**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2008-416-90**

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| | BETWEEN | PROGRAMMED MAINTENANCE SERVICES (N.Z.) LIMITED<br>Plaintiff |
| | AND | DEAN JOHN WITTERS AND LESLEY DIANE WITTERS<br>Defendants |

Hearing: 1 December 2008

Appearances: P Fusic for Plaintiff
C Walker for Defendants

Judgment: 8 April 2009 at 4.30 pm

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**RESERVED JUDGMENT OF ASSOCIATE JUDGE H SARGISSON**

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*This judgment was delivered by Associate Judge Sargisson on **8 April 2009** at **4.30 pm** pursuant to Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

*Date .....*

*Solicitors:*

*McVeagh Fleming, PO Box 1595, Auckland*
*Gilbert Walker, PO Box 1595, Auckland*

[1] The plaintiff, Programmed Maintenance Services (N.Z.) Limited, seeks summary judgment in this proceeding against the defendants, Mr and Mrs Witters, for its claim of $263,361.38 plus interest, or alternatively, the sum of $246,280.49 plus interest. Mr and Mrs Witters for their part seek an order dismissing PMS's claim in its entirety and for that purpose they too seek summary judgment. In their notice of application they seek in the alternative an order striking out the entire claim. However, for all intents and purposes the case they advanced was essentially one for summary judgement and I will proceed on that basis, and deal later in this judgment with any case for strike-out if the need arises.

[2] PMS's claim is based on breach of a written contract the parties entered into in July 2004. PMS agreed to carry out and complete a 12 year programme to paint and maintain the exterior of several properties the Witters owned in Gisborne, and the Witters in turn agreed to pay fixed annual amounts by instalments invoiced monthly. Payment was to be made 30 days after receipt of an invoice.

[3] There is no dispute that the Witters breached the terms of the contract. They defaulted in payments in early 2006 and made known through their accountant that they were suffering financial difficulties and were wholly unable to comply with their ongoing obligations under the contract. At that time, they had unpaid invoices for work totalling $6,907.79.

[4] It is common ground that the Witters' breach was of sufficient substance to trigger PMS's contractual entitlement to give notice to cancel the contract, and that PMS decided to give notice accordingly. PMS's financial controller sent a letter on 11 April 2006 to the Witters advising that it was cancelling the contract and seeking a termination sum. The basis of its claim to the termination sum was a contractual right to cancel the contract for breach and to receive upon notice of cancellation compensation in the form of a termination sum for each of the various properties PMS was contractually obliged to paint and maintain. PMS believed, erroneously as

it turned out, that the letter would serve as the notice of cancellation required under the contract. When the letter went unheeded PMS brought a claim based on a single cause of action in the Gisborne High Court in 2006 under CIV-2006 416-193 to recover the amount of the invoices plus the termination sum of $237,366.98 and interest. The total amount claimed was $244,321.63 plus interest. The Witters opposed summary judgment and they themselves claimed summary judgment successfully against PMS for the same amount less the invoiced amount of $6,907.79, which they did not dispute.

[5] Essentially, Harrison J held that in order to invoke its unilateral power of cancellation PMS was required to exercise its rights strictly in accordance with the contract's express notice provisions. As the notice PMS relied on was not given in strict compliance with those provisions, PMS could not recover the termination sum. His Honour went on to rule:

> [13] I allow PMS's claim for summary judgment for $6,907.79, being unpaid invoices, together with interest at contractual rates, but dismiss its claim for $237,366.98 constituting the termination sum. The Witters are entitled to summary judgment for that amount.

[6] In reaching his findings, His Honour indicated that:

> [3] **The only issue for determination today is whether or not PMS gave the Witters valid notice of cancellation in accordance with the contractual provisions,** entitling it to payment of an additional sum of $237,366.98 known as the termination sum.
>
> [Emphasis added]

[7] In respect of the alleged basis for cancellation, Harrison J stated:

> [9] **It is common ground in this case that PMS elected to cancel under clause 5 by giving 'notice in writing to the clients'**. The mode of performance of that event was regulated by clause 10(a) as follows:
>
> > Any notice consent offer demand request or other instrument ('an instrument') required or authorised to be given or served upon a party pursuant to this Agreement shall be in writing, may be signed by any Director, Secretary or Manager of either party and may be given by post or hand to that party addressed as follows:
> >
> > TO: The Clients
> > at the address specified in Item 4 of the said Appendix 'D'.

