

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

CIV-2009-404-003330

UNDER the District Courts Act 1947

IN THE MATTER OF an appeal against the judgment of the
District Court at Manukau in CIV-2008-
092-003767 delivered on 6 May 2009

BETWEEN SATHASIVAN GOVENDER
Appellant

AND COMMERCIAL FINANCE &
SECURITIES LTD
Respondent

Hearing: 13 October 2009

Appearances: M Colthart for Appellant
P Dale for Respondent

Judgment: 22 October 2009 at 2.30 p.m.

JUDGMENT OF VENNING J

This judgment was delivered by me on 22 October 2009 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Southern Legal, PO Box 76840, Manukau City, Manukau 2241
Ellis Law, PO Box 4516, Auckland 1140

Copy to: M Colthart, PO Box 545, Shortland Street, Auckland 1140
P J Dale, PO Box 130, Shortland Street, Auckland 1140

Introduction

[1] On 5 May 2009, Judge Wade heard an application by Commercial Finance & Securities Limited (CFS) for summary judgment against Mr Govender. At the conclusion of the hearing the Judge entered judgment for liability against Mr Govender, reserving the issue of quantum for a further hearing.

[2] The Judge delivered the reasons to support the decision on 9 July 2009. Mr Govender appeals from the entry of summary judgment.

Background

[3] On 25 August 2007, Mr Govender entered a building contract with DCE Construction Limited (DCE) (although the contract was in the name of Mr Govender and Messrs Donald and Brian Espin, it is accepted that the contract was with DCE). DCE was to provide labour and materials as specified in the contract and also agreed to oversee and co-ordinate the building work.

[4] DCE sought a deposit of \$147,550. Mr Govender paid a deposit of \$70,000 on 5 December 2007.

[5] On 4 February 2008, DCE issued a Payment Claim No: 2 for \$85,218.75, including GST. On 8 February 2008, DCE issued another payment claim, Payment Claim (1) for \$78,750.

[6] On 11 February 2008, before Mr Govender had paid either Payment Claim No: 2 or Payment Claim (1) or the balance of the deposit, Brian Espin from DCE and Simon Thomson from CFS met with Mr Govender. They told him that DCE was a client of CFS and that CFS would pay DCE while Mr Govender was waiting for his bank to release money for the building project. At their request, Mr Govender signed a copy of Payment Claim (1) confirming:

I Sathasivan Govender the owner of 15B Regis Lane Flat Bush hereby confirm that the abovementioned work has been completed to our satisfaction. Progress payment will be paid on the 31st March 2008.

Mr Govender also signed an assignment acknowledging that DCE had assigned its right of payment in relation to Payment Claim (1) dated 8 February for \$78,750 to CFS. No reference was made to Payment Claim No: 2.

[7] On the same day, CFS paid DCE an agreed amount in exchange for the assignment of Mr Govender's debt evidenced by Payment Claim (1) to DCE.

[8] When the bank provided funds to Mr Govender on 13 February 2008, he paid \$72,000 to DCE rather than CFS.

[9] On 18 March 2008, DCE issued Payment Claim No: 3 for \$70,000. On the same day, DCE issued a further payment Payment Claim (2) for \$110,000. Mr Govender again signed Payment Claim (2) confirming that the work had been completed to his satisfaction, and that payment of the \$110,000 would be made on 30 April 2008.

[10] Seven days later, on 25 March 2008, Mr Govender made a further payment of \$70,000 to DCE. On the same day DCE paid \$70,000 to CFS.

[11] On 27 March 2008, Mr Espin and Mr Thomson met with Mr Govender again. Mr Govender signed another assignment document relating to Payment Claim (2) for \$110,000. CFS then paid out the agreed assignment figure relating to Payment Claim (2) to DCE.

[12] Shortly afterwards, in late March or early April 2008, DCE ceased work on the site in breach of the building contract.

[13] Mr Govender was approached by a number of sub-contractors who had supplied work and materials to the site, but had not been paid. In order to resolve the issues with the sub-contractors, Mr Govender paid a number of them direct or otherwise accepted liability for their debts to a total of \$105,737.29. In addition, Mr Govender paid invoices totalling \$11,113.79 for excavation, spouting and

miscellaneous works, and paid a further \$14,200 to Mr Espin personally for the labour required to fix various problems with the work carried out by DCE. In addition, the building project has been delayed by DCE's breach of contract. Mr Govender will incur further holding costs, including interest, rent and scaffolding.

