EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2015-085-000862
[2016] NZDC 7830

BETWEEN	MIYAMOTO INTERNATIONAL NEW ZEALAND LIMITED Plaintiff
AND	THE WELLINGTON COMPANY LIMITED Defendant

Hearing: 4 May 2016

Appearances: Ms McCubbin-Howell for Plaintiff
Mr Collins and Ms Gunawardana for Defendant

Judgment: 6 May 2016

RESERVED JUDGMENT OF JUDGE S M HARROP as to Plaintiff's application for summary judgment

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[1] In this proceeding the plaintiff engineering company ("Miyamoto") sues The Wellington Company Limited (TWC) for the balance of its fees invoiced in connection with the concept design it provided to TWC in July 2014. The claim is for $42,500 including GST and its legal costs on a solicitor-client basis. Miyamoto says this is a straightforward claim for breach of contract and that there is no arguable defence to it. At the outset of the proceeding it has on this basis applied for summary judgment. TWC opposes the application and says there are a number of factual disputes giving rise to arguable defences which cannot properly be resolved on a summary judgment application.

Principles

[2] The principles applicable to summary judgment applications are well known and not in dispute. The starting point for a plaintiff's summary judgment application

is r 12.2(1) District Courts Rules 2014, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[3] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required.[1]

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.[2]

(c) The Court will not hesitate to decide questions of law where appropriate.[3]

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.[4]

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.[5]

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.[6]

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1 *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].
2 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
3 *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (CA) at 516.
4 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21.
5 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).
6 *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.[7]

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.[8]

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.[9]

The facts in more detail and Miyamoto's view of them

[4] There is no dispute that following an approach by Mr Ian Cassels of TWC, on 24 June 2013 Miyamoto presented a proposal for the provision of a concept design for seismic strengthening work at premises at 101 Cuba Street, Wellington. The terms of that proposal were incorporated in a short form consultant's contract signed by Mr Cassels on 17 July 2013. It appears there was an initial fee proposal dated 3 May 2013 (which has not been put in evidence) following which Mr Weir, director and CEO of Miyamoto, had met with Mr Rasbeer Gill to review the scope of works. The proposal of 24 June 2013 purported to be based on the amended scope of service discussed with Mr Gill. The proposal covered the concept design work only and the concept goal was "to achieve 67% NBS [National Building Standard] and budget cost of $620,000".

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7 *Jowada Holdings Ltd v Cullen Investments Ltd* CA 248/02, 5 June 2003 at [28].
8 *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).
9 *Pemberton v Chappell*, above n2.

[5] The fee for the work was to be $25,000 plus GST but a guarantee was provided as follows:

> "We will refund the full value of our professional fees at the end of phase A if the estimated seismic strengthening cost exceeds the current budget of $620,000. This budget is for the structural strengthening construction components only, *however including associated works required to undertake the seismic work."*

[6] The italicised words were added in handwriting, apparently by Mr Cassels.

[7] Miyamoto says that it became apparent that during the work that the concept design for 101 Cuba would require the strengthening of a neighbouring structure at 107 Cuba Street. This was part of the same building development but Miyamoto says that it was not initially included in its brief. Mr Weir says he discussed the situation with Mr Cassels and that they agreed that the scope of the concept design work needed to be broadened to strengthen both structures together. Mr Cassels says that the whole building was included in the original contract but I observe that this seems improbable given that he agreed to an amended contract which expressly included 107 Cuba Street as well. If it was already part of the contract it is difficult to understand why a revised contract was necessary and why he signed it.

[8] Relevantly the amended proposal, which was accepted by Mr Cassels on behalf of WTC on 15 October 2013, included:

> "There are no budget cost constraints on the strengthening of 107 Cuba Street, *however Miyamoto is to use best endeavours to include 107 Cuba Street within the budget of $620,000".*

Again the italicised words were added in handwriting, apparently by Mr Cassels. There was again a guarantee that the fees for 101 Cuba Street would be fully refunded if the budget exceeded $620,000 but it was emphasised that guarantee did not apply to the strengthening works at 107 Cuba Street, albeit subject to the best endeavours proviso.