> TO: The Contractor
> at the address specified in Item 5 of the said Appendix 'D'.
>
> The 'address specified in Item 4 of the said Appendix D' was, by express reference to clause 10, 'Poverty Bay Club, Childers Road, Gisborne, New Zealand'.

> [10] **In this case PMS's statement of claim fails to identify the relevant notice**. **However, Mr Walker accepts its reliance on a letter dated 11 April 2006 signed by the company's financial controller and addressed to 'Mr Dean Witters, Witters Group, PO Box 846, Gisborne'**. This address was nominated in an application form preparatory to the contract signed by the Witters on 17 June 2004. They described themselves as the 'Innes Properties Partnership'. However, it is not the address expressly nominated in Appendix D.
>
> [11] Nevertheless, Mr Peter Fuscic for PMS submits that the letter complied with the combined requirements of clauses 5 and 10. He says it was legally effective because it was sufficient to bring notice of cancellation to the attention of both the Witters at their postal address. Also he relies on the well settled principle that service of notice on one partner constitutes notice to both. Furthermore, he submits that clause 10 is advisory, not compulsory, and does not exclude other ways of giving notice; and that service of these proceedings was sufficient notice to both Witters of cancellation.
>
> [Emphasis added]

[8] His Honour did not accept the submission for PMS that the letter of 11 April constituted notice of cancellation under the contract. He stated:

> [12] I agree with Mr Walker that PMS's letter dated 11 April 2006 failed to satisfy the contractual notice requirements.

[9] His Honour gave several reasons. Referring to PMS's claim of cancellation under the contract, while noting PMS's alternative argument based on cancellation under the Contractual Remedies Act 1979 and the different statutory basis for damages, he said at [12]:

> (1) The combined effect of clauses 5 and 10 is both prescriptive and exclusive on the mode of service of a notice of cancellation. Only two means are nominated. The word 'may' governs the right to choose between both but is not otherwise discretionary. One mode is by personal service and the other is by post. If the latter, the contract is unequivocal in providing for service on the Witters at the address nominated in Appendix D;
>
> (2) This strict construction complies with the intention of the parties objectively expressed. In this respect it is notable that PMS drafted the agreement. As Mr Walker emphasises, the right to payment of a termination payment sum is significant. Arguably it is draconian in

effect. **When invoking its unilateral power of cancellation PMS must exercise its rights strictly in accordance with the contract**;

(3) There is no room to apply common law or statutory rules allowing for service to be effected on the more liberal basis of bringing a document to the attention of a party. The existence of the express notice provision mandates otherwise. Its effect would be rendered meaningless if another mode or modes of service were recognised;

(4) **Mr Fuscic may be correct that service of the proceedings on either or both of the Witters constitutes notice of cancellation of the contract in accordance with the Contractual Remedies Act.** Arguably in such an event (which is not pleaded) PMS would be restricted to damages assessed according to settled principles at common law or statute with a consequential loss of its right to claim a termination sum. **But that is not the type or mode of giving notice specified in terms of clauses 5 and 10**.

[Emphasis added]

[10] In addition to relying on the letter on 11 April 2006 PMS had endeavoured to raise in argument an alternative basis for cancellation, being cancellation under the Act effected by service of the proceeding. But its oral application to raise a further cause of action for that purpose was declined.

[11] Unsurprisingly, PMS was dissatisfied with the position it found itself in. The invoiced amount that it had recovered did not cover the full value of the work it actually undertook. It had also failed to recover, in any significant measure, the benefits it contracted for over the twelve year term of the contract or would have recovered had it strictly adhered to the procedure for giving notice of cancellation under the contract. However it did not appeal the judgement. Instead, it brought this second action, and in it essentially makes the same claim as to breach, in four separate causes of action, but raises several alternative bases for cancellation and seeks additional or new relief.

[12] In broad terms the issues the parties raise for determination in the current application are:

a) Whether, as the Witters contend in their summary judgment application, PMS is unable to pursue them by its fresh action for a remedy for the identical breach of contract that it raised in the first proceeding?

b) If a fresh action is available to PMS, whether as PMS contends in its summary judgment application, it has shown that the Witters have no arguable defence to at least one of its causes of action so as to enable it to obtain the relief it seeks in the new claim?

