Proliant not paying the claim "until all of the above is satisfied." Outstanding issues include matters not previously raised by Proliant.
17	26.6.15	Dekker	Silvester Humphries	Humphries response to item 16. Email copied back to Silvester with Humphries response in red. Noted matters not previously raised now raised for first time. Belief expressed that Humphries entitled to claim 13 being certified and paid.
18	30.6.15 Email and letter	Silvester	Parties	Payment certificate for claim 13 for progress payment in sum of $580,034.91 shortly corrected to $568,914.41
19	30.6.15 (5.19 pm)	Chapple	Lewis Silvester Dekker	Tax invoice for payment claim 13. Total $568,914.41.

[15] There are far more emails than these: many are prior to this trail, and disclose what appears to be increasing concern on the part of Proliant – as to the progress of the job or some parts of it. But they are not relevant to the present application, except to show that in the process of the claims for payment there was a good deal of going backwards and forwards between the parties in "achieving" a payment schedule issued by Mr Silvester, for the preceding payments made.

General principles for an application for a summary judgment

[16] These are now well established. Under Rule 12.2 District Court Rules the Court may give judgment against a defendant on a summary basis if the applicant/plaintiff satisfies the Court that the defendant has no defence to a cause of action relied upon. The usual principles were enunciated by the Court of Appeal in *Jowada Holdings Ltd v Cullen Investments Ltd* (CA) 248/02, 5 June 2003.

> In order to obtain summary judgment under Rule (12.2) of the (District Court Rules) a plaintiff must satisfy the Court that the defendant has no defence to its claim. 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.

Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence Rule 12.2 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy and inexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell*;[1] *National Bank of New Zealand Limited v Lookes*[2]; and *Sudfeldt v UDC Finance Limited.*[3]

They are effectively adopted in *Westpac Banking Corporation v MM Kembla NZ Limited*[4] and more recently in *Krukziener v Hanover Finance Limited.*[5]

---

[1] *Pemberton v Chappell* [1987] 1 NZLR 1, 3-4, 5.
[2] *National Bank of New Zealand Limited v Lookes* (1989) 2 PRNZ 211, 214.
[3] *Sudfeldt v UDC Finance Limited* (1987) 1 PRNZ 205, 209.
[4] *Westpac Banking Corporation v MM Kembla NZ Limited* [2001] 2NZLR 298 (CA) 313.
[5] *Krukziener v Hanover Finance Limited* [2008] NZCA 187, [2010] NZAR 307.

The onus is on the applicant to show there is no defence to the claim. This means an absence of any real question to be tried (*Pemberton v Chappell* (supra)). Despite this onus, there is on the defendant a need to provide some evidential foundation for the defences which are raised. The Court will not normally resolve material complex of evidence or asses the credibility of deponents – on such occasions summary judgment would be inappropriate.

What is claimed to be the defence here?

[17] The nature of the defence of Proliant to the claim is that:

(a) That they did not receive a correct and final copy of either a final payment claim as submitted by Humphries to Mr Silvester, nor an adjusted final payment claim or schedule.

(b) Advice of the determination of Mr Silvester in a preceding final payment schedule was in form a payment schedule.

(c) That each of (a) and (b) were based on an incorrect sum at $597,906.36 which with an adjustment advised to Mr Silvester and also to Mr Chisholm (but apparently not to Mr Lewis) reduced the tentative payment claim to $565,636.21.

(d) That the subsequent adjustment by Mr Silvester resulting in the payment by Proliant (their solicitors) on 9 August 2015 of $500,254.93, leaving the balance unpaid for which Humphries seek judgment, was made by Mr Silvester without reference to Proliant and was itself outside the terms of the contract.

[18] Any consideration of these matters in the context of this application has to take into account what are the aims and the objectives of the Construction Contracts Act 2002. In the ordinary course of events as they have transpired between the parties, this Act is going to apply, and govern the situation.

[19] A relatively recent summary of the position appears from the decision of Associate Judge Gendall (as he then was) in *Herbert Construction Coy Limited v Christie Crown Partnership*[6],

> [11] By its statement of defence to Herbert Construction's claim, the defendants say essentially that:
>
> (a) The purported payment claims are defective;
>
> (b) A valid payment schedule has already been served; and
>
> (c) The defendants have a counterclaim/set-off which is not statute barred under the Construction Contracts Act 2002.
>
> [13] The purpose of the Act is set out in s 3. This 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.
>
> [14] In considering this general purpose, the Court of Appeal in *George Developments Limited v Canam Construction Limited* [2006] 1 NZLR 177 (CA) stated at [31]:
>
> > The purpose provision of the Act includes the fact that the Act was to facilitate regular and timely payments between the parties to a construction contract'. The importance of such regular and timely payments is well recognised. Lord Denning (quoted in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, 214 (HL) Lord Diplock) said: There must be a cashflow' in the building trade. It is the very life blood of the enterprise'.
>
> [15] And, in *Salem Ltd v Top End Homes Ltd* (2005) 18 PRNZ 122 (CA) the Court of Appeal again reiterated this at [11]:
>
> > 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 v Canam Construction Ltd* CA244/04 12 April 2005 at [41]-[42]. It is

---

[6] *Herbert Construction Coy Limited v Christie Crown Partnership,* 21 October 2011, Napier High Court, CIV 2010 – 441-500.

