EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT HAMILTON

CIV-2016-039-000068
[2016] NZDC 23770

BETWEEN	FLOORMAN WAIKATO LIMITED Plaintiff
AND	JOHNATHON MCRAE Defendant

Hearing: 23 November 2016

Appearances: S Gunawardana for the Plaintiff
Defendant appears in Person

Judgment: 23 November 2016

ORAL JUDGMENT OF JUDGE T R INGRAM

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[1] Floorman Waikato Limited has applied for summary judgment against Mr Johnathon McRae in respect of some work done on Mr McRae's house at Waghorns Road near Manawaru.

[2] Mr McRae works in the horse industry and has no involvement with the construction business. He sought a quote, and in his view he received a quote for $5500 from Floorman Waikato Limited. The job was carried out, and as far as Floorman Waikato Limited was concerned, the job was completed and no issues were raised with it until the issue of payment for the work arose. Issues did not arise for six weeks or so after the work was completed. Mr McRae received a bill for the work done and that bill was for $7072.50 including GST. Mr McRae was surprised to see that because he thought that he had agreed a figure of $5500 and there was no mention of GST or any other expenses attaching to the quote.

[3] Attached to the final account was reference to the Construction Contracts Act 2002, and Floorman Waikato Limited invoked the provisions of that Act. That Act is a detailed piece of legislation and it operates generally on the basis that payment

claims are submitted. If they are to be disputed they have to be disputed in writing within the specified notice period and if they are not disputed within that period then the statutory regime requires payment in full and any argument can take place later.

[4] The first question in this case is whether or not there was a construction contract. From Mr McRae's point of view he thought he had a quote for $5500 to do a tradesman-like job inclusive of all expenses and GST, and it is clear that Floorman Waikato Limited did not because they have sent a bill for over $7000.

[5] The first question which falls to be decided is whether or not there was a contract at all. Were the parties ad idem? Did Mr McRae agree with Floorman Waikato Limited as to the job and the price of the job? On the evidence presently available to me I am unable to say that I am satisfied that there was a completed agreement as to all the material aspects of the job. I need to bear steadily in mind that this is a floor sanding and polyurethaning job involving a floor in a rural house which seems to be something like 50 to 60 years old. It is not the construction of new works and I have to confess I was rather surprised that the plaintiff has elected to follow the scheme set out in the Construction Contracts Act 2002 in relation to a job of this kind.

[6] The plaintiff's counsel has been at pains to belabour before me the proposition that that Act is intended to ensure that payment is made promptly and if there is going to be any issue taken with the work it needs to be taken promptly otherwise the operation of the Act is designed to ensure payment in full followed by any subsequent litigation to deal with whatever the problem might happen to be. There is a certain level of force in that submission but it also needs to be observed that it flies directly in the face of the situation that obtains here. I have a layman on one side, involved in something which on any layman's view would have nothing whatsoever to do with a construction contract, it being simply a floor sanding and polyurethaning job.

[7] I accept unreservedly that Mr McRae was given a document referring to the fact that this was a claim under the Construction Contracts Act 2002, but I can understand his mystification that he finds himself embroiled in the provisions of that Act in the circumstances that I have outlined.

[8] If the parties were not ad idem as to the price it seems to me there is a very real question as to whether indeed there was a contract. It seems to me that it is at least arguable on Mr McRae's behalf that the parties never were ad idem as to an essential matter of the job which is the price. In a case of this kind involving something between five and a half thousand dollars worth of floor sanding and polyurethaning and perhaps just over $7000 worth it seems to me that firstly, Mr McRae has every right to be mystified that he found himself after the event involved in the Construction Contracts Act 2002 but secondly, it is more than open to him to say "well actually I thought we had an agreed price and unless we did have an agreed price then we didn't have a contract at all"; and what Floorman Waikato Limited are entitled to is a quantum meruit assessment of the value of the work that has been done. Given the relatively small size of the contract it seems to me that the quantum meruit argument cannot be dismissed in its entirety.