[13] It is common ground that for the purpose of the first question the Witters must show that none of the four causes of action can succeed. For that purpose the Witters contend the entire second action is barred by cause of action estoppel or by the rules governing abuse of process. In the alternative they contend the individual causes of action each face an insuperable hurdle so that the entire claim will inevitably fail in any event. Needless to say PMS does not accept the Witters' contentions. Its contends that that the second action is not only available to it but that there is no tenable defence to it, or to at least one of its causes of action.

[14] Before discussing the issues it is necessary to refer in more detail to the two actions and the judgement relating to the first. It is also helpful to set out in brief terms the principles that govern summary judgement when sought by the plaintiff and the defendant.

**The First Action**

[15] In this action PMS raised a single cause of action. It alleged:

a) the Witters had breached the contract by failing to pay invoices on time;

b) PMS was entitled to and had terminated the contract in the face of this default;

c) PMS was entitled to recover the 'termination amount' under clause 23 of the schedule to the contract and calculated according to the contractual formula.

[16] PMS did not give particulars in its statement of claim of when or how it had cancelled the contract. However, its alleged basis for cancellation was, as the

Harrison J judgement makes clear, that notice to cancel was given in accordance with the requirements of the contract by the letter of 11 April.

[17] On the alternative possibility of notice of cancellation under the Contractual Remedies Act His Honour expressly declined to hear argument on it. Refusing the oral application by PMS to file an amended statement of claim raising cancellation effected under the Act by service of the proceeding, he said:

> [15] Mr Fuscic applies for leave to file an amended statement of claim adding a cause of action under the Contractual Remedies Act based upon cancellation effected by service of this proceeding. Mr Walker opposes. I agree**. Both the cause of action, in its legal and factual sense, and the relief sought are different from and unrelated to this claim.** Also if PMS intends to file a fresh proceeding seeking damages on that legal and factual foundation, it should invoke the jurisdiction of the District Court for that purpose.
>
> [Emphasis added]

[18] The net result was that in the first action:

a) The only live issue before the Court, apart from the Witters' liability to pay the invoices which was (conceded), was whether the letter of 11 April 2006 constituted notice of cancellation under the contract;

b) PMS did not pursue, or was not able to pursue, alternative cancellation under the Contractual Remedies Act or claim damages or relief under s 9 of the Act.

**The Second Action**

[19] Confronted with the consequences of the defective notice of 11 April 2006, on 9 May 2007 PMS sent a further letter to the Witters. The letter purported to give notice that PMS was cancelling the contract pursuant to clause 5 of the contract and the Act, and claimed, again, the termination sum under clause 23 of the schedule to the agreement. The solicitors for the Witters replied that the contract had already been terminated a number of times so there was no need for any further terminations.

[20] Consequently, (and some fourteen months after Harrison J issued his judgment in the first action), PMS issued the present action against the Witters. The four causes of action it raises all rely on essentially the same facts giving rise to breach of contract, while raising additional instances of the Witters' financial consultant advising that the Witters were unable to pay their debts. PMS alleges that such advice, together with the failure to pay invoices, constituted a breach justifying cancellation.

[21] The fourth cause of action relies on notice of cancellation under the contract and essentially repeats the elements of the original cause of action in the first action, but it relies on the letter of 9 May 2007 as an alternative notice of cancellation under the contract. It again seeks the termination sum plus interest.

[22] However, in the first two causes of action, PMS, in a departure from the pleading in the first action, relies on an entitlement to cancel under the Act. The first of the two causes of action raises repudiation (under s 7 (2)), and the second raises breach and anticipatory breach (under s 7(4)). Both rely on notice of cancellation, based on either the letter of 11 April 2006, or a letter from PMS's solicitors of 17 May 2006, or service of the first action.

[23] The third cause of action relies on the same rights of cancellation as the other causes of action but it seeks relief by way of quantum meruit.

[24] In a further departure from the first action, the first three causes of action claim of relief in the amount claimed of $263,361.38 plus interest. An independent chartered accountant desposes on behalf of PMS that this is calculated to establish PMS's restitution interest or right to restoration of the full benefit of the work conferred on the Witters, the object being to prevent unjust enrichment. The amount is calculated on much the same principle, albeit by a slightly different formula, as the termination sum sought in the first proceeding, this being the value of work done up to the date of termination, 11 April 2006, less payments made by the Witters in respect of that work.

