JUDGMENT OF COOPER J : High Court. NZ. Auckland Registry. 14th December 2006

[1] Winslow Properties Ltd ("Winslow") appeals from the judgment delivered against it by Kerr DO in the District Court at Auckland on 21 July 2006. The respondent, Wooding Construction Ltd ("WCL") had sought summary judgment in the sum of $111,790.59, together with interest and costs, a debt claimed in respect of work that it had carried out under a construction contract.

Background facts

[2] WCL's application for summary judgment was brought in relation to a payment claim that it had served on Winslow under the Construction Contracts Act 2002. In the District Court, there was no dispute as to any matters of primary fact. Indeed, the only evidence before the Court was an affidavit by Michael James Wooding, a shareholder in WCL, and its Contracts Supervisor, sworn on 24 March 2006.

[3] As set out in Mr Woodings' affidavit, Winslow was the owner and developer of a residential development in Russell. WCL tendered for and won the building contract for *"Russell Cottages & Gymnasium, Stages 2, 3 and 4"*. The agreement, made on 21 July 2004, was in the form of the New Zealand Standard Construction Contract, NZS 3910:1998, which predated the coming into force of the Construction Contracts Act. Amongst the listed "c*ontract documents*" were "*the General Conditions of Contract NZS 3910:1998"*. That reference was immediately and somewhat incongruously followed by a reference, beside a bullet point, to "*the Construction Contracts Act 2002"*. Following that, the first, second, sixth and seventh schedules to NZS 3910:1998 were mentioned.

[4] Brannigan Project Management Ltd was the Engineer under the contract, and clause 12.1 of the contract entitled WCL to submit claims for payment under the contract to the Engineer. In addition to its role as the Engineer, Brannigan Project Management Ltd was also Winslow's project manager for the development.

[5] It was Mr Woodings' evidence that on 1 February 2006 he had posted the relevant payment claim to Brannigan Project Management Ltd. Attached to his affidavit and said to constitute the payment claim were a letter dated 31 January 2006 and an attached "*Monthly Progress Claim Summary*" detailing amounts due, itemised in respect of the units and particular works within the development. Also attached were a further 36 pages giving detailed breakdowns of the elements of the claim. The total claimed to be due was $371,790.59 (inclusive of GST).

[6] The letter dated 31 January 2006 read as follows:

Brannigan Project Management Limited 17 Marellen Drive
Red Beach Orewa Auckland 1461
Fax (09) 426 3197
Attention Vaughan Brannigan

Dear Sirs,

Re: Russell Cottages & Gymnasium Stages 2, 3 & 4

Please find attached our Progress Claim Number 18 which is a payment claim under the Construction Contracts Act 2002.

This claim is for the Russell Cottages and Gymnasium Stages 2, 3 and 4 project situated at Chapel Street in Russell.

This claim is for work completed for the period to 31s' January 2005 as per the attached trade summaries and Variation Register. We claim payment in the sum of $330,480.52 plus GST.

In accordance with the terms and conditions of our contract and the provisions of the Construction Contracts Act 2002 we anticipate the issue of your corresponding payment schedule within 10 Working Days of receipt of this payment claim. Payment becomes due within seven Working Days of the date of the payment schedule.

We trust that you find everything to be in order.

Yours faithfully,

MIKE WOODING Contracts Supervisor

[7] The letter and the accompanying pages were received by Brannigan Property Management Ltd on 3 February 2006. It was not until 24 February that WCL received a faxed payment schedule from Brannigan Property Management Ltd. This was headed with the words "This Payment Certificate comprises all or part of a Payment Schedule under the Construction Contracts Act 2002". It identified the project, referred to Winslow as the Principal, to Brannigan Property Management Ltd as the Engineer and to WCL as the Contractor. It indicated that nothing was owed to WCL under the contract; rather, Winslow was apparently in credit in the amount of $419,796.54.

[8] Notwithstanding the terms of the payment certificate, Winslow in fact paid WCL the sum of $260,000 (inclusive of GST) on the progress claim. WCL's claim in the District Court was for the outstanding balance, of $111,790.59.