[9] The next question it seems to me is whether or not the justice of the case would allow me to enter summary judgment. I have a serious concern about the invocation of the Construction Contracts Act 2002 in relation to a job of this kind. Laypeople are very unlikely to be able to figure out the intricacies of that Act. Many lawyers have great difficulty with it and I should be surprised indeed if laypeople were able to figure it all out and meet the timetables and the specificity of notices required under the Construction Contracts Act 2002 in most cases.

[10] Certainly in this case I am completely satisfied that Mr McRae was mystified as to what the Construction Contracts Act 2002 had to do with things and when he came to make submissions to me, unsurprisingly he was pointing out the provisions of the Consumer Guarantees Act 1993 and the Fair Trading Act 1986, and saying this is completely unfair, and that he wanted to explain to the Disputes Tribunal just what his beef with Floorman Waikato Limited's work was and have somebody independent make a proper assessment of what had gone wrong.

[11] There is a further element of injustice in the application of this Act, because it is clear under the Act that if this Act is invoked and payment is not made the cost of recovering the money can be added to the outstanding bill, and in the present circumstances it seems to me that that would be wholly unjust. The figures speak for

themselves. The claim for costs here is over $5000 for this stage of the proceedings. That means from Mr McRae's point of view he is being asked to pay more than he was originally quoted, together with another $5000 on top of that, in respect of a floor sanding job which he thought he was getting at five and a half thousand dollars together with appropriate workmanship and quality of work which he says he has not got.

[12] The figures speak for themselves. This particular claim should in my view have been brought before the Disputes Tribunal and the Construction Contracts Act 2002 should not have been invoked. I am completely satisfied that there is a genuine dispute between the parties, and I take no position at all on the merits of that dispute, because I am not in a position to make an appropriately informed assessment. I have not heard evidence from either party about exactly what was agreed. I have received affidavits which contradict each other and I can see no practical way in which I can resolve those without cross-examination. That by itself calls into question the availability of summary judgment in circumstances such as this, because I need to be satisfied that there is no defence to any cause of action.

[13] If the plaintiff is right, the practical affect is for a defendant who has got nothing to do with the construction industry and he has never heard of the Construction Contracts Act 2002, can be handed a bill after a job has been done together with a sheet of paper saying that it is a claim under the Construction Contracts Act 2002 and requiring the matter to then be dealt with under the provisions of an Act which they had never heard of. That, it seems to me, is fundamentally unfair. I can well understand that many people use the Construction Contracts Act 2002 routinely and if it was a construction job I would have no difficulty with that.

[14] Certainly it is not clear to me that a floor sanding contract on a 50 year old house necessarily falls within the purview of the Construction Contracts Act 2002, because on its face there was simply no construction of any kind involved. There was a refurbishment and that is the most that can be said about it. But in any event my sense of justice is very palpably infringed by the resort to this stratagem of

making a claim under the Construction Contracts Act 2002 and bringing a summary judgment application in circumstances such as this.

[15] I have a discretion under the provisions of r 12.2 District Court Rules 2014. That provision says and I quote, "The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to any cause of action in the statement of claim..."

[16] The residual discretion has been examined by appellate Courts on a number of occasions. The leading authority would appear to be *Sudfeldt v UDC Finance*[1] (1987) 1 PRNZ 2005. There the Court said… "Once it has been established that there is no defence there are few situations where the discretion could be exercised, unless it could be shown that summary judgment could cause injustice." I am completely satisfied that in this case that summary judgment would cause injustice and substantial injustice. This is a matter which should have been dealt with in the Disputes Tribunal where a fee of $180 would be payable. Already over $5000 worth of fees have been expended on a completely unnecessary application to this Court, when the matter is well within the jurisdiction of the Disputes Tribunal. I am not prepared to sit idly by and simply apply the black letter of the Construction Contracts Act 2002 when I consider that there has been a substantial injustice or could be a substantial injustice when the application is for summary judgment in respect of which I have a discretion to prevent that injustice occurring.