**Legal Principles – Summary Judgement**

[25] The applications were heard prior to 1 February 2009 under the former High Court Rules. The relevant rule that applied at the time of hearing were r 136. For present purposes there are no relevant changes in the new rule (see r 12.2), so the outcome will be the same whether the old rules or the new rules apply.

[26] Rule 136 provides:

> [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 a claim in the statement of claim or to a particular part of any such claim.]
>
> (2) The Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.]

*Plaintiff's summary judgment*

[27] The principles applying to a plaintiff's summary judgment application are well established. They were summarised by the Court of Appeal in *Jowada Holdings Ltd v Cullen Investments Ltd* (CA 248/02, 5 June 2003):

> In order to obtain summary judgment under Rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence Rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and unexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* [1987] NZLR

1, 304, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.

[28] In *Pemberton v Chappell* [1987] 1 NZLR 1 at [3], Somers J explained the concept of "no defence" as meaning the "absence of any real question to be tried". His Honour also noted at [3] that to defeat the application the defendant must provide sufficient particulars to show that there is a factual or legal issue worthy of trial.

[29] It is worth emphasising the approach that the Court will adopt to deal with disputes of fact on summary judgment applications. As Somers J stated in *Pemberton*:

> [4] Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment.

[30] At the same time, the Court will take a robust approach to summary judgment applications: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 at 85-86 (CA). The object of the procedure would be thwarted if spurious defences or plainly contrived factual conflicts were permitted to prevent judgment being obtained, especially in the context of the structure of r 136 where the onus is on the applicant. A helpful indicator as to where the line should be drawn is found in the judgment of Greig J in *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12:

> [14] In a matter such as this it would not be normal for a judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them. On the other hand, in the words of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331, at 341E, the Judge is not bound:
>
> > "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

[31] Finally, it is important to bear in mind the Court's residual discretion to refuse summary judgment. In *Jowada*, the Court explained the nature of the residual discretion to refuse summary judgment:

> [30] Once the Court has been satisfied that there is no defence Rule 136 confers on it a discretion to refuse summary judgment which is of a residual

> kind. While the types of cases in which the discretion will be exercises to refuse summary judgment cannot be exhaustively defined, the most common instance is where there would be an unfairness in proceeding immediately to judgment, for example if the defendant were unable to get in touch in the time available with a material witness who it was reasonably thought might be able to provide it with material for a defence: *Bank Für Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541. 548 (CA). In that case Cairns LJ also said that harsh or unconscionable behaviour of the plaintiff might require a matter to proceed to trial so that any judgment obtained was in the full light of publicity.

*Defendant's Summary Judgment*

[32] The principles applicable to a summary judgment application by a defendant were conveniently stated by Elias CJ *in Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298, 313-314 (CA), as approved by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433 at [5]:

> [60] … R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed.
>
> [61] The defendant has the onus of proving, on the balance of probabilities, that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
>
> [62] 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 from affidavits. It may also be inappropriate where ultimate determination turns 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 procedure and affidavit evidence will sufficiently expose the facts and the legal issues.
>
> [63] **Except in clear cases, such as a claim upon a simply debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim** …
>
> [64] It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then, it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Courts must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[33] The Board went on to say that the summary judgment procedure can save both time and costs by committing claims with no hope of success to be summarily dismissed at an early stage. But it also said:

> [5]… rarely, if ever, will the procedure be appropriate where the outcome of the action may depend on disputed issues of fact, and reliance on the rule in an inappropriate case may serve to increase both the length and the cost of proceedings.

[34] At [10] the Board cautioned that the Court should not discount even a "theoretical possibility" which would provide support for the plaintiff's claim and which might be open to the tribunal of fact on the evidence. The Board went on to emphasise:

> Summary judgment should not be given for the defendant unless he shows on the balance of probabilities that none of the plaintiff's claims can succeed. That is an exacting test, and rightly so since **it is a serious thing to stop a plaintiff bringing his claim to trial unless is it quite clearly hopeless.**
>
> [Emphasis added]

[35] It is to be noted that judicial views may differ on issues such as these (see *Tilialo v Contractors Bonding Limited* (CA 50/93, 15 April 1994) at [6]).