> relevant to note, for instance, that employers cannot 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.

[16] Disputes between parties under the Act must be analysed with these purposes in mind: *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA) at [41].

[17] The payment regime established under the Act was considered by Asher J in *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC). Asher J said at [16]-[17]:

> 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.
>
> 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.

[18] Section 12 of the Act provides that parties may not contract out of the Act, except for limited grounds which are provided for in the Act and not relevant here. Section 20 provides that a contractor may serve on a payee a payment claim. Section 21 provides that the payer may respond with a payment schedule. Both outline the minimum requirements for each of those documents.

[20] See too, para [46] of Herbert Construction as to the requirements of the Act being cumulative and mandatory, and also, as His Honour sets out:

> Nevertheless, the courts have consistently reminded applicants that a technical quibble will not vitiate formal requirements under the Act.

[21] There is no prescribed form for a payment schedule, but it does have to contain certain things (s 21). I did not understand Proliant to allege lack of form or details, rather failure to serve in the first instance, before what might have been a final adjustment on 15 June 2015. However, in this respect, the earlier, setting up email was sent on 10 April 2015 from Mr Chapple to Mr Chisholm, on the Friday, and he was Proliant's agent in the matter (and from the emails) up to date and well informed as to the details; and sent to Mr Silvester, on the Monday, and he was the appointee of Proliant, and negotiate backwards forwards subsequently.

[22] As to form, the ultimate final adjusted payment claim was issued and in its form, it is clearly a payment schedule in s 21 terms. It becomes a contractual step with statutory ingredients. This figure though was reached after the discussions which had taken place, (or more accurately, from an evidence point of view, the emails exchanged). This was between Mr Chapple, Mr Chisholm, Mr Silvester, Mr Lewis, and Mr Dekker. I do not see any indication of there being more access to Mr Silvester for Humphries than there was for Proliant. Each took the opportunity and further representations were made between themselves and Mr Silvester before the reviewed decision was given by Mr Silvester on the items of disagreement. The tenor of the emails is of some real concern on the part of Humphries that, having paid out subcontractors, they were yet to be paid themselves, which is the very mischief which the legislation was designed to overcome.

[23] I accept the submission on the evidence which I have read, that neither Humphries nor Proliant accepted the decision of 20 May 2015 as final and binding; there is also, the ability of the Engineer Mr Silvester to correct or modify his decision by a subsequent decision in writing (Clause 13.2.1 of the Construction Contract).

[24] Progress claim 13 was always going to be the final claim so it might have been expected that, as earlier in the life of the contract, progress claim procedure was going to be more to and fro with Mr Silvester and the parties – perhaps the more so given the more technical or specialised nature of the project. This was until the tenor of the emails changed, and those from Proliant were distinctly cooler, and those from Humphries increasingly desperate.

[25] But my conclusion is that with the final adjusted payment schedule for Claim 13 being given on 30 June 2015 – bringing the negotiations to an end – and contractually requiring payments of $568,914.41, the unpaid balance now sought is required to be paid to Humphries. I am satisfied that all of the other subsequent procedural steps have been taken. I am satisfied that there is no tenable defence to the present claim. As Mr Lewis accepts in his affidavit, other issues and counter claims are for another time. Some of the Construction Contracts Act cases refer to this Act as "pay now, argue later" regime (Mallon J in *Gill Construction Coy Ltd v Butler*, 2 November 2009, Wellington HC).

[26] If I were in any doubt about the matter, that would for me be resolved by the careful analysis and reconciliation by Mr Dekker which traces matters through to the final adjusted payment schedule and statutory requirement to pay on the part of the defendant. This is in a logical and understandable progression and follows the to and fro of the email trail progression.

[27] There will therefore be judgment for the plaintiff on its application for a summary judgment, in the sum of $68,659.46. Interest is ordered as pleaded in para 14 of the Statement of Claim, commencing 30 June 2015.

[28] Costs as moved are ordered in terms of s 24(2)(a)(i) Construction Contracts Act 2002.

G M Ross
District Court Judge