

**RESERVED JUDGMENT OF ASSOCIATE JUDGE H SARGISSON** : High Court, New Zealand, Auckland Registry. 14<sup>th</sup> September 2007.

- [1] This is a summary judgment application in which the substituted plaintiff, Commercial Receivables Limited, seeks an order for summary judgment in the sum of \$323,925.25, plus interest, and an order for costs.
- [2] The application is made in reliance on a revolving credit facility agreement entered into between the former plaintiff, Nationwide Finance Limited, and the Thompsons in February 2005, a subsequent arrangement they made to provide for Nationwide to make payments from the facility to a company called Okley Construction Company Limited.
- [3] It is common ground that Commercial Receivables is entitled, under the terms of an assignment, to pursue the application.
- [4] The application proceeds only against Mrs Thompson. As Mr Thompson has been adjudicated bankrupt, Commercial Receivables accepts that it cannot pursue an order against him without the consent of the Official Assignee or the leave of the Court.
- [5] Mrs Thompson opposes the application.

**Background**

- [6] The purpose of the credit facility agreement was to provide the Thompsons with funds to build a small townhouse development on a property they owned in Havelock North.
- [7] The development did not proceed smoothly and Nationwide was concerned that monies advanced under the credit facility were not being used for the purpose of the development. It indicated it would exercise its contractual right not to advance further funds unless arrangements were put in place to satisfy its concerns. To stave off that outcome, the Thompsons agreed, as part of an arrangement to secure the continuation of funding, that they would engage a building company to complete the development. The company was Okley.
- [8] With Nationwide's concurrence, the Thompsons engaged Okley under a written contract in which Okley was appointed the contractor to finish the development for a fixed price of \$274,289.44. Clause 11 of the contract provided:

The parties acknowledge that Nationwide shall pay the first TWO HUNDRED THOUSAND DOLLARS (\$200,000.00) exclusive of GST of the contract price to the Contractor upon first having Phillip Atkins (Quantity Surveyor) of AMSL approve and ratify any claims for payments of the Contractor.

- [9] The clause accorded with the arrangement between Nationwide and the Thompsons. Under that arrangement, Nationwide agreed it would make available \$200,000.00 to pay Okley and the Thompsons agreed that they would fund the balance.
- [10] The Thompsons' arrangement with Okley struck difficulties because Okley required security for that part of the funding the Thompsons were responsible for. It appears they were unable to provide security.
- [11] Nevertheless, Okleys proceeded with some of the work, and it presented two progress claims to Nationwide.
- [12] The first progress claim was for \$95,796.37 which Nationwide paid in January 2006. Before payment, the claim was certified by Mr Atkins of AMSL. In his certificate he approved and ratified the claim for payment. The Thompsons are aggrieved by the payment. They say that it was Mr Thompson who did the subject work and not Okley.
- [13] In February, Okley submitted the further progress claim, seeking payment of \$71,099.10. By this time, Mr Atkins was no longer acting as quantity surveyor. It appears he had declined to act.
- [14] Mr Kevin Longman a registered building surveyor, was appointed by Okley to project manage the completion of the works described in the contract between the Thompsons and Okley. He wrote to Nationwide on 17 February 2006 confirming his appointment by Okley and advising that:

Although not specifically referred to in the agreement, it will be our intention to follow the role of engineer to a building contract, as outlined in NZS 3910:2003, in an attempt to bring this matter to a satisfactory conclusion.

This course of action has been taken by Mr Willis [Okley] as a direct result of the withdrawal of AMSL ... from having any further involvement with the project. I attach a copy of a fax dated 10 February 2006 from Mr Phillip Atkins for your information.

Clearly, Mr Willis is anxious to fulfil his obligations under this agreement and considers the withdrawal of AMSL, which is beyond his control, will frustrate his progress. Accordingly it is his request that our firm be accepted by you to take over the role previously fulfilled by AMSL, as described in the agreement.

If you have any queries please do not hesitate to contact me. I have in any event been advised by Mr Willis to expect the next payment claim from him shortly for checking, ratification and passing for you to payment as appropriate.

The provisions of the Construction Contracts Act 2002 will apply to all future payment claims.

- [15] Nationwide accepted Okley's appointment of Mr Longman to fulfil the role of certifier under Clause 11 of the building contract. It is unclear on the evidence whether the Thompsons agreed to Mr Longman's substitution, but it

is clear that the Thompsons instructed Nationwide not to pay the second claim. Their reason was that they disputed that the work had been done.

