798 NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

LOW PRIORITY

CP.382/95

UNDER the Arbitration Act 1908 and its amendments Act

BETWEEN HAWKINS CONSTRUCTION LIMITED

Applicant

AND PACIFIC MECHANICAL CONTRACTING LIMITED

Respondent

CP.550/96

BETWEEN HAWKINS CONSTRUCTION LIMITED

Plaintiff

AND PACIFIC MECHANICAL CONTRACTING LIMITED

First Defendant

AND PACIFIC MECHANICAL SERVICES LIMITED

Second Defendant

Hearing: 16, 19 December 1996

Counsel: S. Stokes and S. J. Moylan for Plaintiff/Applicant
J. G. Hannan for First and Second Defendants/Respondent

Judgment: 12 FEB 1997

JUDGMENT OF SALMON, J.

Solicitors: Rudd Watts & Stone, Auckland for Plaintiff/Applicant
Phillips Fox, Auckland for First and Second Defendants/Respondent

There are two applications before the Court. The first is an application by Hawkins Construction Ltd for a stay of arbitration. The second is an application by Pacific Mechanical Contracting Ltd and Pacific Mechanical Services Ltd to strike out a statement of claim recently issued by Hawkins Construction Ltd.

Background

On 16 November 1992, Hawkins Construction ("Hawkins") and Pacific Mechanical Contracting ("Contracting") executed a subcontract agreement for the carrying out of the mechanical services work on the Whangarei Courts Redevelopment Project. During the course of the project a dispute arose between Hawkins and Contracting with the latter claiming that Hawkins had underpaid it. This dispute came to a head in early February 1994 and on 3 February Contracting suspended the subcontract works and walked off the site. As a result Hawkins terminated the subcontract agreement and engaged replacement subcontractors to complete the works. Hawkins claims that the engagement of these replacement subcontractors significantly increased the cost of the completion of the works for Hawkins.

The dispute was referred to arbitration in accordance with the terms of the subcontract agreement. Whilst both parties agreed that their dispute should be referred to arbitration they were unable to agree on an arbitrator

and each made an application for an order appointing their preferred appointee. Contracting sought an order appointing a construction consultant, Hawkins sought an order appointing Mr Paul Davison, Q.C. a barrister. In the event Master Kennedy-Grant decided that Mr Davison was the more appropriate choice. He therefore dismissed the application of Contracting and made an order in terms of the Hawkins' application.

In its statement of claim in the arbitration Contracting claims a total of $226,459.60 plus GST and costs against Hawkins for underpayment and wrongful termination. Hawkins has counterclaimed against Contracting for $228,937.43 plus interests and costs being the increased costs to Hawkins to complete the subcontract works as a result of the removal of labour and material. The counterclaim makes allowance for the sum otherwise payable to Contracting but for its alleged repudiation.

Hawkins now claims that immediately prior to the commencement of the arbitration hearing on 18 November 1996 it realised that the name of Contracting as the contracting party in the subcontract agreement was a mistake and that the correct subcontractor should have been Pacific Mechanical Services Ltd ("Services"). Accordingly, it made the application for a stay of the arbitration and issued proceedings against the two Pacific companies, seeking that the subcontract agreement be rectified by substituting for Services for Contracting as subcontractor, or in the alternative an order pursuant to the Contractual Mistakes Act 1977 varying

the subcontract agreement so as to provide for Services as the subcontractor.

The statement of claim also seeks damages for wrongful repudiation or breach of contract against Services in the sum of $228,937.43 plus interests and costs.

The defendants to those proceedings have moved to strike out the statement of claim on the grounds that it is an abuse of process, likely to cause prejudice, embarrassment or delay, and that no reasonable cause of action is disclosed.

Hawkins' Argument

Hawkins claims, that as a result of a review of the relevant correspondence and documentation leading up to the execution of the subcontract agreement it concluded that the company which should have been named as subcontractor in that agreement was Services not Contracting. Hawkins points to various documents preceding the execution of the subcontract agreement which are in the name of Services rather than Contracting. These documents include the tender for the subcontract which was submitted by Services. Hawkins conditionally accepted that tender and the conditions to which the acceptance was subject were resolved. At that stage Hawkins claims that a contract came into being between Hawkins and Services. Hawkins says that Services commenced performance of the

subcontract works at the end of August 1992, with Hawkins issuing its first instruction to subcontractor to Services on 25 September 1992. Hawkins submits that the understanding of both Hawkins and Services in accordance with standard industry practice was that the contract between them would be subsequently formalised in a subcontract document. Services had previously carried out work for Hawkins and was familiar with Hawkins' standard terms and conditions of subcontract.

