Court of Appeal, New Zealand before William Young, O'Regan and Panckhurst JJ. 12th December 2005.

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant shall pay costs of $3,000 together with usual disbursements.

REASONS (Given by Panckhurst J)

Introduction

[1] Top End Homes Limited, a building company, undertook the conversion and refit of premises in Whangarei to enable them to be let by Salem Limited, a commercial landlord, to a government department. A dispute arose concerning payment of a final sum, $279,687.56, under the construction contract. Top End on 19 July 2005 obtained summary judgment against Salem for this sum together with interest and costs, a total of $297,617.59, before Venning J (HC WHA CIV-2005488-332).

[2] Salem has appealed against the entry of summary judgment. It maintains that a valid "payment claim" in terms of s 20 of the Construction Contracts Act 2002 (the Act) was not made by Top End. Hence, it is said, Salem's failure to respond by providing a "payment schedule" pursuant to s 21 in response to the contractor's claim, should not have given rise to a right to recover the amount of the claim as a debt due pursuant to s 23(2)(a). More particularly, Salem maintains that the payment claim did not comply with the requirement to "identify the construction work and the relevant period to which the progress payment relates" as required in s 20(2)(c).

[3] This point, however, was not taken before Venning J. To the contrary, a statement of defence and counterclaim filed by previous counsel for Salem shortly before the summary judgment hearing admitted that a payment claim in terms of the Act had been made. We are satisfied that this admission is fatal to the present appeal. The sole intended ground of appeal is one which was not left open in terms of the pleadings and, we think, is also one which would have excited further evidence in the court below, had it been raised at that time.

[4] Accordingly, we indicated to counsel at the conclusion of the hearing that the appeal would be dismissed and ordered costs of $3,000 and usual disbursements to be paid to the respondent, with reasons to follow. These are the reasons.

Background

[5] Top End carried out work on Salem's property known as the Money Factory in Whangarei pursuant to a construction contract concluded on 7 July 2004. The premises were to be extensively altered and refitted so that Salem could lease them to the Ministry of Education.

[6] The work was carried out in the period July to December 2004. Salem made progress payments totalling $920,477.13 to Top End. The agreement between the parties was characterised as a "cost plus premium contract". Thereby Top End was entitled to charge for the labour of its employees at defined rates and to recover the cost of materials and payments to sub-contractors sourced by Top End, both with a defined percentage added. Such percentage margins varied from 5% to 12% depending upon the particular trade or service involved.

[7] In January 2005 Top End sought to recover a final payment of $279,687.56. When delay occurred, it served a payment claim under cover of a solicitor's letter. The claim was issued in early February 2005 with service effected variously between 3 February and 11 February on Salem's registered office, the offices of its solicitor and on the company's director (by both email and personal service). Because the construction contract did not stipulate the time for response by way of a payment schedule, Salem had 20 working days within which to respond: s 22(b)(ii).

[8] It did not do so within the prescribed period, whether by effecting payment or providing a payment schedule which disputed liability.

[9] On 26 May 2005 Top End applied for summary judgment.

The pleadings and the High Court decision

[10] Top End's statement of claim sought recovery of the amount of the final claim, with interest and costs, on the basis that this amount was a debt due to it: s 23(2)(a).

[11] Salem filed a notice of opposition which asserted that it had a complete defence to the claim, and that the application was an abuse of the summary judgment procedure for reasons appearing in an affidavit of Mr Kim, a director of Salem. Such affidavit raised a number of matters including that, initially, a quotation had been provided by Top End for $589,000, plus GST, and that the subsequent construction contract dated 7 July 2004 was intended to secure a reduction from the quoted price for the specified work. There were also claims that the work had not been completed on time and that the last progress payment on 17 November 2004 was made under protest and upon the basis that Top End would "absorb any extra costs", so there would be no further claim for payment.

[12] Shortly before the summary judgment hearing a statement of defence and counterclaim was also filed. Its terms reflected the contentions contained in Mr Kim's affidavit. In particular the value of the construction work was said to be $589,000 plus GST and the allegation was made that the November progress payment, which brought the total amount paid to $920,477.13, was made on the basis "that no further payments would be due". The counterclaim was for a sum of $58,905, being the amount of an alleged claim against Salem by the Ministry of

Education for late commencement of the latter's tenancy, said in turn to have been caused by Top End's failure to achieve practical completion by the end of September 2004, as agreed between the parties. Significantly for present purposes the statement of defence contained an admission in relation to paragraph 7 of the statement of claim, which contained Top End's pleading that it had served a payment claim under the Act by effecting service upon Salem, its solicitors, and Mr Kim, its director.