[14] In total, Mr Govender has paid \$212,000 to DCE. He has not paid anything to CFS. In the District Court CFS sought to recover the debts assigned to it, but later amended its claim to seek judgment for the money paid by it to DCE in reliance on the assigned invoices, less a credit for payments received from DCE.

District Court judgment

[15] Judge Wade noted that CFS relied on its rights as assignee and, in the alternative, pursued a claim based on estoppel. After discussing the principles relating to assignment and estoppel as a cause of action and the general principles relating to summary judgment, the Judge expressed himself satisfied that it was appropriate for CFS to have summary judgment against the first defendant for liability. He did not consider the evidence of loss was clear enough to fix quantum, and reserved that issue to a further hearing.

[16] Mr Colthart submitted as a preliminary point that the Judge had failed to give any, or any sufficient, reasons for his ultimate finding. I agree that the Judge's findings are somewhat conclusionary. However, as counsel accepted, even if this Court concluded that the Judge had failed to give full reasons, it was unnecessary to refer the matter back to the District Court. This Court is in as good a position as the District Court was to consider the application for summary judgment. I therefore dealt with the appeal on its substantive merits.

The issues

[17] There are two issues in this appeal:

- a) Can CFS exclude an arguable defence of set-off to its claim as assignee of DCE's rights against Mr Govender?
- b) Can CFS exclude an arguable defence to the cause of action based on estoppel?

Set-off

[18] Prior to addressing the issue of set-off, Mr Colthart submitted that Mr Govender had a complete defence to CFS's claim. He submitted that as assignee, CFS was fixed with the actions of DCE and DCE had effectively issued two fraudulent invoices, namely the invoices relied on by CFS.

[19] In my judgment, that submission is misconceived. Under s 50(3)(b) of the Property Law Act 2007 the assignments to CFS are subject to any equities that arose before Mr Govender had notice of the assignment. But it is accepted that DCE carried out building work for Mr Govender. Even if DCE, for its own reasons, issued two sets of invoices, it is still entitled to be paid for the work it carried out. Mr Colthart was prepared to concede that work to the value of about \$217,000 had been carried out by DCE.

[20] Clearly, neither DCE nor its assignee CFS could require payment twice, but the problem for Mr Govender with this first argument is that, as at the date of the first assignment, 11 February, Mr Govender had only paid \$70,000 to DCE. Mr Govender paid the second payment of \$72,000 to DCE on 13 February, after he had notice of the assignment of DCE's claim for \$78,750 to CFS. Further, he had acknowledged and accepted Payment Claim (1), the claim assigned to CFS, by signing it. If there are any invoices that cannot be relied on, they would be Payment Claims Nos: 2 and 3, which Mr Govender did not expressly confirm he accepted. The notice provisions in ss 51(2) and (3) of the Property Law Act determine to whom a debt is payable, not when it arises or when it is due. If Mr Govender paid the debt owing to DCE before he had actual notice of the assignment, then he would be discharged to the extent of that payment: *Roxburghe v Cox* (1881) 17 Ch D 520.

[21] But if, on the other hand, the debtor has actual notice of the assignment before payment, (as Mr Govender did from 11 February in relation to the assignment of the first invoice) the debt is properly payable to the assignee. Once Mr Govender had notice of the assignment of the debt under Payment Claim (1) he was obliged to make payment to CFS. While there is a dispute as to whether he was given a copy of the assignment document he signed, whether or not he had a copy, the document he signed was an effective notice of assignment. Mr Govender had notice and actual knowledge of that assignment.

[22] The issue is more difficult in relation to the second assignment because it appears the third payment of \$70,000 was made some two days before the second assignment document was completed. However, that would be a quantum matter and does not affect the entry of judgment for liability.

[23] The better argument for Mr Govender on CFS's first cause of action is the claim to set-off.

[24] As a consequence of DCE's breach of contract, failure to pay sub-contractors and the defective workmanship, Mr Govender has been required to pay a number of sub-contractors and has incurred other expenses relating to the building project.

[25] Mr Dale submitted that those claims arose after the assignments and so were not able to be raised by way of set-off against CFS's claim. Mr Dale is correct in his general submission that CFS, as assignee, takes the assignment subject only to equities that have matured at the time of notice of the assignment to the debtor: s 50(3)(b) Property Law Act 2007.

