IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-4637
[2012] NZHC 2502

BETWEEN	H & H CONTRACTORS LIMITED Plaintiff
AND	LEIGHTON CONTRACTORS PTY. LIMITED First Defendant
AND	WORKS INFRASTRUCTURE LIMITED Second Defendant

Hearing: 24 September 2012

Appearances: Mr D Connor and Ms J Campion for Plaintiff
Mr S Price and G White for Defendants

Judgment: 19 November 2012

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
19.11.12 ***at 12 pm****, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Counsel:
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MinterEllisonRuddWatts, P O Box 3798, Auckland – Stephen.price@minterellison.co.nz

Introduction

[1] This is an application for strike out and other related orders ("the application") by the defendants in respect of the plaintiff's statement of claim.

Background

[2] This proceeding relates to an agreement between the plaintiff H&H Contractors Limited ("H&H") and defendants Leighton Contractors Pty Limited and Downer EDI Works Limited (together as an incorporated joint venture called Leighton Works ("LW") in respect of construction work carried out as part of the formation and construction of State Highway 20 at Auckland. The terms of this agreement are governed by a detailed written contract dated 5 February 2008 ("Works Contract").

[3] The plaintiff's view of this case is set out in the following terms:

> 1.1.1 This is a claim for an account for profits or damages arising out of a breach of contract by the Defendants. They engaged the Plaintiff in late November 2007 to carry out drainage and earthmoving work on the State Highway 20 Project. This is the highway between Manukau and Auckland International Airport.
>
> 1.1.2 The claim is as a simple as this: while or shortly after engaging the Plaintiff to carry out all of the earthmoving and drainage work on the project, the Defendants were engaging with W&D Contractors to do the same work at cheaper rates.
>
> 1.1.3 The evidence, put politely, is that at site meetings the Plaintiff was told that it was ahead of the programme and effectively part of the team. At a higher level, the Defendants then started picking on minor health and safety infractions. These were later used as a reason to engage W&D at lower rates.

[4] The plaintiff claims that, had the contract run its complete course, it would have earned profits in the region of $5,000,000. It claims that that the defendant had no right to end the contractual arrangements when it purported to do so. In particular it says that the defendant could not use its power to scale back the scope of the work under the contract so as to leave the plaintiff with no allocation of work under the contract and that it could not use the lack of work allocated to the plaintiff to dismiss the plaintiff for reasons of the convenience of the defendant in such a way as to deprive the plaintiff of its rights under the contract.

[5] The defendant on the other hand says that there was no breach of contract and, more importantly for the purposes of the present application, that if there was any such claim the plaintiff failed to submit it in time in compliance with a clause prescribing the timeframes for disputes under the Works Contract ("time-bar provision") and accordingly the claim is unenforceable.

[6] In order to resolve this case it will be necessary to say something additional about the causes of action because that goes to the heart of the question of whether the claims that were eventually brought by the plaintiff are in fact time-barred. They will only be time-barred if they fall within the description of claims covered by the time-bar section in the contract.

[7] The broad approach taken by the plaintiff was that both the provisions of the contract which the defendant relied upon to quit itself of the plaintiff and the time limitation provisions were inequitable. For various reasons, it claims that the time limitation provision in the contract, the existence of which it did not dispute, ought not to be given effect to or ought to be read in a way which does not prevent the plaintiff from now proceeding with its claims.

[8] In order to understand the circumstances in which the time limitation point arises it is necessary to make brief mention of additional facts. The contract between the parties was signed on or about 5 February 2008. It seems that the contract ran into difficulties at an early stage because on 27 February 2008 the defendant gave notice to the plaintiff requiring it to remedy "all material breaches at your own cost

within the next five days of receipt of this letter". The plaintiff claims that it was not in breach at that point.

[9] Then on 5 March 2008 the defendant issued a notice to the plaintiff (purportedly under cl 10.2 (b) of the Works Contract) stating that the defendant intended to employ another drainage contractor to maintain the contract program and to enable the plaintiff to concentrate on remediation and other programmed works. By April 2008 the plaintiff was concerned about the future of the contract. Mr Van Uden, the managing director of the plaintiff, wrote to the defendants on 4 April 2008 noting that the defendants had brought another drainage contractor onto the job, the purported reasons for which were "in order that we can maintain our current programme". Mr Van Uden noted that the plaintiff had a contract for the entire drainage works on the project which it was entitled to undertake and stated that in the event that the defendant deleted work or cancelled the contract without a valid reason the plaintiff would be entitled to claim for loss of profit. He further stated that the defendant had no reason to employ another contract to carry out sections of the drainage works and he asked for a programme of how work was to be done going forward.