[13] For completeness we note that an amended statement of defence was filed on 26 August 2005 (by which time Mr Rooney was retained as counsel). It simply responded to the statement of claim and did not refer to a counterclaim. Unlike its predecessor, this statement of defence denied paragraph 7 of the claim, saying that the document described by the plaintiff as a payment claim under the Act did not comply with s 20(2)(c), in that the relevant construction work was not identified. The statement of defence also alleged that Top End was not a party to the construction contract. The latter point was abandoned in this Court, but the claim that there was no valid payment claim made by Top End was pursued.

[14] Although we have mentioned the amended statement of defence, it was not before Venning J. He heard the summary judgment application on 19 July 2005 and in an oral decision granted summary judgment. The Judge expressed himself satisfied that the quotation for $589,000 plus GST was not the "operative contractual document". He accepted that the construction contract was the cost plus agreement concluded on 7 July 2004. With reference to the counterclaim and set-off which was asserted in the then statement of defence, the Judge referred to and applied s 79 of the Act by which any proceeding for the recovery of a debt due under s 23 is not affected by a counterclaim or set-off, unless one for a liquidated amount for which judgment has already been entered, or for an amount which is not in dispute between the parties. In this instance the terms of s 79 were decisive against Salem.

[15] Venning J also observed that in his view the matters advanced on behalf of Salem reflected a misapprehension of the force and effect of the Construction Contracts Act. He continued that the Act effected a change in the approach to the recovery of claims by contractors and to that end cited a passage from a decision of this Court in ***George Developments Limited v Canam Construction Limited*** CA244/04 12 April 2005, taken from the reasons for judgment given by Robertson J:

> [41] We are satisfied that the necessary analysis must be undertaken with the purpose of the Act in mind. 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*".

Clearly, effect is given to the statutory purpose of regular and timely payments through the statutory regime of a payment claim, which if not met by a payment schedule confers on the payee a right to recover the amount of the claim as a debt due from the payer: ss 20 to 23.

Was the sole ground of appeal available in this Court?

[16] Mr Rooney's written submissions essentially focused upon the requirement in s 20(2)(c) that a payment claim must "identify the construction work and the relevant period to which the progress payment relates". By reference to the terms of the payment claim served by Top End, and supported by extensive reference to New South Wales authorities decided in the context of the Buildingand Construction Industries Continuity of Payment Act 1999, counsel contended that the claim in this instance was defective, with the result that Salem's failure to respond to it was not fatal and summary judgment should not, therefore, have been entered.

[17] This approach gave rise to the question whether this ground of appeal was available in this Court. Mr Bell contended that it was not, for two reasons: first, the making of the payment claim was admitted in the statement of defence which was before Venning J; and secondly, had the point had been raised in the High Court, further evidence would have been adduced by Top End in support of its contention that the terms of the payment claim were adequate and entirely intelligible to Salem in light of the course of dealings between them.

[18] It was common ground that in order for a point not previously raised to be taken on appeal, "the pleadings and the evidence (must) leave it open to be taken": ***Savill v Chase Holdings (Wellington) Limited*** [1989] 1 NZLR 257 (HC, CA and PC), see in particular the judgment of McMullin J at 307.

[19] Mr Rooney sought to confront this hurdle by reference to three points. He contended that the test identified in Savill was satisfied. We disagree. There is no escape from the conclusion that the relevant statement of defence contained an admission which was entirely at odds with the position sought to be taken on appeal. Moreover, Mr Bell drew our attention to matters which would have been the subject of evidence in the High Court had the point been on the table at that stage. There would have been evidence that, in addition to the payment claim itself, Salem was provided with copies of all of the invoices covered by the claim and that it was the practice for representatives of the two companies to meet and discuss the contents of the invoices.

[20] We are satisfied that the pleading point is necessarily decisive in this instance. We need not confront the issue whether, in assessing if a payment claim satisfies the requirements of s 20(2), evidence extraneous to the document itself may be relied upon.

[21] Mr Rooney's second point was that the Court should be more ready to allow the introduction of a new point on appeal in a summary judgment context, as opposed to in the context of a general appeal. He submitted that a summary judgment based upon the payment claim under the Act was not finally determinative of the party's rights. Rather, a contractor's ability to recover the amount of the claim as a debt due essentially determined who was out of pocket in the meantime because it was still open to a property owner who had not contested the claim by responding with a payment schedule, to pursue its defences and counterclaim in subsequent proceedings.