In an affidavit filed by Mr Cook, on behalf of Hawkins, he explains how the correspondence received from a director of Services changes from Services to Contracting in late September 1992. The letterheads of the two companies are very similar and Mr Elstob was a director of both companies.

Contracting's response to this is that Hawkins was advised before the initial tender letter that a separate company would be formed to undertake the contracting. Contracting was incorporated on 24 August 1992, and indeed, Mr Cook of Hawkins was aware of that in October 1995 when he swore an affidavit in support of an application for security for costs. The first progress claim was issued by Contracting and Hawkins issued a subcontract progress certificate to Contracting. The subcontract document was drafted by Hawkins and it was they who inserted the name "Pacific Mechanical Contracting Ltd" in it. Mr Cook, of Hawkins, wrote to Contracting on 16 November 1992 enclosing the subcontract for execution. The previous year he had prepared a subcontract document between

Hawkins and the Services company. Contracting points out that all correspondence between 21 September 1992 and the date of the subcontract was in the name of Contracting and all correspondence after the date of the subcontract was in the name of Contracting. Contracting further notes that in June 1993 letters were sent to various people at Hawkins outlining the different Pacific Mechanical companies, including the distinction between Services and Contracting. All the documents relating to the arbitration, including the applications to the High Court were in the name of Contracting, whether issued by that company or by Hawkins.

The Application for Stay of the Arbitration

After I had heard argument from counsel for Hawkins, in support of the stay application I suggested to counsel that in fact a continuation of the arbitration was in the interests of all parties because at some stage the issues which were before the arbitrator would need to be determined. Counsel for Hawkins expressed the concern that if a finding in favour of Hawkins was made on the present arbitration and Hawkins also succeeded on its rectification proceedings it could face a situation where it had an award against the wrong company.

After some discussion on this point both counsel sought instructions from their clients. Mr Hannan advised the Court that his client companies agreed that if the High Court proceedings continue and the Services company is substituted for the Contracting company, then any result in the

arbitration will be subject to the same substitution. On this basis Mr Stokes withdrew the application for the stay. Clearly this was a sensible and pragmatic solution to this particular issue. Accordingly, the application by Hawkins Construction Ltd for a stay of the arbitration was withdrawn and no determination of that application is needed.

The Strike Out Application

That leaves for determination the application by the defendants in CP.550/96 to strike out the statement of claim. The grounds upon which that application has been made are set out earlier in this judgment. The principles upon which the Court should exercise its discretion on an application to strike out were not in dispute. The cases emphasise that the jurisdiction to strike out is to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material and necessary assistance from the parties to reach a definite and certain conclusion.

In ***Abraham's Wool Exchange Ltd v Norlake Wool Ltd*** [1986] 1 PRNZ 101, Quilliam, J. used the phrase "very sparingly" noting that the applicants must show that the claim "cannot on any basis expect to succeed against them". Affidavit evidence is admissible only to the extent that the matters to which they refer are incontrovertible facts. An observation made by Master Williams, Q.C. (as he then was) in ***Adams v Joseph Banks Trusts Ltd*** (unreported, High Court, Wellington Registry, CP.224/91, 4 March 1992)

that many such applications depend on acceptance of a particular interpretation of a point of law -

> "Often arcane or recondite, which is commonly found not to be the only interpretation conceivable on the pleadings ... and which is often better decided in the context of a full trial." -

has some relevance to this application.

The application does not rely just on the usual ground of no reasonable cause of action. In so far as it alleges abuse of process the cases suggest that the exclusion of evidence need not be so rigorous as it would otherwise be. (See e.g. ***Remington v Scoles*** (1897) 2 Chan. 1).

Hawkins' case in CP.550/96 is that the contract was with Pacific Mechanical Services Ltd, that when the subcontract document was signed it was signed by each party in the belief that that company was the subcontractor and it is on that basis that the claim for rectification and relief under the Contractual Mistakes Act is made.

The defendants, of course, deny that this was so, but for the purposes of the strike out application I must assume that the facts alleged in the statement of claim can be proved. I am also entitled to take into account any uncontested facts contained in affidavits.

Abuse of Process

For the defendants, Mr Hannan first argued that the statement of claim represented an abuse of process. The basis for this contention was that the plaintiff was estopped. Issue estoppel, estoppel by deed, and estoppel by representation were argued.

The claim of issue estoppel relied upon the contention that in two interlocutory applications in CP.382/95 the issue of identity of the party which had subcontracted with Hawkins was fundamental to the Court's determination. Those two applications were for security for costs and for the appointment of an arbitrator. The defendant's argue that in each case Hawkins admitted that its subcontract was with Contracting and that it is now estopped from bringing proceedings denying that Contracting was the party it contracted with because the Court has already determined (through Hawkins' admission) that it was.

I do not accept that submission. The identity of the subcontractor was never an issue in those proceedings.