[10] The reply that Mr Van Uden received dated 8 April 2008 was to the effect that the defendants would not able to schedule adequate work for the plaintiff in the near future because of the need for a winter shutdown due to an Auckland Regional Council ("ARC") requirement.

[11] In November 2008 Mr Van Uden made further enquiries about when and where the plaintiff would be required to continue the works but he says he received no reply. Then on 28 January 2009 the defendant sent a pivotal email to the plaintiff which stated:

> We have not called H & H Contractors to return to this project as a result of performance issues relating to health and safety, environmental and quality. Ongoing breaches with H & H became a constant issue and these breaches reflected badly on the job.
>
> As a result of this, we were left with no alternative but to engage another contractor who thus far, has performed better in all of these areas.

> Current resource levels across the project are sufficient to meet program and no further assistance is required.

[12] On 5 February 2009 Mr Van Uden replied seeking confirmation from the defendant as to whether the works contract had been terminated by the defendant or whether "LW had reduced the scope of the works to nothing". The response that this drew from the defendant was:

> At present we are reviewing work areas undertaken by H & H where we believe were not (sic) completed by you or defective. As soon as this review is complete next week we shall revert back to you.
>
> As already explained to you by Glenn H & H were not called back to this project as a result of performance issues relating to health and safety, environmental and quality.

[13] The plaintiff was never called back to site and the remaining works were undertaken by another company (WD Drainage).

[14] On 23 March 2009 the plaintiff served a "prescribed notice" on the defendant pursuant to cl 45.1 of the Works Contract. The notice is a lengthy one. In it the plaintiff claimed that there had been a breach of express and implied terms of the contract and other acts of prevention of performance. It claimed that the defendant's actions and omissions with respect to the plaintiff had been motivated by collateral and irrelevant considerations "namely obtaining completion of the works ... to save costs". It then later referred to the general principle of construction law, namely:

> That the principal will generally not be entitled to use the power to omit work from the contract works in order to give it to another contractor to do, or to do the work himself and finally the likely quantum of the claim was stated to be likely to exceed $1,000,000.

[15] The full text of cl 45 of the Works Contract is set out in the schedule annexed to this judgment.

The applications

[16] There were three aspects to the strike out application which the defendant filed. These were described by Mr Price, for the defendant, as follows:

a) First, it seeks that the plaintiff's asserted causes of action be struck out as being time-barred under the time-bar provision. It says this by reference to the plaintiff's own sworn admission that it had actual knowledge that H&H had not been called back to site after the winter 2008 shutdown notwithstanding that works had recommenced, and that WD Drainage was carrying out what the plaintiff considered to be its work. It is said that the plaintiff knew this fact more than 15 working days prior to the issue of its First Prescribed Notice on 23 March 2009. The effect of the Time-bar Provision is clear; having failed to issue a Prescribed Notice within the requisite window, the plaintiff is said to have no grounds on which to pursue its claim. The defendant submits that if the Court accepts that position, then that is the end of the matter as it is not something which can be remedied by the plaintiff re-pleading its statement of claim.

b) The second submission for the defendant is that even if the Court does not accept the above position in relation to the time-bar provision, the works contract prescribes the way in which claims are to be valued (under cl 33). Yet it is said that the plaintiff seeks to value its asserted claim on an entirely different basis. Accordingly, the claims asserted by plaintiff are untenable in their present form. The defendant accepts that this is a matter which might be remedied by re-pleading (which the plaintiff ought to be ordered to do so as to comply with the mandatory damage valuation provisions, failing which its Claim should be struck out).

c) The third submission is only relevant if the defendant is unsuccessful in relation to both of the above two aspects of its application. The defendant says that if the plaintiff is permitted to continue to assert claims for loss in a form that is contrary to the works contract, then it has refused to provide discovery of documents which are directly relevant to determining those asserted losses. Accordingly the defendant seeks orders requiring discovery of those further documents

(the details of which are set out in paragraph 2 of the application and Appendix A to Mr Apps' affidavit of 25 May 2012).

Strike out applications - principles

[17] Mr Connor, for the plaintiff, submitted that the relevant principles which the courts had developed for deciding strike out applications were explained in *Attorney-General v Prince & Gardner*[1] (subsequently endorsed by the Supreme Court)[2] as follows:

a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

b) The cause of action for defence must be clearly untenable. In *Couch* Elias CJ and Anderson J said: "It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."

c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.

d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

e) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation. In *Couch*, at [33], Elias CJ and Anderson J said: "Particular care is required in areas where the law is confused or developing." There is considerable authority that developments in negligence need to be based on proved rather than hypothetical facts.