- [16] Nationwide considered it had no option but to pay the second progress claim and paid it. Its position was that Mr and Mrs Thompson would have been in breach of their contract if the certified payment was not met and that this could have jeopardised the completion of the project.
- [17] The Thompsons were, in any event, unable to complete the project. Okley was unwilling to complete the remaining work without security for payment. The net result was that Nationwide called up the loan. The Thompsons could not repay it and Nationwide sold the Thompsons' property pursuant to the mortgage it held over the property. After applying the sale proceeds, Nationwide says there is a shortfall of \$323,925.25.
- [18] When confronted with Nationwide's proceeding, the Thompsons' position was that Nationwide's failure to ensure that both progress payments were applied for the purpose of the development meant the property was sold for less than it otherwise would have been. The complaint appears to be that not only did they not recover work to the value of the progress payments, they were unable to recover a premium a buyer would normally pay for a completed development.
- [19] However, for reasons I will come to, to the extent that any real dispute arises in this proceeding, it is about the Thompsons' liability for the second progress payment of \$71,099.10. It is not about the balance of \$252,826.15.

#### Respective Positions

- [20] Nationwide's position is that the two payments were chargeable to the Thompsons under the credit facility as agreed by the terms of the subsequent arrangement made with the Thompsons. Its position is that under that arrangement it was obliged to make the two progress payments.
- [21] Counsel for the Thompsons conceded that Nationwide was entitled, under the subsequent arrangement made with them, to make progress payments direct to Okley provided the payments were certified by AMSL in accordance with Clause 11 of the building contract between the Thompsons and Okley. He also indicated that he raised no issue about the substitution of Mr Longman as certifier. However, he went on to submit that Nationwide's entitlement to pay Okley was not open ended and that Nationwide could not pay out progress claims if the Thompsons challenged the quantity surveyor's certificate(s). He submitted also that the appropriate way of looking at the relationship was that Nationwide was the Thompsons' agent for the purpose of making progress payments and that the Thompsons were entitled to withdraw the agent's authority to make those payments and they did so.
- [22] Mr LaHatte went on to accept in relation to the first progress claim that there was no evidence that the Thompsons put Nationwide on notice that the first progress claim was challenged. He conceded that Nationwide could not be criticised for making the payment as, on his own analysis, it acted within the terms of its authority. However, he pointed out that the evidence shows that Mr Thompson told Nationwide he challenged the second payment and expressed concerns that work had been certified when it had not been carried out. He submitted the challenge amounted to a withdrawal of authority.
- [23] Mr LaHatte argued that in these circumstances, there is a real dispute as to Nationwide's authority to make the second payment and that the dispute as to the second payment and the related issue of any consequential loss affecting the value of the property, should go to trial. However, as far as consequential loss was concerned Mr LaHatte was unable to point to any real evidential foundation for the assertion that the potential loss would exceed the amount of the progress payment itself.
- [24] Mr LaHatte submitted, apparently in the alternative, that Nationwide breached an implied term that it would only pay on a certificate that was a "true" or fair certificate and not misleading, and that it would not pay on a certificate that was challenged as false and misleading. The basis of the argument was that Nationwide could not accept a certificate as true or fair if the certificate was challenged.
- [25] Mr LaHatte also advanced an alternative argument that the bank's payment of the second progress claim was a breach of a mortgagee's duties attaching to the power of sale, under s 103A of the Property Law Act 1952. He indicated that he did not challenge the way in which Nationwide conducted the process of the mortgagee sale of the Thompsons' property or that it was sold at an under value. Rather, his argument was that Nationwide had a duty as mortgagee to ensure that monies advanced for the purpose of improving the value of the property were actually applied for that purpose. Mr La Hatte did not pursue the argument with any real conviction and I reject it. He recognised that his argument, if right, would extend a mortgagee's duties well beyond the scope of the section or relevant case law.
- [26] Mr Hunter advanced several arguments in response. I need only refer to those relating to liability for the second progress payment. He accepted that Mr Thompson had informed Nationwide that he challenged the second progress payment. Nationwide would likely have been aware that he did not want Nationwide to pay it. However, he pointed to Clause 11 of the agreement between the Thompsons and Okley, and submitted that Nationwide was obliged to pay out. He also submitted that Nationwide had no obligation or duty to go beyond the building surveyor's certificate and even if it did have such a duty, it discharged the duty because it made enquiries of Mr Longman to confirm the appropriateness of the certificate. It did all that could be reasonably expected of it. In those circumstances, the payment was properly debited to the Thompsons under the credit facility.

- [27] Mr Hunter also submitted there is no real evidence before the Court of any substance to show that Mr Longman's certificate was misleading or that the work certified had not been done. He said the Thompsons' claims in this regard amount to mere assertion.