**Discussion**

[36] It is against the above background and in the light of the above principles that I return to the issues I must determine. It is convenient to deal first with the particular hurdles the Witters contend stand in the way of PMS and the possiblility of its succeeding on its individual causes of action. It will only be necessary to go on and deal with their arguments as to cause of action estoppel or abuse of process if any one or more causes of action survive the particular hurdle or hurdles relied on.

[37] For convenience, I start with the third and fourth causes of action.

**Third cause of action: quantum meruit**

[38] Quantum meruit is the generic term used to identify a right at common law to reasonable remuneration for services rendered. The right to remuneration may attach

by implication to a contractual relationship or arise independently of contract: *Seton Contracting Ltd v Attorney-General* [1982] 2 NZLR 386, 376.

[39] At common law quantum meruit can arise in contractual relationships where a condition precedent to payment under the contract fails. In other words where the contract is an entire contract that provides that one party is to receive payment only when it has completed its part of the contract and is to receive nothing until that happens. If a party to an entire contract performs some work but is prevented by the other from proceeding further the common law will allow it to recover reasonable remuneration on a quantum meruit basis: see Burrows Finn and Todd *The Law of Contract in New Zealand (3rd ed)* at 18.5.

[40] Counsel for the Witters argued that the third cause of action seeking quantum meruit must fail. Essentially, the reasons advanced were that quantum meruit is not available as a cause of action or remedy where parties have contractually agreed a price for services to be provided under the contract, and further the work that was actually done has been invoiced and paid for.

[41] I agree that the cause of action in quantum meruit is not available but my reasons differ. They are:

a) This is not a case where the parties failed to specify in their contract the rate or basis of payment and there is therefore no basis for an implied right to reasonable remuneration. The amount payable by the Witters under the contract was contractually agreed. The contract provided for instalments on a monthly basis over a 12 year period and in the event of premature termination by the Witters, a termination sum additional to the amount invoiced to the date of termination, provided PMS gave the requisite notice of cancellation;

b) This is not a case of an entire contract where nothing is to be paid until the entire job has been completed. It is a case where a condition precedent to payment of the additional termination sum has failed because the required notice of cancellation was non-complying.

However, even if this were a case of a contract to be treated as an entire contract where a condition precedent failed, relief would not be by quantum meruit.

c) While it is recognised that this common law remedy may still arise where there is no contractual relationship, it has been concluded the remedy is largely obsolete in New Zealand as far as contractual relationships are concerned: see *Dickson Eliiott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608. If a contract has been cancelled for breach, relief under s 9 replaces the common law quantum meruit: see *Brown &Doughtery Limited v Whangarei County Council* [1990] 2 NZLR 63. Accordingly, provided the contract was properly cancelled, discretionary relief under s 9 would be available instead: see Burrows Finn and Todd at 18.5.1.

**The fourth cause of action: claim for termination sum under the contract**

[42] PMS' fourth cause of action pleads that if for any reason it is determined that the contract was not cancelled prior to 9 May 2007, the letter of that date was valid notice of cancellation. Further, as a consequence PMS became entitled to payment of a termination sum calculated in accordance with the contract.

[43] There is no reason to determine that the contract had not been cancelled prior to 9 May 2007. Prior cancellation is a non-contentious point. PMS pleads prior cancellation was effected under the Act in its other causes of action by service of its earlier proceeding if not by one or other the prior letters it relies on. The Witters do not take issue with the particular pleading. Indeed they argue, as a basis for contending the fourth cause of action cannot succeed, that on any view PMS had exercised its (alternative) legal right to cancel under the Act well before it sent its letter of 9 May 2007. Counsel for the Witters also points out that PMS made clear in its counsel's submissions at the earlier hearing that the contract was cancelled and at an end, which Witters accepted.

[44] The net result is that there is no lis or argument on the issue. I accept therefore that the Witters are right when they contend that the letter of 9 May 2007 cannot be treated as notice to cancel in the exercise of the right to cancel under the contract, or indeed as notice to cancel under the Act.