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[1] *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262, at 267 (CA).
[2] *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

The ground that the plaintiff failed to lodge a Prescribed Notice in time

[18] The relevant provisions of cl 45, the time-bar provision, are as follows:

> **45. Claims**
>
> 45.1 LW and the Main Contractor shall not be liable to the Contractor and the Contractor shall not be entitled to make any claim:
>
> (a) in respect of a matter:
>
> (i) arising our [sic] of or in connection with a breach of the Works Contract by LW;
>
> (ii) arising out of or in connection with the subject matter of the Works Contract; or
>
> (iii) arising out of in connection with any direction or approval by LW; or
>
> (b) in respect of a claim or proposed claim by the Contractor:
>
> (i) under or in connection with any provision of the Works Contract;
>
> (ii) for any payment under the Works Contract;
>
> (iii) for any valuation or other determination made by LW under the Works Contract;
>
> (iv) for damages for negligence;
>
> (v) for damages or any other remedy under any statute; or
>
> (vi) for quantum meruit or for restitution or based on unjust enrichment,unless within the period stated in Annexure A, or if nothing is stated in Annexure A within 15 Working Days, after the first day upon which the Contractor could reasonably have been aware of the matter at issue the Contractor has submitted to LW a prescribed notice.
>
> ...
>
> With respect to the preceding two paragraphs, the amount of any claim which the Contractor is entitled to make under this Clause 45 shall be valued:
>
> (g) In accordance with Clause 33.6; and
>
> (h) After taking into account measures which were reasonably available to the Contractor to reduce the impact of the circumstance or event on which the claim is based.

[19] The central issue on the first limb of the application is whether the plaintiff submitted a prescribed notice within 15 working days after:

> The first day upon which the contractor could reasonably have been aware of the matter at issue.

[20] Submissions were made to me concerning what it was the plaintiff had to know about in order for time to start running. The particular events that the parties focused on were the email of 24 January 2009 that the defendants sent to the plaintiff and the plaintiff's reply of 5 February 2009, both of which are set out at paragraphs [11] and [12].

[21] Mr Connor said that that meant that Mr Van Uden would first have to be given a reply to his letter of 5 February 2009 (that is his reply to the 28 January 2009 email from Leighton) before it could be said that the point was reached where the contractor could reasonably been aware of the issue to be referred to in the prescribed notice. That is he needed to have a reply to the question below:

> I need to understand whether you have terminated our contract (LW067) or reduced the scope of work under that contract to effectively nothing?
>
> As usual your urgent response is appreciated.

[22] It was the plaintiff's submission that until that question was answered, the plaintiff could not reasonably have been aware of the matter at issue and the engagement of WD Drainage.

[23] In substance this is a submission that before the plaintiff could know what the "matter at issue" upon which it wished to claim was, the defendant had first to identify what the source or justification it had for declining to call the plaintiff back to the project. Mr Price on the other hand submitted that, once the plaintiff received a notice which told it that it would not be getting any further work under the contract, it knew what it needed to know in order to issue a notice of claim.

[24] Before assessing the competing submissions, some brief remarks about the nature of cl 45 are required.

[25] There seems to be little doubt that the commercial purpose of the window created by the time-bar provision was to provide the defendant with a very favourable (because it was short) limitation period in which any claims could be

brought. It is not a limitation period which was designed to achieve traditional objectives of statutory limitation periods such as preventing stale claims, and avoiding the difficulties inherent in witnesses having to give evidence about events which occurred a long time ago. The present limitation period secures advantages to the defendant in that it has certainty of knowledge at a point very soon after the events occur whether they give a rise to a claim for compensation.

[26] The purpose of this type of clause was described by Bingham J in the following terms:[3]

> The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh (cf. *Metalimex Foreign Trade Corporation v. Eugenie Maritime Co. Ltd.* [1962] 1 Lloyd's Rep. 378, 386, *per* McNair J.).