[9] Although there is evidence of subsequent oral discussion about the contractual terms and allegations of additional terms being agreed, in my view the plain objective meaning of the revised written contract is as follows:

(a) Miyamoto would not be entitled to the $25,000 plus GST fee for 101 Cuba Street if either the cost of implementing its design exceeded $620,000 or if it did not achieve 67% NBS.

(b) Miyamoto had no budgetary limitation in respect of 107 Cuba Street. It could provide a design costing any sum at all provided it used best endeavours to include it in the $620,000 budget for 101 Cuba Street. Again the 67% NBS standard needed to be achieved by the design.

(c) Accordingly, if Miyamoto provided a design achieving 67% NBS and costed it below $620,000 then it would be entitled the payment of $25,000 fee relating to 101 Cuba Street. In relation to 107 Cuba Street if it provided a design which met the 67% NBS standard and it could show it had used best endeavours to bring the work within the $620,000 budget then it was entitled to be paid the further $25,000 plus GST fee regardless of how much that design cost.

[10] On 30 August and 30 September 2013 i.e. prior to the revision of the contract, Miyamoto had rendered two progress payment invoices totalling the $25,000 plus GST relating to 101 Cuba Street. In relation to 107 Cuba Street invoices were rendered on 31 October and 15 December 2013 totalling the second $25,000 plus GST. The design work was completed in December 2013.

[11] TWC submitted Miyamoto's design to its contractor Arrow International for costing. TWC was unhappy with the resulting cost estimate for 107 Cuba Street which exceeded $1,000,000. Miyamoto says it was asked to revise the design to try and reduce the cost and that it did so at no further charge despite a significant further work being required. During this process Mr Weir says that he and Dr Miyamoto, Miyamoto's founding Director, met with Mr Cassels to talk about his budget expectations. He says he told Mr Cassels there was realistically no chance of doing the strengthening work for both properties for under $620,000. He says that Mr Cassels and Mr Miyamoto agreed that a realistic budget for both properties was around $1,000,000 and that this would be acceptable to TWC.

[12] Miyamoto says its revised concept design for both properties was submitted to TWC on 11 July 2014. When this was costed Arrow International came back with costings for 101 Cuba Street of $364,187 plus GST and for 107 Cuba Street of $512,001 plus GST, a total of $876,188.

[13] Costings were also obtained from Fulton Hogan which were respectively $311,845, $496,848 and a total of $808,963.

[14] From Miyamoto's perspective this exceeded its brief because both buildings could now be strengthened for well under the $1,000,000.

[15] Miyamoto says that despite various emails reminding TWC about non-payment it did not push payment of its fees because it had the prospect of further work relating to the strengthening itself. On 24 November 2014 Mr Weir did email about various matters and seeking payment. In response Mr Cassels sent an email on December 2014 which said:

> "I can organise a part payment of $15k on January 5.
>
> I do no (sic) yet accept your bill of $50k.
>
> The Body Corporate has engaged another engineer who will complete a greater scope of work for $24k – if his scheme cost less than yours then we have serious questions.
>
> Alternatively if it doesn't we may well wish to continue with Miyamoto.
>
> Will look to settle completely early Feb."

[16] On 6 January 2015 Miyamoto received the $15,000 payment from TWC but nothing further has been paid despite various demands and that has led to the issue of this proceeding.

[17] Miyamoto says that it fulfilled all of the terms of its revised contract with TWC and that there is no reason why it should not be paid in full and therefore no reason why summary judgment should not be entered.

The TWC opposition to summary judgment

[18] TWC notice of opposition dated 22 February 2016, supported by affidavits from Mr Cassels and from the Chairman of the Body Corporate which owns the buildings in question, Mr Mark Ingram, provides six grounds of opposition, though I note that additional points were made in Mr Collins' submissions. These are:

(i) The payment of fees was conditional on the concept design being complete and acceptable to the Body Corporate which was not the case because of the level of disruption that would be caused during the work to the ground floor retail tenancies, there would be permanent adverse effects to those areas, the concept design was incomplete and accordingly the pricing was also incomplete.

(ii) The applicant's fees were also conditional on the construction cost for the concept design, which had to be acceptable, being under $620,000, a condition which the applicant failed to satisfy.

(iii) The applicant deliberately and/or negligently omitted to consider the cost of strengthening the upper floor structure and to ask the contractors who provided pricing to allow for the cost of making good areas affected by the earthquake strengthening.