The defendants then raise estoppel by deed. In 1996 the parties entered into what the defendants claim was a "stand alone" reference to arbitration. There is no doubt that there was a reference to arbitration signed at that time. The plaintiff argues that it was not "stand alone" but that it arose out of the notice issued by Pacific requiring the appointment of an arbitrator, which in turn, arose out of the subcontract agreement itself.

The defendants' argument on this point must be rejected because it relies on a contested allegation of fact. In any case, commonsense would suggest that what the plaintiff says as to the genesis of the 1996 reference must be correct.

Finally, under the estoppel head there is a claim of estoppel by representation. This is based upon the assertion in the form of the documents that it signed, that Hawkins' contract was with Contracting. I accept that the answer to this submission is that the doctrine of estoppel by representation can have no application in circumstances of mistake. As counsel for Hawkins said, if a mistaken party were to be estopped by conduct resulting from a mistake, there could be little or no room for the Court to give relief for that mistake. The principle adopted by Lord Romilly, M.R. in ***Brooke v Haymes*** (1868) LR 6 Eq.25 that:

> "...a party to a deed is not estopped in equity from averring against or offering evidence to contravert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part...."

must apply both to estoppel by representation and estoppel by deed.

I reject the estoppel arguments.

The final basis upon which the defendants put their abuse of process argument was based on the fact that the plaintiff's alleged mistake had been raised at a very late stage. The defendant submitted that by reference to

the history of the relationship between the party and the proceedings there could be held to be an abuse of process. ***Fraser v Robertson*** [1991] 3 PRNZ 175 was relied upon. The principle in that case is that it is an abuse of process to raise in litigation an issue which was so clearly part of earlier litigation that it could and ought to have been raised there. A helpful statement of the principle is contained in ***Greenhalgh v Mallard*** [1947] 2 All ER 255, 257 where Sommerville, L.J. said:

> "... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."

This quotation, and indeed the judgment in ***Fraser v Robertson*** (supra) indicate that the issue must be one which was or should have been in the knowledge of the party at the time of the earlier proceedings. It is of the essence of the plaintiff's claim in the present case that it did not have knowledge of its mistake at the time of the earlier proceedings or indeed, at any time up until shortly before the arbitration hearing was to commence.

However, that leaves open the question as to whether on the basis of the undisputed facts that claim is one that has sufficient validity to found the cause of action. This issue is one which might be relevant under the head of abuse of process, but it is better determined on a consideration of the defendants' claim that the statement of claim discloses no reasonable cause of action.

Rectification

The statement of claim alleges that on or about 21 August 1992 Hawkins entered into a contract with Services and that it was a term of that contract that Hawkins and Services would enter into a formal subcontract agreement on Hawkins' standard terms and conditions of subcontract. The statement of claim then says that contrary to the terms of the subcontract and the expressly stated intentions of Hawkins and Services, the subcontract agreement entered into on 16 November 1992 named the contracting parties as Hawkins and Contracting.

Although neither party could refer to a case where a contract had been rectified by changing the name of one of the parties to it, there would seem to be no reason in principle why this should not be done.

The defendant points to uncontested facts to assert that there cannot have been any such common intention. Those facts include:

1. That the agreement was prepared by the plaintiff and sent by the plaintiff to the Contracting company.
2. That all subsequent correspondence was with Contracting.
3. That in June 1993 Contracting sent letters to various people in Hawkins setting out details of the three Pacific companies - Pacific

Mechanical Services Ltd, Pacific Control Services Ltd and Pacific Mechanical Contracting Ltd.

4. Hawkins applied for security for costs in September 1995. In the affidavit filed in support of that application complaint is made of Contracting's lack of substance. A company search is referred to and it is noted that the company was incorporated in August 1992.

In the light of this combination of facts it is almost unbelievable that the plaintiff could have thought that it was contracting with Services. None the less I have concluded that the issue is really one of credibility and should be determined at trial rather than on a strike out application.

The plaintiff should be warned, however, that if the impression I have gained from an examination of the uncontested facts is the conclusion reached by the trial Judge, this might well be a case for the imposition of client and solicitor costs.

Contractual Mistakes Act

Similar comments to those made above apply in the case of the claim for relief under the Contractual Mistakes Act. Under this head the plaintiff has the added burden of establishing a significantly unequal exchange of values. I have very real doubts as to whether the plaintiff will be able to discharge that burden, but once again it is a matter best left for the trial Judge after hearing all the evidence.

I have, therefore, decided that I must dismiss the application to strike out. I do so because the central issue raised by the application is one of credibility. That, of course, is an issue which cannot be decided on this application and must be left to the trial of the proceedings.

I think it is appropriate that the question of costs on this application also be determined at the trial and accordingly, that issue is reserved.