[27] The disadvantages of such clauses, from the point of view of claimants, is that through inadvertence or a lack of agility in responding very sizable and valuable claims can, for practical purposes, swiftly be extinguished. The arguments are not all one way, however. There are doubtless cases where the contract is part of large scale operations which a principal or contractor carries on. One can understand why such a party will need to know at an early stage whether one of the numerous contracting parties that it is engaged with will be bringing forward a claim so that, if such a claim is to be brought, the necessary investigations that Bingham J spoke of can be undertaken. Because of risks associated with staff turnover, loss of records and other such matters it may not be possible to reconstruct what happened in order to mount a defence to historical claims. In construction cases where the dispute relates to work that is ongoing and has to be completed within a timeframe then the period provided for allows documentation of the state of affairs and the works without impeding further progress on the project.

[28] I now turn to consider the factual matters that the present application raises.

[29] The wording of the email of 28 January 2009 can only be reasonably construed as advising the plaintiff that it would not receive any further work under

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[3] *Avant Petroleum v Babanaft International* [1982] 1 Lloyd's Rep 448 (EWHC).

the contract. In my view the point was then reached at which the defendant had to make up its mind whether or not to submit a claim in the prescribed form. It did not matter whether the plaintiff framed its decision in terms of explicitly terminating the contract or whether it adopted the other approach of reducing the scope of the work under the contract to effectively nothing, which was the point that Mr Van Uden raised in his letter of 5 February 2009. There is no reason why that should make any difference. The plaintiff did not offer any explanation as to why the difference between these two forms of repudiation was crucial. This was not a situation where court proceedings were being contemplated which would have required that a careful analysis of the cause of action be carried out.

[30] The plaintiff never received any response to its letter of 5 February 2009. Notwithstanding that the plaintiff eventually found it possible to formulate a prescribed notice. The notice issued generally alleged breach of contract and referred to losses which the plaintiff would suffer either because of wrongful termination or from "the diminution in the scope of the work".[4]

[31] In essence I consider the defendant is right in submitting that all the asserted causes of action fundamentally come down to the same alleged grievance, that is that the plaintiff was not called back to the project after the 2008 winter shut down and that the defendant instead engaged another drainage contractor to complete the works. My conclusion is that, subject to whether the type of claim which the plaintiff intended to bring was within the provisions of cl 45, there is no doubt that time began to run from 28 January 2009.

[32] This ground of opposition to the strikeout application cannot succeed.

Would the Court be justified in not giving effect to cl 49?

[33] Mr Connor addressed a number of submissions to me. The essence of those submissions was that the 15 day cut-off point for filing a prescribed notice was burdensome and unjust and that the court ought not to give effect to it. He submitted that equity recognised grounds upon which the court would be justified in declining to give effect to the 15 day time limit.

[4] At [2.7] of the Notice.

[34] The broad submission made for the defendant was that the Court ought to respect the bargain that the parties entered into. As it is put in the Law of Contract in New Zealand:[5]

> Nor will (the courts) denounce an agreement merely because it seems to be unbalanced or unfair.

[35] The submission for the plaintiff was that the defendant could not insist upon a strict approach to timeliness being taken. Mr Connor said that unless the contract expressly provided for this eventuality by the inclusion of words such as "time of the essence" the defaulting party had to be given a reasonable opportunity to comply. He referred to *Morris v Robert Jones Investments Limited.*[6]

[36] I do not accept that submission. I agree with the submission for the defendant that the position is as it was stated in the English High Court decision of *WW Gear Construction Limited and McGee Group Limited*.[7] In that case the court was considering a requirement in a contract that a notification seeking compensation for various losses or expenses under the contract had to be made within two months of it becoming apparent to the contractor that the events giving rise to such a claim could be made. The Court in that case held that the requirement to make a timely application in writing was an effective precondition to the recovery of loss and or expense.

[37] Those cases that Mr Connor referred to dealt with the specific principles that equity developed in regard to specific performance and the right to rescind a contract. Specific performance would not be declined where there had not been exact compliance with time requirements is one example. The cases that he referred to are not a foundation for a submission that the general approach to the interpretation of contracts is affected by the same principle.

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[5] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [4.5.1].
[6] *Morris v Robert Jones Investments Limited* [1994] 2 NZLR 275 (CA).
[7] *WW Gear Construction Limited and McGee Group Limited* [2010] EWHC 1460 (TCC).

[38] In the decision of *Babanaft International v Avant Petroleum*,[8] the Court of Appeal was considering an appeal from a judgment on a preliminary question of law. The parties were signatories to a charter party contract which included provision for arbitration. At arbitration the charterers relied on the owners' failure to support their claim with all available documents within 90 days of discharge of the cargo. This was therefore a case that was concerned with a contractual cut-off date for asserting a claim. The owners sought to have time extended pursuant to the Arbitration Act 1950. That point is not relevant to the present circumstances but the remaining discussion is useful for what it contains about contractual limitation periods.