[45] To the extent that the fourth cause of action relies on the letter of 9 May 2007, it must therefore fail. The letter of 9 May 2007 cannot be notice of cancellation for the purpose of recovering the termination amount when the letter was sent after the contract had already been cancelled. The same applies to the letter of 11 April 2006. Harrison J has already determined that letter was not a valid cancellation under the Act.

[46] There is another and more fundamental reason why the fourth cause of action must fail. It is cause of action estoppel.

[47] Cause of action estoppel prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the existence or non-existence of which has been determined by a court of competent jurisdiction in previous litigation against the parties: *Joseph Land Co Ltd v Lynch* [1995] 1 NZLR 37.

[48] The point was put another way in *Thoday v Thoday* [1964] 1 All ER 341 at 347:

> Where the cause of action or the plea in defence in the second action is precisely the same as has been raised in the previous case, and where that has been the subject of a full examination and adjudication in the previous case, the party seeking to re-litigate the matter will normally be held to be estopped.

[49] The public policy principles underlying cause of action estoppel are: the public interest in seeing an end to litigation, the hardship to an individual who is faced twice for the same cause, and the undesirability of creating opportunities for different courts to pronounce differently on the same issue. See: *G Russell v Taxation Review Authority (*HC AK CP 526-SD99, Fisher J, 2 October 2000).

[50] The fourth cause of action raises is essentially the same as the sole cause of action in the first action. Both raise the identical issue that Harrison J identified as the overarching issue for determination in the first action. The issue now raised is, as it was in the first action, whether PMS effected valid notice of cancellation in accordance with the contractual provisions, entitling it to payment of an additional sum of $237,366.98 known as the termination sum. The issue has been determined. It is now plainly too late for PMS to revisit it, by relying on a new notice to cancellation. Clearly, the cause of action is caught by cause of action estoppel.

[51] In any event, it is a cause of action that is a clear abuse of process. If the letter of 9 May 2007 or indeed any other letter was to be relied on as the means of effecting valid cancellation under the contract, it was incumbent on PMS to raise in its earlier action. It was a factual matter that properly belonged to that action: see *Henderson v Henderson* (1843) 2 Hare 100, 114-115, where Wigram VC said that the court requires the parties to the litigation:

> … to bring forward their whole case … The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[52] That brings me back to the first two causes of action.

**The first two causes of action: repudiation, breach and anticipatory breach**

[53] The basis of the Witters' argument that these causes of action must fail is, in effect, that:

a) The contractual obligation to pay the contract price for the work that has actually been done has been fulfilled;

b) The parties agreed their own contractual mechanism for relief for premature termination, which requires that a fully complying notice must be given under the contract; and

c) The combined effect of the mechanism and s 5 of the Act prevents PMS invoking ss 9 and 10 to obtain what is effectively the termination sum in a different guise, without having given the agreed contractual notice.

[54] Section 5 states that:

> If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of the Act relate, those sections shall have effect subject to that provision.

[55] Counsel for the Witters also submitted that PMS has lost once and for all the opportunity to recover the relief that would otherwise have been available under the contract and it cannot come back and seek the same relief in a different guise, by asserting a statutory entitlement to relief.

[56] The submission was advanced notwithstanding Harrison J's finding that the proposed cause of action based on that statutory entitlement was different from and unrelated to the first action, and I do not accept it.

[57] The first two causes of action do not seek recovery of the termination sum or that sum in a different guise. They seek relief pursuant to the discretion the Court has to grant relief under s 9 of the Act by way damages to restore to them the full benefit of the work conferred on the Witters. In other words, on the "value" of the work that was undertaken in the period before cancellation less the amount of the paid invoices. While PMS puts a value on that work of $263,361.38 (GST and interest inclusive, less payments received) and that sum is in the same ball-park as the termination sum of $246,280.49, that does not mean it is the contractually fixed termination sum. It is an assessment of the value of a restitution interest, the availability of which is to be assessed according to settled principles under the Act.

[58] Further, the fact that the contract does make express provision for a remedy for breach, and that breach is covered by ss 6 to 10 (specifically s 7), does not oust those sections entirely – rather they apply 'subject to' the contractual provision. Often, contractual and statutory remedies can stand together: *MacIndoe v Mainzeal*

*Group Ltd* [1991] 3 NZLR 273; (1991) 1 NZ ConvC 190,820(CA), at pp 281, 283, 287; pp 190,828, 190,829, 190,833, 190,829 per Cooke P, Richardson J, and Hardie Boys J respectively; *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275; (1994) 2 NZ ConvC 191,783 at p 279; p 191,787 per Hardie Boys J. As Richardson J said in *MacIndoe* (above) at p 283; p 190,829, s 5 is a limited contracting out provision.