(iv) The fees were not payable due to a complete failure of consideration due to the concept design being entirely unsuitable and of no use or value whatsoever to the Body Corporate.

(v) The costs which would be incurred in engaging another engineering firm to produce a suitable design ought be set off or the subject of a counterclaim if value of the fees exceeded those claimed by the applicant.

(vi) TWC has a claim for restitution for the fees part paid of $15,000 because the concept design was rejected in its entirety by the Body Corporate and because the applicant did not meet the conditions of the revised contract.

[19] Mr Ingram says that TWC was authorised by the Body Corporate to act on its behalf in arranging the concept design but this was subject to the design being complete and acceptable to the Body Corporate. While he was not involved in the initial discussions regarding the fee arrangement he understood the concept design

was always meant to be for the entire building because the Body Corporate wanted to have the whole building meet the requirement of at least 67% NBS. He says he walked through the building with Mr Cassels and with Mr Mike King an American engineer who (he says) worked for Miyamoto. He says Mr King understood the concept design had to be acceptable to the Body Corporate.

[20] Mr Ingram also refers to a meeting at TWC's offices on 29 September 2014 at which Miyamoto presented its concept design proposal. He says the presentation did not go well and that one of Miyamoto's engineers, Jitendra Bothara, admitted that Miyamoto had not taken into account approximately one-third of the building namely the top level structure above the southern half of the building which comprises residential units. He further says that Mr Bothara acknowledged that for the building to achieve 67% NBS this part of the building would need to be considered and the concept design would require further work. Mr Ingram says that the Body Corporate made its position very clear to Miyamoto that the concept design proposal was incomplete and unacceptable and that a completely new design would be required.

[21] In his affidavit Mr Cassels said the work always included the entire building and that Miyamoto failed to recognise that this meant both 101 and 107 Cuba Street were included until after they had started work though this should have been apparent to them from the outset from the seismic assessment report prepared by Silvester Clark Limited in March 2013 and even from a cursory examination of the building.

[22] Mr Cassels also says:

> "At all material times, it was made known by myself to Miyamoto through their engineers Mike King and Dr Kit Miyamoto that the concept design was for the Body Corporate and that would have had to be acceptable to the Body Corporate."

He also deposes as to making them aware of the need to minimise disturbance to the occupants/tenants and that both Dr Miyamoto and Mr King represented from the outset that they could achieve a design that would minimise such impact.

[23] Mr Cassels says that there was a discussion with Dr Miyamoto (and I infer with Mr Weir) that fees would be conditional on achieving a construction budget under $1,000,000. But he says: "*However I did not agree to change the fees arrangement if the construction budget exceeded $620,000".* He says the cost obtained did not include the cost of making good after the earthquake strengthening work. He says it should have been patently clear to Miyamoto that this work was required and that accordingly they were never able to establish or demonstrate that the true construction budget would be under $1,000,000. He confirms Mr Ingram's account of the meeting on 29 September 2014.

[24] Despite the direct assertions of discussions with, and important acknowledgements by, Dr Miyamoto, Mr King and Mr Bothara, none of these people have filed affidavits in reply for Miyamoto. Mr Weir however did. He explains that Mr King only briefly worked for Miyamoto, from November 2012 until February 2013 when he left to set up his own engineering firm. He had earlier worked for another company related to Miyamoto, Miyamoto+Cardno Limited. That company had previously been involved in work for TWC on the Harcourts building on Lambton Quay; he says Mr Cassels must be confused about Mr King being involved in the Cuba Street contract. He says that Mr King could not have been involved in the Cuba Street job, as that was after he had left Miyamoto.

[25] Generally Mr Weir notes that the complaints now made by Mr Cassels were never made at the time and/or are not relevant to the contract they entered into. In particular he says there was no condition that payment would not be made if the final design was not approved by the Body Corporate nor would it ever make commercial sense for Miyamoto to contract on those terms. This was simply a design proposal which the owner of the building may or may not accept but that was never a reason why payment would not be made for the design work.

