

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA120/2024
[2024] NZCA 577**

BETWEEN KEITH BULLOCK CONTRACTING
LIMITED
Appellant

AND GENESIS RESIDENTIAL LIMITED
Respondent

Hearing: 7 October 2024

Court: Palmer, Grice and Gault JJ

Counsel: R J B Fowler KC and S Jung for Appellant
J Long and L R Hebden for Respondent

Judgment: 11 November 2024 at 12 pm

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The application for summary judgment is remitted to the High Court for reconsideration in light of this decision.**
- C The respondent must pay costs to the appellant for a standard appeal on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Gault J)

[1] Keith Bullock Contracting Ltd (KBC) appeals against part of the High Court's decision declining KBC's application for summary judgment against Genesis

Residential Ltd (GRL).¹ The appeal relates only to that part of KBC's claim that concerns Payment Claim 16 (PC16) issued under s 20 of the Construction Contracts Act 2002 (CCA) and GRL's Payment Schedule 16 (PS16) issued in response.

Factual background

[2] A brief summary of the factual background will suffice for present purposes. There are material conflicts of evidence in relation to a number of matters which the High Court accepted can only be determined at trial.²

[3] GRL engaged KBC to undertake bulk earthworks at a residential development in Lower Hutt. On 26 November 2020, the parties signed the relevant construction contract (contract) on NZS 3910:2013 terms and conditions with additional special conditions.

[4] The contract stated that payment schedules must be provided no later than 12 working days after a payment claim is served.

[5] On 19 October 2022, GRL served KBC with a notice to rectify outstanding works.

[6] On 4 November 2022, after the prescribed 14 days to rectify the delays and complete all outstanding works had elapsed, GRL served KBC with a notice of cancellation of the contract.

[7] On 25 November 2022, KBC served PC16 for \$1,222,978.47 (including GST).

[8] On 19 December 2022, GRL served PS16 in response to PC16 stating a scheduled amount of \$773,758.11 (including GST). PS16 was served 16 working days after PC16 was served.

¹ *Keith Bullock Contracting Ltd v Genesis Residential Ltd* [2023] NZHC 2887 [judgment under appeal].

² At [26] and [77].

[9] The due date for payment of PC16 was stated to be 20 December 2022. GRL failed to pay the claimed amount or the scheduled amount on or before that due date.

KBC's claim

[10] KBC's statement of claim contained six causes of action, five of which were initially pursued by way of summary judgment. The first three causes of action concerned breach of contract claims (for earlier payment claims and a retentions invoice) that are not relevant. The fourth cause of action was a claim under s 24 of the CCA for the scheduled amount in PS16. The fifth cause of action was for breach of contract claiming the full amount in PC16.

[11] During the High Court hearing, KBC withdrew its claim for summary judgment in respect of the fifth cause of action, apparently because GRL disputed KBC's ability to issue PC16 post-cancellation of the contract (and asserted the need for a final wash-up on completion and a substantial claim against KBC by way of set-off).³ KBC pursued its first to fourth causes of action.

The High Court judgment

[12] Associate Judge Skelton declined KBC's application for summary judgment.⁴ In relation to the fourth cause of action, he rejected GRL's primary argument that KBC was not entitled to issue PC16 as GRL had terminated the contract.⁵ He held that PC16 was a valid payment claim in accordance with s 20 of the CCA even if the contract was validly terminated, applying the approach of this Court in *Demasol Ltd v South Pacific Industrial Ltd* in relation to an application to set aside a statutory demand.⁶ He stated:⁷

... If GRL wished to contend that KBC was not entitled to serve a payment claim on 25 November 2022 after the alleged termination of the contract, that was a point that it could and should have taken by way of response in its payment schedule.

³ Judgment under appeal, above n 1, at [14], as confirmed in the leave judgment: *Keith Bullock Contracting Ltd v Genesis Residential Ltd* [2024] NZHC 105 [leave judgment] at [36].

⁴ Judgment under appeal, above n 1, at [79]–[82].

⁵ At [68]–[71].

⁶ At [66] and [69], citing *Demasol Ltd v South Pacific Industrial Ltd* [2022] NZCA 480 at [41]–[42] and [47].

⁷ Judgment under appeal, above n 1, at [69].

[13] The Associate Judge also considered that KBC’s failure to state the correct period to which the claim related was a mere “technical quibble”.⁸ GRL, through the engineer, “responded fully to PC16” and “there was no evidence of any confusion”.⁹

[14] However, the judgment raised a timing issue with PS16 that had not been addressed at the hearing by either party or the Court. The Associate Judge said:¹⁰

[74] The difficulty for KBC is that it is not clear whether the payment schedule was served by GRL within the time allowed by section 22(b) of the CCA as required by s 24(1)(b). In any proceedings for the recovery of a debt under s 24, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection 24(1) exist.