[59] In *Morris v Robert Jones Investments Ltd*, a case that was concerned with the breach of a lease agreement, the Court of Appeal affirmed that contractual remedies will stand together with and not oust common law or statutory remedies unless the contract expressly or impliedly so provides. While the case concerned leases, the Court said leases are no different from other contracts with regard to the application of ordinary principles of contract law. At 278-279 the Court discussed those principles, stating that:

> More specifically, where a contractual right to terminate for past breach and the common law right to terminate for repudiation or fundamental breach exist concurrently, the reliance upon the contract involved in the exercise of the contractual right to terminate will not preclude the recovery of damages for loss of the future benefit of the contract by reason of repudiation or fundamental breach unless the contract expressly or impliedly so provides: cf *Yeoman Credit Ltd v Waragowski* [1961] 1 WLR 1124.

[60] The Court further held that in New Zealand, while a provision in a lease for re-entry or forfeiture is given effect under s 5 of the Contractual Remedies Act, that does not exclude the right to cancel under s 7:

> As at common law, both remedies, but here the statutory and contractual, may be exercised.

[61] Applying the same principles to the contract between PMS and the Witters, PMS's contractual right to a termination sum extends the circumstances that cancellation is available and can stand together with the statutory remedies. Furthermore, there is nothing in the contract that expressly, or impliedly, precludes the right to seek statutory damages for loss of the benefit of the contract by reason of repudiation or qualifying breach.

[62] That brings me to the defendant's argument that the first two causes of action must fail in any event because they are caught by cause of action estoppel or they are an abuse of process.

[63] I do not accept the submission. PMS has not lost the right to argue cancellation and recovery under the Act by reason of its earlier action. As was made clear by Harrison J:

> a) That action raised a single and different cause of action based on the contractual right to cancel and the sole issue he was determining concerned whether PMS gave the Witter's valid cancellation in accordance with the contractual provisions entitling it to payment of the termination sum. He expressly left open the possibility of a fresh proceeding raising the alternative cause of action based on cancellation under the Act.

[64] Whether the alternative cause of action is based on cancellation effected by service of the first action or by one of several prior letters does not matter. What does matter is that the overarching issue in the alternative cause of action was expressly left open.

[65] In short the parties' own contractual mechanism and s 5 do not prevent PMS invoking ss 9 and 10 to obtain relief. Nor does the prior action.

[66] In reaching this view, I am mindful that counsel referred to *Calvert & Another v Pricewaterhouse Coopers* (HC Auckland, CIV2005-404-6379, 4 August 2006), where the High Court struck out a claim for breach of fiduciary duty that concerned the same matters as an earlier claim in negligence. Associate Judge Doogue said:

> [74] It is a matter of the Court making a broad judgment as whether in all the circumstances that the Court can fairly infer that it was not unreasonable to have expected the plaintiff to formulate the alternative claim before the trial.
>
> [75] The principles that justify a plaintiff being barred from bringing a further proceeding relate to the public interest and to the private interests of the litigants.

> From the perspective of the parties themselves, it is unfair for a defendant to be taxed with two sets of proceedings when all matters ought to have been raised in one. There is also the public interest in there being an end to litigation. There is a secondary aspect to the latter. Lord Bingham in the passage from his speech in Johnson described it as "the current emphasis on efficiency and economy in the conduct of litigation". To duplicate litigation unnecessarily contravenes those objectives.

[67] However, in the present case the broad judgment called for does not warrant the inference that His Honour described and I do not accept that the principles of either estoppel or abuse of process prevent PMS from pursuing either its first or second causes of action. Not only do those causes of action not seek the same relief, but as Harrison J noted, they raise different facts going to cancellation, and they raise cancellation under the Act. That was an issue that Harrison J expressly put to one side as unrelated to the claim before him.

[68] In those circumstances it is not an abuse of process to consider the question of cancellation by that alternative method in a new proceeding, and it cannot be said that the new proceeding relies on matters that belonged properly to the first proceeding.