[26] He also rejects the suggestion that the fees were contingent on some subjected level of disturbance minimisation being met. Mr Weir also says that the contention that Mr Cassels did not agree to change the fee arrangement if the construction budget exceeded $620,000 makes no sense because there was no prescribed budget constraint for 107 Cuba Street. He also says that he was present at

the meeting on 29 September 2014. He says that was the first time since the commencement of the project that Miyamoto had been invited to engage with the Body Corporate. Of course that was well after all of the work had been done and, Miyamoto says, after the entitlement to payment of the fees arose. He agrees that the Body Corporate did not like an aspect of the design but that no other issues as now raised by Mr Cassels were raised at that meeting. He sees the issues now being raised merely as a device to avoid paying Miyamoto any more money.

Discussion

[27] In my view there is considerable force in Mr Weir's contentions about the commercial reality of this case. Several of the points raised by Mr Cassels do not make sense and/or are at odds with the clear contractual position. The idea that the payment of Miyamoto's fees was conditional on the approval of the Body Corporate is not commercially sensible but if it was a condition Mr Cassels would surely have ensured it was expressly included in the written contract. I note that he had no difficulty in adding in handwriting additional terms which he thought were important yet he made no attempt to record such a fundamental condition as the approval of the Body Corporate being required. Had he done so it seems unlikely that Miyamoto would have agreed to proceed because there was an obvious risk of their carrying out substantial work only to find subsequently that for some subjective reason the Body Corporate was not happy. It is however possible it might have done so because it was prepared to refund its entire fees if certain other conditions were not met. It did that, I infer, both because it was confident it would provide a complying design and it wanted to be awarded the -no doubt much more substantial- contract to undertake the strengthening work.

[28] TWC, as Mr Ingram acknowledges, was authorised by the Body Corporate to deal with Miyamoto. The latter was therefore entitled to assume that TWC was acting as its agent and that any Body Corporate concerns were either expressly included in the contract or they need not concern it, as TWC would take responsibility for dealing with the Body Corporate.

[29] There is also considerable force in the point that the relevant complaints were not raised at the time and that gives rise to a strong suspicion that they have been raised belatedly for reasons unrelated to the entitlement to fees in terms of the contract. In particular I consider it significant that the $15,000 part-payment was made. That was made well after the meeting of 29 September 2014 and well after both TWC and the Body Corporate fully understood the design, including the extent of the building it covered and the cost of carrying out the work. If there were genuine reasons for Mr Cassels to believe the design was of no use and that it failed to meet the contractual obligations, it is very difficult to understand why he made any payment at all. Mr Collins highlighted that Mr Cassels had said in his email that he did not yet accept the invoices, but that implies that he still might. Both making a significant payment and leaving open the possibility of full payment in February are clearly inconsistent with total unacceptability of the design at the 29 September 2014 meeting. I also think it is significant that Mr Cassels makes no reference to this payment in his affidavit, despite it obviously requiring an explanation.

[30] In short, for the above reasons and others advanced by Ms McCubbin-Howell and Mr Weir I consider that Miyamoto's claim has a strong prospect of success. The issue at this stage however is whether I can safely enter summary judgment, whether I am satisfied there is no fairly arguable defence. I have come to the view for a number of reasons that I am not quite brought to that stage and that the summary judgment application must, by a fairly small margin, be dismissed. My reasons are as follows.

[31] Even on Miyamoto's view of the case the contract is not confined to the written terms. Mr Weir himself refers to the discussion about the need to achieve the necessary work for under $1,000,000. Therefore, even on the plaintiff's view, the parties agreed orally to at least one variation. Mr Cassels has given sworn evidence that the Body Corporate's approval was essential and that Miyamoto through both Mr King and Dr Miyamoto knew that. Neither of them has filed an affidavit in reply denying this so even though I think it is unlikely that Miyamoto would have so agreed, the possibility of the oral agreement asserted by Mr Cassels supplementing the revised written contract cannot safely be excluded.

[32] There is uncertainty and disagreement about whether the design provided was sufficient in scope, in terms of including the whole of the building including the top floor residential apartments. This is important especially because of the essential condition that 67% NBS be achieved. Unless it is known 67% *of what* is to be achieved then there is uncertainty about whether Miyamoto is entitled to either fee. Indeed it is not clear to me whether 67% NBS was achieved even in relation to the design submitted, let alone whether the 67% NBS would be achieved for the whole building, if in truth those top levels were agreed to be included, that being in dispute.