[75] Section 22 of the CCA provides that a payer becomes liable to pay the claimed amount on the due date for the payment to which the payment claim relates if a payee serves a payment claim on a payer, and:

- (b) the payer does not provide a payment schedule to the payee within—
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

[76] The construction contract between GRL and KBC stated that the payment schedule was to be provided no later than 12 working days after the payment claim was served.¹¹ GRL served the payment schedule in response to PC16 on 19 December 2022 which was 16 working days after PC16 was served.

[77] It may be arguable that, if the contract was validly terminated on 4 November 2022, then the contract no longer provided for a time by which the payment schedule was to be served, in which case s 22(b)(ii) would apply. However, determination of that issue requires determination of whether GRL validly terminated the construction contract on 4 November 2023. As discussed above, due to the material conflicts of evidence, that issue can only be properly determined at trial.

[78] Therefore, because I am not satisfied that the circumstances in s 24(1)(b) of the CCA exist, I am unable to grant summary judgment in respect of KBC’s claim for a debt due under s 24 of the CCA.

⁸ Judgment under appeal, above n 1, at [72], citing *Rangitahi Ltd v Pemberton Civil (Hamilton) Ltd* [2021] NZHC 3471 at [46]; *Herbert Construction Co Ltd v Reinforcing Steel & Mesh Ltd* [2013] NZHC 376 at [52]; and *Pedestal Ltd v City Build Construction Ltd* [2014] NZHC 1783, [2014] NZCCLR 32 at [43]–[49].

⁹ Judgment under appeal, above n 1, at [72].

¹⁰ Footnote in original.

¹¹ Clause 12.2.5 of the general conditions of contract.

[15] KBC sought leave to appeal in respect of PC16 and one other payment claim.¹² The Associate Judge granted leave only in respect of PC16.¹³

Approach on appeal

[16] On a general appeal, “the appellate court has the responsibility of considering the merits of the case afresh”.¹⁴ The appellate court “must be persuaded that the decision is wrong”,¹⁵ but “[t]he weight it gives to the reasoning of the court below ... is a matter for the appellate court’s assessment”.¹⁶ Further:¹⁷

[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court’s opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

Applicable CCA provisions

[17] Part 2, subpt 3 of the CCA provides for payment claims and payment schedules in ss 20 and 21. Sections 22 to 24 then provide:

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within—
 - (i) the time required by the relevant construction contract; or
 - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

¹² Leave judgment, above n 3, at [17] and [26].

¹³ At [46].

¹⁴ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31], citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

¹⁵ *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 14, at [13].

¹⁶ *Kacem v Bashir*, above n 14, at [31]. No deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because credibility is important: see *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 14, at [13]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [31]–[32].

¹⁷ *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 14, at [16] (footnote omitted); and see: *Kacem v Bashir*, above n 14, at [32].

23 Consequences of not paying claimed amount where no payment schedule provided

- (1) The consequences specified in subsection (2) apply if the payer—
 - (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
 - (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the payment to which the payment claim relates.
- (2) The consequences are that the payee—
 - (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the claimed amount; and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
 - (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state—
 - (a) the ground or grounds on which the proposed suspension is based; and
 - (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

24 Consequences of not paying scheduled amount in manner indicated by payment schedule

- (1) The consequences specified in subsection (2) apply if—
 - (a) a payee serves a payment claim on a payer; and
 - (b) the payer provides a payment schedule to the payee within the time allowed by section 22(b); and
 - (c) the payment schedule indicates a scheduled amount that the payer proposes to pay to the payee; and
 - (d) the payer fails to pay the whole, or any part, of the scheduled amount on or before the due date for the payment to which the payment claim relates.

- (2) The consequences are that the payee—
 - (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the scheduled amount; and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
 - (b) may serve notice on the payer of the payee’s intention to suspend the carrying out of construction work under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state—
 - (a) the ground or grounds on which the proposed suspension is based; and
 - (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

[18] Section 79 in pt 5 of the CCA provides:

79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand

In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—

- (a) judgment has been entered for that amount; or
- (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

Discussion

[19] As Mr Fowler KC submits for KBC, we accept that the “pay now argue later” provisions in pt 2, subpt 3 of the CCA provide a statutory payment mechanism for a payee under a construction contract to serve a payment claim and then recover as a debt either the amount claimed if no payment schedule is served within time, or the scheduled amount if a payment schedule is served within time. These are alternatives provided for in ss 23 and 24 of the CCA. Consistent with the terms and purpose of

the provisions in pt 2, subpt 3,¹⁸ a dispute about whether a payment schedule was served within time should not preclude a payee from recovering at least the scheduled amount as a debt.

[20] Here, however, KBC did not bring a claim under s 23 of the CCA (even in the alternative). Its fifth cause of action was not a claim under s 23. Although the fifth cause of action pleaded that in breach of contract GRL failed to provide a payment schedule in response to PC16 or make payment of PC16, it was pleaded as a claim for breach of contract, which does not have the benefit of s 79 precluding set-off. There was no reference to s 23. Moreover, this claim was not pursued at the summary judgment hearing. Further, we do not accept that leave to appeal was, or could be, sought in respect of summary judgment on the fifth cause of action which was not pursued in the High Court hearing.