District Court judgment

[9] The judgment under appeal records that Winslow resisted the claim in the District Court on the basis that WCL's payment claim failed to comply with the Construction Contracts Act in two respects. First, it was claimed that the payment claim had not indicated the due date for payment of the claimed amount, and was therefore in breach of s 20(2)(d) of the Act (references in the judgment to this argument being based on a breach of s 20(2)(e) of the Act are plainly in error.) Second, it was argued that the payment claim had failed to state that it was a payment

claim made under the Construction Contracts Act, and was therefore in breach of s 20(2)(f) of the Act. Alternatively, in the event of those arguments being rejected, Winslow relied on an argument that it had served WCL with a payment schedule in accordance with s 21 of the Act, and within the time prescribed for that to be done by s 22(b)(ii) of the Act.

[10] Section 20 of the Construction Contracts Act provides as follows:

20 Payment claims

(1) A payee may serve a payment claim on the payer for each progress payment,

(a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or

(b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).

(2) A payment claim must

(a) be in writing; and

(b) contain sufficient details to identify the construction contract to which the progress payment relates; and

(c) identify the construction work and the relevant period to which the progress payment relates; and

(d) indicate a claimed amount and the due date for payment; and

(e) indicate the manner in which the payee calculated the claimed amount; and

(f) state that it is made under this Act.

(3) If a payment claim is served on a residential occupier, it must be accompanied by

(a) an outline of the process for responding to that claim; and

(b) an explanation of the consequences of

(i) not responding to a payment claim; and

(ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

(4) The matters referred to in subsection (3)(a) and (b) must

(a) be in writing; and

(b) be in the prescribed form (if any).

[11] Kerr DO recorded the argument advanced on behalf of Winslow that the letter of 31 January 2006 was not itself part of the payment claim, rather it had accompanied it. Thus the letter had begun by referring to the *"attached"* progress claim. The documents attached, however, did not themselves make any reference to the Act. That had only been done in the letter. Consequently, with respect to the claim itself, s 20(2)(f) had not been complied with. The Judge took the view, however, that the letter and the attachments should be read together, and as together constituting the payment claim. He characterised Winslows' argument as a *"technical quibble"*.

[12] In respect of the argument that a due date for payment had not been provided, the Judge held that a simple calculation would have enabled the date by which a payment schedule had to be proffered to be calculated. While acknowledging that a specific date had not been nominated, the date was in fact dependent on whether the claim was received, and on the "further series of documents" (presumably a payment schedule), so it was impossible to specify an actual date. On this issue, the Judge was influenced by Asher J's decision in Marsden Villas Ltd v Wooding Construction Ltd (HC AK CIV 2006-404-002136, 25 May 2006), noting that the letter that had accompanied the listed items of the payment claim in this case was in the same terms as had been sent by WCL in Marsden Villas. Kerr DCJ observed that Asher J had found nothing inappropriate about the letter and its failure to specify a precise date when the claim was due. He held that Winslow's argument on this issue also should not succeed.

[13] The Judge then turned to consider the alternative argument advanced by Winslow that its payment schedule had been served in time with the result that, pursuant to the relevant provisions of the statute, the payment claim had not become payable as a debt due to WCL. Having regard to the time when Winslow purported to serve its payment schedule, the question of whether it had been served in time depended upon whether the normal 20 working day time period for service of the schedule applied (s 18, and s 22(b)(ii)) or whether there was a relevant contractual provision that applied. Here, clause 12.2.1 of the contract was in the following terms:

Within 10 Working Days after the receipt of the Contractor's claim the Engineer shall issue a progress payment certificate for a sum comprising the value of the Contractor's claim amended as necessary under 12.3, less previous payments certified, and less any other deductions which are required by the terms of the contract or by law. The certificate shall show details of any amendments and deductions.