[39] In his judgment Donaldson LJ referred with approval to certain aspects of the judgment of the Judge who heard the matter at first instance but also noted:[9]

> This appeal discloses what many may think is a serious gap in the law. Time bar clauses can, as Bingham J. pointed out, become a source of injustice or even oppression. In such cases the courts should not be impotent to grant relief. However, as the law stands, that will be the position if, in order to avoid a barring provision, the claimant is required to take some action other than taking a step to commence arbitration proceedings.

[40] While those comments were made in the context of an arbitration case, consideration of their context makes it clear that Donaldson LJ's remarks were not restricted to cases involving arbitration but were an observation on time-barring provisions generally.

[41] The authority just referred to is one of those which is mentioned in *Chitty on Contracts* where it is stated:[10]

> **Agreement of the parties**. It is open to the parties to a contract to stipulate in the contract that legal or arbitral proceedings shall be commenced within a shorter period of time than that provided in the Limitation Act 1980. Such stipulations are not uncommon in commercial agreements and their effect may be (depending on the precise wording of the stipulation) to bar or extinguish any right of action, or deprive a party of his right to have recourse to particular proceedings, e.g. arbitration, after the expiration of the agreed time limit. It is also open to the parties to agree that one party shall be released from liability or the other party's claim shall be

[8] *Babanaft International v Avant Petroleum* [1982] 1 WLR 871 (EWCA).
[9] See above at [26].
[10] Hugh Beale (ed) *Chitty on Contracts* (30th ed, Sweet & Maxwell, London, 2008) , vol 1 at [28–112].

extinguished or become barred unless a claim has been presented within a stipulated period of time.

[42] Despite the notes of caution sounded by Donaldson LJ, Mr Connor was not able to point to any authority authorising the Court to ignore contractual time limitation periods or to treat them as though exact compliance with them was not required.

[43] My conclusion is that the Court does not have any power to ignore the contractual limitation period or extend it.

Which, if any, of the claims fall within cl 45?

[44] Proceeding on the basis of the above approach, the next issue is to consider whether or not the type of claim which the plaintiff seeks to bring here is actually caught by the contractual wording in cl 45.

[45] The plaintiff's statement of claim describes three causes of action. They are first, 'breach of the works contract",[11] "wrongful repudiation",[12] and the third cause of action is described as "breach of Fair Trading Act 1986".

[46] Turning to the contract claim, in my view that is clearly caught by the provisions of cl 45 which prevents any claim:

> (a) In respect of a matter:
>
> (i) Arising out of or in connection with a breach of the Works Contract by LW;
>
> (ii) Arising out of or in connection with the subject matter of the Works Contract;

[47] It would also seem to be caught by the prohibition against claims in part "(b)" being:

> ... in respect of a claim or proposed claim by the Contractor:
>
> (i) Under or in connection with any provision of the Works Contract;

[11] This heading appears before [42] of the statement of claim.
[12] The heading preceding [44].

> (ii) For any payment under the Works Contract;
>
> ...
>
> (v) For damages or any other remedy under any statute or
>
> (vi) For quantum meruit or for restitution or based on unjust enrichment
>
> Unless the claim / within 15 working days "after the first day upon which the Contractor could reasonably have been aware of the matter at issue the Contractor has submitted to LW a prescribed notice.

[48] No argument was addressed to me seeking to differentiate between the supposed unpaid retention of money due under the Works Contract and the claim for loss of future profits. Clause 45 is formulated in sufficiently wide terms to bring within its purview claims for unpaid retentions of $102,178 and for the estimated loss of profits which while initially stated to be $2,132,510 has, I am told, now increased to at least $5,000,000.

[49] Although it is not pleaded, the plaintiff at the hearing before me on 24 September 2012 submitted that one of the bases of the claim that it intends to bring which would survive the limitation provision contained in cl 45 is "an account for profits" claim. The defendant was not disposed to take the point that this type of claim had not been pleaded on the basis, no doubt, that the Court when considering an application to strike out would need to keep in mind the possibility that the plaintiff could elect to amend the statement of claim to introduce such a claim for relief. I will return to that claim subsequently.

Breach of contract claim

[50] I can deal briefly with the breach of contract claim. In the statement of claim, the introductory phrase of [43], which details the losses claimed by the plaintiff reads:

> 43. As a result of [the defendants'] breaches of the Works Contract H&H has suffered and will suffer loss being ...