[21] This is the context in which the High Court judgment is criticised by KBC. Mr Fowler submits that, where a payment claim has been made and partially accepted by the payer by a payment schedule, asserting a termination of the contract allows the payer to avoid the strict payment regime of the CCA. We note the Associate Judge and GRL should not be criticised for dealing with the claim as pleaded.

[22] Even so, having identified the timing issue with the service of PS16,¹⁹ we consider the Associate Judge erred in two respects. First, s 24(4) of the CCA mandates that the court “must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subs (1) exist”, which includes that “the payer provides a payment schedule to the payee within the time allowed by s 22(b)”. We also agree that whether GRL validly terminated the contract could only properly be determined at trial.²⁰ But we disagree that determination of the timing issue required determination of whether GRL validly terminated the contract. There was no factual dispute about the timing. Whether PS16 was served in time depends on the application of the proper statutory interpretation of s 22(b) to clear facts.

¹⁸ See: *Salem Ltd v Top End Homes Ltd* CA169/05, 12 December 2005 at [22].

¹⁹ Judgment under appeal, above n 1, at [74].

²⁰ At [77].

[23] The plain meaning (and purpose) of s 22(b) is to provide a statutory timeframe for a payment schedule if the contract does not provide a timeframe. As Mr Long submits, subparas 22(b)(i) and (ii) are mutually exclusive alternatives. Here, the contract provided for the time within which a payment schedule is required (12 working days). Therefore, s 22(b)(i) applied irrespective of whether the contract had been terminated before PC16 and PS16 were served.²¹ The “payment claim mechanism simply uses the contract term as a part of the statutory mechanism”.²² This is consistent with the purpose of the “pay now argue later” provisions. Section 22(b)(ii) only applies where the construction contract does not provide for the matter. It does not automatically apply where there is a disputed termination. Accordingly, PS16 was not served within the required 12 working days.

[24] However, this default by GRL does not assist KBC in relation to its fourth cause of action under s 24. While summary judgment may be given where the plaintiff satisfies the court that the defendant has no defence to a particular part of a cause of action as Mr Fowler submitted,²³ s 24 did not apply here and could not found summary judgment in respect of PS16. Given the requirements of s 24(1), emphasised in s 24(4), KBC could not make s 24 apply (instead of s 23) by accepting or assuming that PS16 was served within time when it was not. We accept that, if there were a genuine factual dispute as to when a payment schedule was served which could not be determined on summary judgment, and alternative causes of action were brought under ss 23 and 24, the High Court Rules 2016 should be sufficiently flexible to allow for summary judgment in respect of the scheduled amount. However, that was not the case on the basis of the causes of action pleaded here. KBC was not entitled to summary judgment on its fourth cause of action.

[25] Secondly, having identified the timing issue, we consider the Associate Judge should have sought further submissions from the parties as a matter of natural justice. As Mr Long responsibly acknowledged, that may have resulted in KBC realising that it should seek to amend its statement of claim to add an alternative claim for the

²¹ This is consistent with the approach of this Court in *Demasol Ltd v South Pacific Industrial Ltd*, above n 6, at [48].

²² John Ren “The CCA payment claim process after termination of contract” [2024] NZLJ 196 at 200.

²³ High Court Rules 2016, r 12.2(1).

recovery of debt due under s 23 (on the basis that PS16 was not served in time) and seek summary judgment on that basis. Mr Long did not raise any prejudice which might have precluded such a course.²⁴ KBC did not have that opportunity. This may have affected the ultimate outcome of the summary judgment application.

[26] KBC did not seek for this Court on appeal to grant leave to amend its fifth cause of action relating to PC16 from a breach of contract claim to a claim for the recovery of debt due under s 23, and conduct a first instance hearing of an amended application. Rather, if KBC's appeal did not succeed based on s 24, Mr Fowler sought to have the matter remitted to the High Court. Mr Long did not oppose that in the event of the Court being troubled about the natural justice issue.

[27] Irrespective of the outcome of this appeal, KBC could amend its statement of claim in the High Court (without leave before close of pleadings) to add a cause of action under s 23 and seek leave to bring a second application for summary judgment relying on special circumstances.²⁵ However, having observed that such an amendment could be an appropriate way forward, we consider it is appropriate to allow the appeal on the basis of the two errors identified and remit the application for summary judgment to the High Court for reconsideration (of an amended application based on a new cause of action under s 23) in light of this decision.²⁶

[28] The appeal unfolded differently from the way it was initially pursued but we consider that costs should still follow the event.

Result

[29] The appeal is allowed.

[30] The application for summary judgment is remitted to the High Court for reconsideration in light of this decision.

²⁴ See *Cegami Investments Ltd v AMP Financial Corporation (NZ) Ltd* [1990] 2 NZLR 308 (CA) at 314.

²⁵ High Court Rules 2016, r 12.4(2AA).

²⁶ Senior Courts Act 2016, s 57.

[31] The respondent must pay costs to the appellant for a standard appeal on a band A basis together with usual disbursements.

Solicitors:

Dalzell Wollerman, Wellington for Appellant

Collins & May Law, Lower Hutt for Respondent