[14] In Marsden Villas Ltd (supra) Asher J was dealing with identical contractual provisions. As well, the Engineer to the contract was a Mr Brannigan who received WCL's claims and responded to them on behalf of the principal. The forms of payment claim and payment schedule were also the same. Asher J held that the contractual stipulation of ten working days within which to issue a progress payment certificate for a sum comprising the value of the contractor's claim should be applied to govern the time within which the payment schedule had to be served, notwithstanding the fact that the terminology employed in clause 12.2.1 reflected the law as it was prior to enactment of the Construction Contracts Act.

[15] Section 22 of the Construction Contracts Act provides that:

22 Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress 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.

[16] Kerr DCJ, properly in my view, regarded himself as bound by Asher J's decision and held that the contract had provided for the matter and provided in effect that the payment schedule had to have been served within ten working days after service of the payment claim. It followed that, in the present case, the payment schedule had been served outside the required period, with the consequence that WCL's claim had become due and could be recovered as a debt pursuant to s 23(2) of the Act. Under that latter provision, where no payment schedule is provided in time, and the claimed amount is not paid in full, the payee may recover from the payer, as a debt due, the unpaid portion of the claimed amount, together with the actual and reasonable costs of recovery awarded against the payer by the Court. It followed in the circumstances that WCL was entitled to summary judgment.

The appeal

[17] The appeal is advanced on three grounds, two of which were the subject of argument in the District Court, and one which is entirely new. The new argument is a contention that because WCL's claim had been served on Brannigan Project Management Ltd, and not on Winslow, it was for that reason invalid.

[18] Not only was this argument not advanced in the Court below, it is effectively contrary to the arguments that were advanced because if it is correct, the issues that Winslow did raise in the Court below were otiose.

[19] Although appeals from the District Court in its civil jurisdiction are heard and determined de novo in this Court, they are still appeals and it is necessary for the appellant to show that the judgment in the District Court was affected by some error. It is axiomatic that that cannot be the case in respect of issues that are not argued. Nevertheless, because the matter has been argued, essentially turns on an issue of law and may be of some significance, I deal with it briefly.

[20] Ms Holland relied on the fact that Winslow Properties Ltd was the defined "payer" under the construction contract and that, pursuant to s 20(1) of the Construction Contracts Act a payee must serve a payment of claim on the payer for each progress payment. She pointed to the fact that s 12 of the Act is headed "No contracting out of Act" and provides that the Act is to have effect despite any provision to the contrary in any agreement or contract. She contended that there was nothing in the Act that would authorise expressly or implicitly any departure from the requirements of s 20(1). She argued further, that the provisions of clause 15.1.2 of the contract, which provided for service of notices on Winslow to be care of Mr Brannigan at Brannigan Project Management Ltd's premises were invalid to the extent that they were contrary to the Act itself. Referring to Asher J's decision in Marsden Villas Ltd she purported to find in the strict requirements that had been imposed on the principal in that case to follow the prescribed procedures under the Act, a justification for being equally strict in respect of the obligation of contractors to comply with its requirements.

[21] She purported to find support for her approach in the decision of Associate Judge Christiansen in ***Canam Construction Ltd v George Developments Ltd*** (HC AK CIV 2004-404-3565, 10 November 2004). In that case it had been contended by a developer that a valuation report from quantity surveyors was effectively a *"payment schedule"* under the Act, but it was held that the quantity surveyors were not within the definition of *"payer"* under the Act (i.e. *"the party to a construction contract who is liable for that payment"*). Ms Holland argued that if the response must come from a "payer" who is a principal, then service of the payment claim should also be strictly on the *"payer"*.

[22] In my view, there is nothing in this argument. Clause 15.1.2 of the contract between the parties provided:

Any document which is to be served upon the Principal, the Contractor or the Engineer under the contract shall be sufficiently served if it is handed to that Person, or to their appointed representative, or delivered to their address as stated in the Contract Documents or as subsequently advised in writing. Except for a notice given to the Principal under 13.3 or 14.3.3 every notice to the Principal shall be sufficiently given if it is given to the Engineer.

[23] In my view, it follows from the plain words of that provision that the parties had agreed that in any case where a notice was required to be given to Winslow, it would be sufficiently given if given to the Engineer, i.e. Brannigan Project Management Ltd.