[69] In reaching this view I also do not overlook the other authorities that counsel referred to me. But they are essentially cases concerned with abuse of process, and whether or not there is an abuse of process is a matter that must be considered on the facts of the individual case: see *Walker v Wilson* 16/04/02, Randerson J, HC Auckland CP198/00. Even where re-litigation of an issue is involved, that does not necessarily amount to an abuse of process. There must be, as a result of re-litigation over the same issue, a situation where the Court's processes would be brought into disrepute or manifest unfairness to a party*: Arthur J S Hall and Co v Simons* [2000] 3 All ER 673 per Lord Hoffman at p 703 and Lord Hobhouse at 749.

[70] This is not a case where it can fairly be said that such adverse consequences arise. The position may have been otherwise had the circumstances been different. Had PMS not signalled its wish to raise the alternative cause of action at the first hearing, or the Witters not challenged PMS's application to add an alternative cause of action, there would likely be no room for further argument. But PMS did raise the alternative cause of action albeit belatedly and the Witters did oppose amendment to

the statement of claim. In the result, His Honour expressly left open the opportunity for this further action and that is an outcome the Witters must live with. They cannot now complain that it is manifestly unfair that they have to face this further action.

[71] For the above reasons I do not accept that these causes of action are no longer available and may not be argued, or that they must fail.

**Result on Witters' application**

[72] It follows that the Witters' application for summary judgment must be declined. This is not a case where the defendants have established that none of the cause of action can succeed.

[73] However, given the findings I have made so far, it appropriate that PMS's third and fourth causes of action should be struck out as they cannot succeed.

[74] That brings me to PMS's application and whether or not they have demonstrated an entitlement to summary judgment on the first or second cause of action.

**PMS's Application**

[75] For reasons already discussed there is no real dispute that there has been cancellation in terms of the Act.

[76] PMS is therefore entitled to a finding on liability under r 137 (now r 12.3). Section 137 states:

> [**137**] **Summary judgment on liability –** The Court may give judgment on the issue of liability, and direct a trial of the issue of amount (at such time and place it thinks fit), if the party applying for summary judgment satisfies the Court that the only issue to be tried is one as to the amount claimed.

[77] The remaining question is whether or not PMS is entitled to a finding by way of summary judgment as to quantum, based on its assessment of the value of the work that was done.

[78] Counsel for the Witters recognised that they derived a benefit from the work that was done that was well in excess of the amount of the invoices. The contract itself indicates that the parties did not intend the invoices to be the only payment for the work that was actually done. The contract did not exclude relief under the Act and some remedy is clearly warranted.

[79] However, the question whether or not PMS has clearly shown that the value it seeks to attach to the work that was done is justified in accordance with established contractual principles governing the assessment of damages needs to be further considered. PMS places a value on the work that exceeds by some $30,000 the termination sum. If that is the measure to be applied the value of the conferred restitution will exceed the sum it expected to recover under the contract.

[80] It also needs to be borne in mind when considering the issue of damages that there is significant discretionary element involved in the assessment of damages under s 9 and the section raises a range of matters to which the Court must have regard. Value is but one of those matters.

[81] Further, neither side has said a great deal about the principles to be applied and such evidence as has been given will require careful consideration in the light of those principles once they have been elucidated. It may well be that the Court would be assisted by oral evidence to further and better explain the basis on which damages have been calculated. It would certainly be assisted by further submissions on the principles to be applied.

[82] Taking into account all these factors I consider this is a case where further consideration may be needed needs to be given to both the evidence and relevant principles to be applied in assessing damages and that is best done at trial.

**Overall Result**

[83] Orders are made as follows:

a) The Witters application for summary judgment is declined.

b) PMS's third and fourth causes of action are struck out.

c) PMS has summary judgment on the first and second causes of action in respect of liability. The matter of quantum is to be reserved for trial.

d) There will be a **telephone case management conference** on **27 May 2009** at **9 am** for the purpose of allocating a trial date on the issue of damages and making pre-trial directions.

e) The question of costs is reserved. The parties may prefer that costs be dealt with at trial but if not they are to file and serve brief memoranda within 14 days and the matter will be dealt with, or if required, further directions will be made at the telephone conference.

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Associate Judge Sargisson