[33] The meaning and application to this job of the additional term inserted by Mr Cassels, "including *associated works required to undertake the seismic works",* is unclear and ought to be the subject of examination at trial. Mr Cassels says this "obviously" included the cost of making good which were not included in the costings obtained. It is not clear to me what Miyamoto says on this point but, regardless, this is an aspect of uncertainty about the meaning and purview of one of the few written terms.

[34] On the view I take of the revised written contract, as set out in [9], the entitlement of Miyamoto to the second $25,000 plus GST fee is, given that the cost for 107 Cuba Street did not come within the $620,000 budget, entirely dependent on its proving that it used best endeavours to bring the cost within the $620,000 budget. There is very little evidence about what efforts were made and there is no pleading of best endeavours in the statement of claim to which it is said there is no defence; on the contrary it is pleaded in paragraph 14 that "*the overall budgeted cost for both 101 and 107 Cuba based on the revised concept design came under $1million and came within the expectations of the defendant as discussed and agreed between the parties during the course of the work"*. That suggests the plaintiff agrees the contract had changed from the written revised contract and that Miyamoto thought it no longer had to use best endeavours to bring it under $620,000; rather the target had shifted to under $1million. If that is what Miyamoto does indeed contend, then there is further uncertainty about the extent to which the written contract was varied orally and therefore as to the truly agreed contractual terms.

[35] Mr Weir does say that after the initial costings they went away and after considerable work for which they did not charge they came back with a design which when costed was well under the $1 million. It is unclear however whether the agreement about the $1,000,000 varied the revised contract or not. If it did not, then before it could be paid the fee relating to 107 Cuba Street, Miyamoto had to prove that it had used its best endeavours to bring the costing within the budget of $620,000 – not $1,000,000. There is no evidence that it used its best endeavours to bring it within $620,000. There is an inference available on the evidence, but it is not sufficient on a summary judgment application to make a clear finding, that that essential condition had been met. The only evidence is that an effort was made to reduce the costs from above $1,000,000 down to the figures ultimately achieved. There is no evidence of the efforts made to bring them down further to within $620,000.

Conclusion

[36] As I have noted, in my view, on the information put before me Miyamoto has a strong case and may well succeed at trial in relation to all of the areas of factual dispute which I have mentioned. However, in particularly in combination, those issues are not able safely to be resolved in favour of Miyamoto on this application. There needs to be a trial with cross-examination and further evidence from the other witnesses who have not provided affidavits and probably from independent experts.

[37] In our civil litigation system costs normally follow the event, so that in principle, in successfully opposing the application for summary judgment, TWC would be awarded costs. Indeed Mr Collins sought these on the basis that the factual disputes should have been readily apparent to Miyamoto. I do not agree. In my view a number of the defences put forward appear to me to be tenuous (and that puts into question the genuineness of the others). It is significant that these points were not made contemporaneously and that Mr Cassels made the $15,000 part-payment well after he had all the information he needed to assess Miyamoto's work. In my view costs should be reserved pending the outcome at trial. If TWC succeeds at trial then it could properly expect to be awarded costs in relation to this application but if it fails it should not be.

[38] In view of the amount at stake, the cost of having this matter resolved in a "Rolls Royce" way at trial and the commercial nature of the dispute, I would urge the parties, in particular TWC, to make a realistic assessment of the prospects of success and to engage in pragmatic settlement discussions to avoid further cost and delay. As Ms McCubbin-Howell pointed out, it is important to keep in mind this was simply a design concept which TWC and/or the Body Corporate was entitled to consider and, if it thought fit, to reject. The fact that it has ultimately found the work to be of no value, or so it says, does not mean it should not pay a reasonable fee for the extensive work which was obviously done by Miyamoto. Equally Miyamoto was prepared to refund its fees if it did not perform so it ought to be prepared to accept some reduction now in order to resolve the dispute and allow both parties to move on. The costs of proceeding to trial especially with expert evidence involved are likely to be prohibitive in relation to the amount at issue. I also note that the parties agreed in the standard conditions of engagement to attempt in good faith to settle any dispute by mediation. I do not know whether any such effort has yet been made but regardless it certainly should be made before the parties commit to the substantial costs of trial.

[39] I direct that counsel discuss the way forward with their clients and each other and that, if the case is not settled, they file by 10 June 2016 a joint memorandum setting out suggested further directions so that a civil-designated judge may make appropriate directions.

S M Harrop
District Court Judge