[24] That conclusion does not, of course, mean that there has been any contracting out of the Act. Setting aside issues that might flow in this context from the fact that the contract was entered into after the commencement of the Construction Contract Act, the adoption by the parties of standard terms of contract that applied to contracts entered into before the Act came into force made the position straightforward. The Act requires service of the payment claim on the payer. Winslow was the payer. Its contract with WCL provided that the notice to it would be sufficiently given if it was given to the Engineer. That is what happened in the present case. As a matter of law, applying the contract of the parties, Winslow was served and in my view the Act has been complied with.

[25] I can see no reason of principle or policy that would justify the appellant's approach. If the parties to a written contract such as this agree to a service provision such as the one in issue, they presumably do so for reasons of convenience and efficiency in the application of the machinery provisions of the contract. Other than her assertions

that a strict approach was required, Ms Holland gave no reason why the Act should be applied so as to defeat the plain intention of the parties in respect of a matter which is entirely "*procedural*" in nature.

[26] The situation here is different from that which applied in Canam Construction Ltd. There, as was made plain at [26] of the judgment, the quantity surveyors had been engaged to assess and decide claims for variations, but they had never been appointed as the representative of the principal.

[27] For these reasons, I reject the new issue that was raised on the appeal.

[28] The next issue raised on the appeal was essentially a rehearsal of the argument that had been presented in the Court below to the effect that no "*payment claim*" in terms of the Act had in fact been made for four reasons:

a) The claim did not describe itself as a "payment claim".
b) The accompanying letter of 31 January 2006 from WCL to Brannigan Project Management Ltd did not describe the document as a "payment claim".
c) The document did not indicate a due date for payment as required by s 20(2)(d) of the Act.
d) The document itself did not state that it was a payment claim made under the Act (s 20(2)(f)).

[29] In my view, these arguments are devoid of any merit. I consider that Kerr DO was correct to read the letter together with its attachments, as essentially one document constituting a payment claim. The first paragraph of the letter, of course, referred to the attached "*Progress Claim No.18 which is a payment claim under the Construction Contracts Act 2002*". Boiled down, the appellant's argument is that the words "payment claim" should have been included in the attachments, and not in the letter. The fact that the words had been used only in the letter, and not in the actual schedules that were attached, meant that no payment claim had been made. I think that this argument is without merit and that the letter and its attachments were properly read together as Kerr DO decided they should be.

[30] It will be noticed that the penultimate paragraph of the letter of 31 January 2006 referred to the time within which WCL expected a payment schedule to be issued, referring both to the terms and conditions of the contract and to the Construction Contracts Act 2002. I have also earlier set out the relevant statutory provisions dealing with the time when payment is due. Because the due date for payment depends upon the date on which a payment schedule is served, it is not possible when making a payment claim to specify a precise date to comply with the direction in s 20(2)(d) of the Act. Although no date can be specifically stated, words can be used which enable the due date to be ascertained. In my view, this was satisfactorily done by the wording used in this case, and which has earlier been set out.

[31] After referring to the contractual obligation to issue the payment schedule within ten working days of receipt of the payment claim, the letter went on to state that payment would become due within seven working days of the date of the payment schedule. The reference to seven working days was plainly based on clause 12.2.4 of the Contract which provided:

Every amount certified by the Engineer in a progress payment certificate together with the amount of goods and services tax payable shall be paid by the Principal to the Contractor within seven Working Days of the date of the certificate.

[32] In context, the reference to the "*certificate*" was a reference to the "progress payment certificate" referred to in clause 12.2.1. Setting those contractual terms into the language used by the Construction Contracts Act has the result that, if a payment schedule were to be provided, then any amount accepted in the schedule as payable to the payee would not become a debt due until the period of seven days after service of the payment schedule had elapsed. There would effectively be an extended *"due date"* before action could be taken to recover the amount due under s 24 of the Act. That section provides:

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 progress 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.