[26] But the issue is what constitutes equities in this situation. In *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741 the Court was prepared to accept that a debt arising out of the same contract that gave rise to the assigned debt could be set off. Further, even unliquidated damages may be set-off against the assignee's claim provided they flow out of and are inseparably connected with the contract which created the subject matter of the assignment: *Newfoundland Government v Newfoundland Railway Co* (1888) 13 App Cas 199, 213. That

principle has been applied to building cases. Where a builder assigns money due upon completion of the building, the defendant may set-off against the claim any damage caused by delay or defective workmanship of the builder: *Young v Kitchin* (1878) 3 Ex D 127.

[27] Parliament has recognised the general nature of such rights by using the phrase equities in s 50(3) of the Act. While the equity or right must have accrued by the date of assignment, it is not necessary the claim be made by that date. It is arguable that Mr Govender has such equities to the extent the invoices rendered to him included claims for material and work which DCE represented had been carried out, but in fact had not been carried out, or related to payments due to sub contractors who had not been paid. It is not clear exactly what that set-off would amount to and whether it would extinguish CFS's claim or merely reduce it. But the set-off would be sufficient to defeat the claim for summary judgment based on the assignment of the debts under the building contract.

Estoppel

[28] The more difficult issue for the appellant is the issue of CFS's alternative claim in estoppel. Mr Colthart accepted that estoppel can now constitute a cause of action in its own right: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 587, *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80.

[29] For present purposes I adopt the approach of the High Court of Australia in *The Commonwealth v Verwayen* [1990] 170 CLR 394, 413 where the Court said:

The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a Court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. ...

[30] The estoppel relied on in this case is an estoppel by way of the written representation in respect of the invoices signed by Mr Govender, namely that he

confirmed the work had been completed to his satisfaction and that payment would be made under the invoices on the due date.

[31] Mr Colthart submitted that in order for CFS to succeed in its claim based on estoppel, CFS had to prove:

- an unequivocal representation; and
- reliance by CFS; and
- detriment.

[32] In his written submissions Mr Colthart suggested that as estoppel is an equitable remedy, CFS would also have to establish that the Court ought to exercise its discretion to enter judgment against Mr Govender. However in his oral submissions he submitted that the issue was whether it would be unconscionable to allow Mr Govender to depart from any representation he had made. Mr Colthart submitted that in order to assess that issue all of the circumstances needed to be considered and, as they could only be considered at an oral hearing, the entry of summary judgment was inappropriate. Mr Colthart argued that because of the circumstances the documents were signed in, it would not be unconscionable to allow Mr Govender to resile from the obligations created by the assignment.

[33] The high point of Mr Govender's evidence about the execution of the documentation is that he was reluctant to sign the documents, but was told he just needed to sign them so CFS could forward the money to DCE while Mr Govender waited for his bank to release the money to pay the invoice. In relation to the first set of documents he said:

I had no time to read or consider the documents properly, and felt that I was under pressure by both Brian Espin and Simon Thomson to sign them. I also felt pressured because we were on the school grounds, and the principal does not like us to conduct our private affairs at school. In the end I signed the documents despite feeling uncomfortable about the situation. ...

[34] The documents relating to the second assignment were signed on two separate occasions. On 18 March Mr Govender signed the invoice relating to

Payment Claim (2) but it was not until 27 March that he signed the assignment document relating to that invoice. Again, Mr Govender said that his recollection is that the meeting with Mr Thomson and Mr Espin on 27 March was rushed as he only had 10 minutes before his afternoon classes began. He said he did not want to sign any more documents until he had the chance to read and understand them and that, as far as he could see, the documents stated his account was with DCE and so, on that basis, he signed them reluctantly.

[35] Mr Govender knew the purpose of the assignment. He accepted that it was explained to him that the assignment documents would enable CFS to fund DCE while Mr Govender waited for his bank to release payments. To the extent that Mr Govender says Mr Thomson told him that when he received the money from his bank he was to repay DCE, that evidence is inherently implausible. It is contrary to the written documentation and whole purpose of the transaction. CFS needed to be satisfied that there was no dispute about the work and once it received that confirmation from Mr Govender, it was prepared to discount the invoice and pay DCE on the basis that CFS would in turn be paid by Mr Govender. Mr Thomson would not have told Mr Govender to pay DCE. The Judge was right to reject that aspect of Mr Govender's evidence.