#### Issues

- [28] The key issues for determination are:
- a) Has the plaintiff provided sufficient proof of its claim? The question raises as subissues:
    - i) Has the plaintiff demonstrated that under its subsequent arrangement with the Thompsons, it was irrevocably bound to make the second certified progress payment and that it was unable to act on Mr Thompson's instruction not to pay it?
    - ii) If the answer is no, has Mrs Thompson raised an arguable defence that Nationwide paid for work under the second progress claim that was never carried out and if so, has the plaintiff discharged the onus of showing that the defence is not genuinely arguable?

#### Summary judgment principles

- [29] Rule 136 (1) states:  
*136 Judgment where there is no defence or where no cause of action can succeed.*  
*(1) The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to the claim in the statement of claim or to a particular part of any such claim.*
- [30] The outstanding feature of the rule is that the onus of establishing there is no defence is cast on the plaintiff. The concept of no defence is described as "the absence of any real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1, 3.
- [31] It is for the plaintiff to adduce sufficient evidence to prove its claim. If it does so, there is an evidential onus on the defendant to provide a foundation for any defences that are raised and in order to defeat a plaintiff's application for summary judgment, the defendant must provide sufficient particulars to show that there is an issue worthy of trial. However, once the defendant has provided an evidential foundation for the defence, the onus is on the plaintiff to show that the defence is not genuinely arguable: *Pemberton v Chappell* at 3.
- [32] The importance of the plaintiff's overall onus cannot be over emphasised. In this respect, it is worth mentioning the Privy Council's recent decision in *Jones v Attorney General* [2004] 1 NZLR 433 approving a passage from *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) wherein Elias CJ said:
- [62] *An application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded by the affidavit. It may also be inappropriate where the ultimate determination depends on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated proceedings and affidavit evidence will sufficiently expose the facts and legal issues ...*
- [63] *Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary judgment procedure the sufficiency of the proof of the plaintiff's claim. ...*
- [33] The decision makes clear how important it is that the plaintiff provides sufficient proof of its claim.
- [34] The onus is the normal civil standard - the balance of probabilities: *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [61].

#### Discussion

- [35] The plaintiff has provided sufficient proof of its claim to recover at least the major part of the loan monies advanced under credit facility.
- [36] Further oral contractual arrangements were made between Nationwide and the Thompsons at the time Okley was engaged by the Thompsons. It is for the plaintiff to provide a proper evidential foundation to prove what those oral arrangements were, if it is to establish a proper foundation for its claim for summary judgment in respect of the second progress payment. It has not established clearly what the terms of the contractual arrangement were that it relies on. Unlike in respect of the first claim, the Thompsons have made no concession about the second payment and therefore the plaintiff must clearly establish the terms of the arrangement.
- [37] In these circumstances, whether or not Nationwide was obliged to make the second payment, or acted within or outside the scope of its authority or breached an implied duty, when it made the payment are questions that I cannot decide by way of summary judgment.
- [38] In addition, I cannot determine whether the work claimed for was done. I do not accept the dispute as to the work can simply be dismissed as spurious. In reality, I cannot reliably find that either side is correct on the evidence before the Court. There appears to have been a background of distrust which resulted in the original quantity surveyor resigning, and Okley's appointment of a building surveyor in substitution. It would not be prudent, against this background, to make findings of fact as to whether or not the certificate was justified. I am satisfied that there is a dispute of fact which I cannot resolve. Whether or not the dispute is material will depend on the terms of the arrangement between Nationwide and the Thompsons and I am unable, on the evidence before me to determine precisely what they were.

**Result**

[39] The result is that I make orders as follows:

- a) The plaintiff is entitled to and order for summary judgment for \$254,836.15 being the amount claimed less the amount of the second progress payment.
- b) The plaintiff is also entitled to interest at the rate authorised by the contract (23% per annum) from 7 March 2007 to the date of judgment.
- c) The plaintiff's summary judgment application fails on the second progress claim.

[40] As each side had been successful in part, I make no order for costs.

[41] The remaining claim on the second progress claim comes within the jurisdiction of the District Court. Counsel should consider whether there is any reason why the case should not be transferred accordingly. This case is to be listed in the Chambers List at 10.00 am on 12 October 2007 so that I can hear from counsel on the question of transfer and make such further directions as are appropriate.

P Hunter for Plaintiff instructed by Simpson Western Solicitors, Private Bag 93533, Takapuna, Auckland  
C LaHatte for Defendant instructed by Brian Ellis Layers, PO Box 4516, Auckland