[33] As can be seen, the section does not state a time that must elapse before action to recover the debt may be taken. Clause 12.2.4 of the Contract between these parties, however, made reference to a seven day period appropriate. The point is academic in any event, because the payment schedule provided in this case did not indicate a scheduled amount that the payer proposed to pay to the payee (s 24(1)(c)). I do not consider that reference to the seven day period rendered the notice invalid because a due date for payment had not been indicated. Rather, in my view the wording of the penultimate paragraph of the letter of 31 January 2006 was a practical way of complying with the requirement of s 20(2)(d) that the payment claim indicate the due date for payment. This further ground of appeal must also fail.

[34] The final issue raised involved the repetition of the argument presented in the District Court that the payment schedule had been served within time. As I have already indicated, the evidence before the District Court was that WCL's payment claim was received by Brannigan Property Management Ltd on 3 February 2006. As has also been previously discussed, if the ten working day period provided in clause 12.2.1 of the contract applied, then Winslow's payment schedule was served out of time.

[35] Ms Holland contended that the contract did not stipulate a time for provision of a payment schedule since it provided neither for payment claims nor payment schedules. This had the result that the 20 working day period set out in s 18 (and s 22(b)(ii)) must apply.

[36] Mr Hurd, for the respondent, however, argued that the parties were plainly conscious of the provisions of the Construction Contracts Act when they entered into the contract. This was shown by the specific reference to the Act in clause 4 of their agreement, which set out the relevant contract documents for the purposes of the agreement. Then, the relevant payment claim had, in the letter of 31 January 2006, specifically described it as a payment claim under the Construction Contracts Act 2002. The Act was again referred to in that letter's penultimate paragraph, and the reference to the anticipated issue of Winslow's *"corresponding payment schedule within 10 Working Days"* was further confirmation that WCL had intended the provisions of both the contract and the Act to apply. Likewise, when Mr Brannigan eventually issued the progress payment certificate he had specifically referred to it as being a "Progress Payment" (the language of the contract) which comprised "all or part of a Payment Schedule under the Construction Contracts Act 2002".

[37] It can be emphasised here that in this part of its argument Winslow asserts that it served a payment schedule within time. The actual contract between the parties did not envisage the service of such a document. It is only if the Act is applied to the contract between the parties, the necessary changes being made to the expressions used in the contract, that Winslow can maintain any argument that it served a payment schedule.

[38] Having regard to the explicit reference to the Act in the contract itself, I consider it likely that the parties intended to agree that contractor's claims for payment submitted under clause 12.1.1. and payment certificates issued under clause 12.2 should be treated respectively as payment claims and payment schedules within the meaning of the Act. It is only by reading the contract in this way that the apparent intention of the parties can be given effect and the contract as a whole read in a sensible commercial way. That would include in my view holding that the parties meant what they said with respect to the relevant time periods contained in the contract, including the ten working day rule in clause 12.2.1. Unless that approach is taken, the words are surplusage and it would make no sense that a contract had been entered into in those terms by parties aware of the provisions of the Construction Contracts Act, after its enactment.

[39] The same issue was considered by Asher J in ***Marsden Villas Ltd.*** At [81] of his judgment he pointed out that if the provisions of clause 12 and the time limits in the contract did not apply for the purposes of the Act, then it would have been necessary for there to have been two responses to each payment claim: one under the contract, and one under the Act. The contract, of course, does not admit of such an interpretation. Asher J continued:

> *... It is to be noted as part of the background to the Contract that the parties knew that the Act applied. Therefore, if they had intended there to be the provision of a separate payment schedule to the periodic claims, they would have provided for this in the Contract. They did not do so. I infer that they intended a single process, governed by clause 12.2.1. I interpret that clause in the Contract as providing for the time within which the principal must provide a payment schedule, despite the absence of a direct statement to that effect.*

[40] I agree with that conclusion and for that and the other reasons that I have given I consider that the third ground of appeal must also fail.

Result

[41] In the result, all of the arguments advanced in support of the appeal have failed and the appeal is dismissed.

[42] WCL is entitled to its costs calculated in accordance with Category 2 Band B.

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