[22] Again, we need not explore the limits of this argument. What is plain is that ss 20 to 23 of the Act are designed to facilitate regular and timely payments between the parties to a construction contract. If a property owner does not respond to a payment claim by serving a payment schedule, then the contractor is entitled to recover the amount of his claim as a debt due. Put colloquially, the payer is under an obligation to pay first and argue later. This, we are satisfied, is the intention of the legislation. No doubt it reflects the philosophy referred to earlier that cashflow is the very life blood of the building industry. Contractors (and their sub-contractors in turn) are entitled to be promptly paid where they have invoked the payment regime under the Act and the payer has not responded as the Act requires.

[23] In these circumstances the entry of summary judgment was appropriate. To contemplate the introduction of a ground of appeal not previously taken, which seeks to question the efficacy of the payment claim, when such point was admitted in the pleadings, would fly in the face of the statutory scheme.

[24] Finally, Mr Rooney advanced what might be termed a merits based argument. He submitted that in justice it was proper to allow the new point to be taken, since in his submission the payment claim was deficient on its face because certain of the percentage margins claimed were greater than the margins allowed in the construction contract, and provision had not been made for a retention sum, which counsel contended was necessary in terms of s 17(1)(c) of the Act.

[25] Assuming these points were well made (about which we express no view) their availability indicates that Salem should have filed a payment schedule; rather than both failing to do so and compounding matters by making the admission contained in the initial statement of defence. In these circumstances Salem has no option but to pursue these aspects outside the summary judgment process. Top End, in terms of s 23(4) of the Act was entitled to recover the final payment as a debt due to it under the section, once the court was "satisfied that the circumstances referred to in subs (1) exist". Hence, the necessary inquiry was limited to whether Salem had failed to provide a payment schedule (contesting liability) or to pay the amount claimed by the due date. The general merits were not open for consideration. We do not, therefore, accept counsel's argument that the merits generally are relevant in the summary judgment context.

[26] For these reasons we were satisfied that the ground of appeal which Salem sought to advance in this Court was not available to it. Accordingly we indicated at the conclusion of the argument that the appeal was dismissed.

Costs

[27] The announcement of the decision was accompanied by an award of $3,000costs, with usual disbursements. An opportunity was not extended to counsel to make submissions on the issue. Subsequently, by memorandum we recalled the costs order and invited counsel to file memoranda as to costs in light of s 23(2)(a)(ii). This subsection provides that one consequence of not paying the claimed amount in a payment claim, where no payment schedule is provided, is that the payee may recover "the actual and reasonable costs of recovery awarded against the payer by that court".

[28] Mr Bell contended by memorandum that Top End was entitled to actual and reasonable costs and disbursements in the sum of $10,308.50 (being costs $8,500, GST $1,062.50 and travel and accommodation $746). However, Mr Rooney contested whether s 23(2)(a)(ii) was intended to have application in this Court. The word "court" is defined in s 5 of the Act to mean the High Court or the District Court (provided the claim was within that court's jurisdiction). Therefore, counsel contended, the section contemplated recovery of the debt due and actual and reasonable costs in either the High or District Courts. By contrast he argued there was no entitlement to actual and reasonable costs in this Court.

[29] Counsel also submitted that it is "recovery" of the debt due which attracts actual and reasonable costs. Here, recovery of the debt has already occurred, together with the actual and reasonable costs incurred in effecting recovery in the High Court. The appeal was characterised, therefore, as a step in the post recovery phase.

[30] Although we have not had the benefit of submissions from Mr Bell directed to the specific points made by Mr Rooney, we are of the view that the latter's approach is correct. Section 23(2)(a)(ii) is specific in its terms, in that a payee's entitlement to actual and reasonable costs is linked to recovery of the debt due where affected in either of the two courts named in the interpretation section. We accept that a section of this kind, which gives rise to a special entitlement, must be construed on its terms.

[31] For these reasons we conclude that the appropriate course is to direct payment of costs in the same terms as initially ordered, that is costs of $3,000 with usual disbursements.

B P Rooney for Appellant instructed by Queen City Law, Auckland
R M Bell and T L M Field for Respondent instructed by Webb Ross Johnson, Whangarei