[17] It seems to me that there is at least some merit in Mr McRae's claim that the provisions of the Consumer Guarantees Act and the Fair Trading Act should be taken into account in assessing the rights and wrongs of the situation, and a fully informed decision made by an independent arbiter about whether or not the job was good enough, whether or not there was indeed an agreement as to the cost of the work, and whether or not the quote was binding as Mr McRae has noted it at $5500, and whether or not it could be increased, and whether or not it could be brought under the Construction Contracts Act 2002 by the simple stratagem of providing a payment claim under the provisions of that Act after the work had been done without any mention being made prior to that, or any hint, whisper or suggestion either from the

[1] *Sudfeldt v UDC Finance* (1987) 1 PRNZ 2005

circumstances or from the interaction of the parties that the Construction Contracts Act 2002 regime was going to apply here.

[18] So put shortly, in my view the merits of the argument before me are crystal clear. I do not consider that the plaintiff has got anywhere near establishing firstly that there was a concluded contract, or secondly that the Construction Contracts Act 2002 necessarily governs the process to the exclusion of the Consumer Guarantees Act and the Fair Trading Act. I would need to be satisfied as to those matters before I could fairly say in terms of my jurisdiction under r 12.1 District Court Rules 2014 that there was no defence to the cause of action.

[19] In so saying I do not overlook the mandatory nature of the payments regime set out in the Construction Contracts Act 2002. What I say in relation to that is that it is manifestly unfair that it be called into operation in the way that it has been in a case of this kind involving these amounts where the defendant if he was unsuccessful today would be expected to pay costs in excess of $5000 in relation to a job which he believed would not exceed $5500 in total. In short the manifest financial penalty which must attach to the operation of the Construction Contracts Act 2002, is offensive to my sense of justice in the circumstances of this particular case, and I do not accept that it can fairly be brought within the terms of r 12.2, and I am not satisfied that there is no defence to the plaintiff's claim.

[20] For the benefit of those who might be interested in the precedent value of this judgment I have this to say. It seems to me that invocation of the Construction Contracts Act 2002 in circumstances where the claim is well within the Disputes Tribunal jurisdiction is inappropriate if the contract involves a layperson and he has no prior knowledge of the provisions which operate in the Construction Contracts Act 2002 in relation to payment disputes about workmanship and the like. Had this been a case involving people used to the construction industry I would have had no difficulty with it, but I do have a difficulty and a very substantial difficulty with a layman being dragged into a web of which they had no knowledge of, little ability to figure out and which will cost them a whole lot of money to get appropriate advice and to act appropriately if they want to argue the toss about what has gone on. With the sums involved in this particular case in my

view it would be impossible for either party to get this case fully argued in the District Court for anything like the sum in dispute. Both parties are going to end up vastly out of pocket if this matter goes on to a hearing in due course. The injustice of that seems to me to be extremely obvious. To the extent that it might be regarded as a precedent, I do not shrink from the view I have expressed that people should be careful about invoking the Construction Contracts Act 2002 in matters of genuine dispute where the Disputes Tribunal Act 1988 can operate at vastly lower cost to resolve issues of a nature that the Disputes Tribunal is well capable of dealing with.

[21] On the face of it, the costs of the litigation here produces a wholly inequitable outcome, which this Court should not desist from calling out as to what it sees. I do not consider that there would be any injustice at all in refusing summary judgment here. If I could I would transfer this case to the Disputes Tribunal but I cannot do so unless or until either party files a claim in the Disputes Tribunal. If and when either party does file a claim in the Disputes Tribunal in my view it would be an appropriate case to transfer to the Disputes Tribunal given the small sum involved and the huge cost of resolving it in this Court.

[22] Mr McRae is entitled to make a claim in the Disputes Tribunal if he wishes. Floorman Waikato Limited are equally entitled to bring a claim in the Disputes Tribunal if they wish but unless or until either of them do I cannot transfer the matter to the Disputes Tribunal. I would invite them to consider their options. Certainly I consider that it would be desirable if one or both of them made a claim in the Disputes Tribunal so that can be dealt with at an appropriate level without spending enormous sums of money in what appears to me to be a genuine dispute about workmanship.

[23] For all those reasons the application for summary judgment is declined. I am not satisfied if there is no defence to the plaintiff's claim and the application is accordingly dismissed.

T R Ingram
District Court Judge