[36] Mr Govender is a mature man and a school teacher. As was stated by Hillyer J in *IFC Securities Ltd v Sewell* [1990] 1 NZLR 177, 182:

It is well established that mere carelessness on the part of a person signing will not enable that person to avoid the presumption that he did intend to sign the document. It is only in exceptional circumstances that a party of full age and understanding will not be bound by his signature to a document, whether he reads or understands it or not.

[37] Further, the assignment documentation does not create a contract between CFS and Mr Govender in any event. The assignment is by DCE, of its debt, to CFS. The assignment document was, in relation to Mr Govender, no more than formal notice of the assignment.

[38] If there is an estoppel in this case, it is an estoppel by way of representation. Estoppel by representation arises where person A makes a representation to person B

that has the effect of creating or encouraging an assumption in person B, and person A knows that person B will alter his or her position detrimentally on the faith of or in reliance on that representation: *Laws of New Zealand, Estoppel*, para 36; *General Bills Ltd v The Ship "Betty Ott"* [1990] 3 NZLR 715; *The Ship "Betty Ott" v General Bills Ltd* [1992] 1 NZLR 655.

[39] Mr Colthart submitted, first, there was room for doubt as to the nature of the representations made by Mr Govender. But in each case Mr Govender signed an invoice directed to him with a reference to the work done, which formed the basis of the claim, and confirmed "that the abovementioned work has been completed to our satisfaction". He also confirmed that the progress payment would be paid on, in the case of the first payment claim, 31 March 2008, and in the case of the second, 30 April 2008.

[40] Further, the assignment document signed by Mr Govender contained the following clauses:

We are asking for your acknowledgement that you have received the goods and/or services which are the subject of the following and that when payment is due that you will ensure it is made to [CFS].

And later:

Mr & Mrs Govinder [sic] ("Payer") confirms it has received from you the goods and/or services which are the subject of the following tax invoice ("Invoice") and that payment will be made as follows [invoice details].

[41] Mr Govender signed the documents to confirm the above. While Mr Colthart is correct that the right to set-off was not expressly excluded in the invoices, by signing the documentation Mr Govender represented to CFS as assignee that the work, the subject of the invoice, had been completed to his satisfaction and further that payment would be made on the due date for payment. The representations were unambiguous that the work had been carried out and would be paid for.

[42] It follows that I conclude Mr Govender represented to CFS that it could rely on the invoices assigned to it by DCE as representing a valid debt. From CFS's

point of view at the date of the assignment it had an unimpeachable right to enforce the claim.

[43] Nor do I accept Mr Colthart's second submission that there was doubt as to whether CFS should have relied upon the representation. While CFS no doubt had a business relationship with DCE, including a personal guarantee from the directors, as Mr Govender said, it still relied on Mr Govender's representations in making the particular payments out to DCE. That was why Mr Govender was asked to confirm his acceptance of the invoices. Nor is it a coincidence that the two payments made by CFS to DCE following the assignment documents were made on the same days as the assignment documents were executed by Mr Govender.

[44] Next, Mr Colthart submitted it was doubtful whether the required detriment could be established to a point that would exclude any defence because CFS may be able to recover from DCE. But CFS does not have to exhaust remedies against other parties that it may have a claim against to establish detriment. CFS's detriment in this case is that, in reliance upon the representation, it paid out the moneys to DCE and Mr Govender has now refused to pay it.

[45] Finally, Mr Colthart submitted again it would not be unconscionable to allow Mr Govender to resile from the agreement. However, as noted, the documentation is clear. There was more than just an executory promise that Mr Govender would pay in the future in this case. Mr Govender represented that the work identified in the invoice had been completed and, what is more, completed to the satisfaction of Mr Govender. He said payment would be made. In those circumstances, it would be unconscionable to allow Mr Govender to resile from the representations and deny liability to CFS for losses sustained by it in reliance on Mr Govender's representations.

Result

[46] It follows that the Judge was right to enter summary judgment for liability. The result is that the appeal must be, and is, dismissed.

[47] The parties agreed that in the event the appeal was unsuccessful the issue of quantum will be dealt with in the District Court. That is the appropriate venue for that issue.

Costs

[48] Costs to the respondent on a 2B basis.

Venning J