[51] It is beyond argument in my view that any such cause of action falls within the terms of cl 45. If the defendant is able to satisfy the Court that the limitation provision in cl 45 applies then this cause of action will be caught.

The repudiation claim

[52] The next head of claim is "wrongful repudiation". A repudiation can give rise to a right of cancellation under s 7 of the Contractual Remedies Act 1979. That Act, in s 8(4), preserves the right of a party to recover damages in respect of "the repudiation or breach of the contract by another party". Section 10 of the Act makes it clear that a party to a contract shall not be precluded by cancellation of the contract from recovering damages. In [45] of the statement of claim the plaintiff says that it accepts the repudiation of the Works Contract on the part of the defendant. The probable effect of this would seem to be that by notifying this stance to the defendant, the plaintiff has cancelled the contract. The alternative position would be that the contract remains on foot.

[53] Further, assuming that the repudiation is the prelude to cancellation, it is necessary to consider what rights of compensation the non-cancelling party has. At common law the position was as stated in the speech of Lord Diplock in *Photo Production Ltd v Securicorp*:[13]

> Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law - generally common law, but sometimes statute, as in the case of codifying statutes passed at the turn of the century, notably the Sale of Goods Act 1893. The contract, however, is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties, although, for reasons to be mentioned later, they cannot, in my view, be totally excluded. In the instant case, the only secondary obligations and concomitant reliefs that are applicable arise by implication of the common law as modified by the express words of the contract.

[13] *Photo Production Ltd v Securicorp* [1980] AC 827 (HL) at 848.

> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the "general secondary obligation." It applies in the cases of the two exceptions as well.

[54] The analysis suggested in the *Photo Production Ltd* case is referred to in the *Law of Contract in New Zealand*[14] and reference is made to that view having been adopted by Salmon J in *Grain Processors Limited v Bluebird Foods Limited*.[15]

[55] The point is that any rights that arise from the purported repudiation are also caught by cl 45 because they would comprise a claim in respect of a matter:

> (i) Arising out of or in connection with a breach of the Works Contract by LW.

The account for profits claim

[56] I deal next with the proposition that it is open to the plaintiff to bring a cause of action by way of a claim for an "account for profits".

[57] Mr Connor described the plaintiff's claim as an:

> Account for profits or damages arising out of a breach of contract by the defendants.

[58] It is the case that the plaintiff in its statement of claim says that it has suffered loss being certain retentions held by the defendant totalling $102,178.00. This is said to be the lost revenue which it would have received for carrying out the remainder of the work under the Works Contract and:

> 43.3 An account of the profits made by LW by engaging other contractors to undertake work within the scope of the Works Contract to 18 August 2009.

[59] Mr Connor explained the basis of the claim further:

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[14] At [18.3.5].

[15] *Grain Processors Limited v Bluebird Foods Limited* (1999) 9 TCLR 385 (HC).

> In the current setting the account for profits is used in the sense of a remedy for breach of contract. That is recognised as a "potential remedial response to a number of civil wrongs", including breach of contract: see again Blanchard (ed), *Civil Remedies in New Zealand* (Wellington: Brookers, 2003) at [8.4.2].

[60] On this basis the plaintiff says cls 33.6 45 of the Works Contract do not apply to claims for an account for profit.

[61] Mr Price criticised these contentions. His submission was that the authorities make it clear that there must be a fiduciary relationship or at least something similar to it before the remedy of an account for profits can be obtained: *Vercoe v Rutland Fund Management Limited.*[16] But in any case, even if there was such a foundation for the claim, he pointed out that the scope of cl 45 extends to any claim for "restitution or unjust enrichment".

[62] Mr Connor accepted that while the account for profits is commonly used in cases of breach of fiduciary duty he said there are cases where accounts for profits have been awarded (presumably in cases of contract) and he gave as an example *Attorney General v Blake.*[17]

[63] My assessment of this part of the claim is as follows. First, an account for profits being a remedy must be linked to an underlying right which has been violated or denied and which the remedy is designed to redress. The remedy itself does not provide the right but rather it provides the means of vindicating the right. Given that the plaintiff accepts that the account for profit is used in the sense of a remedy for breach of contract it is beyond argument that the plaintiff has brought a claim which is caught by cl 45. Further, the case of *Attorney General v Blake* makes clear the importance of a link to the underlying contract as the following passage from the speech of Lord Nicholls indicates:[18]

> When, exceptionally, a just response to a breach of contract so requires, the Court should be able to grant the remedy of requiring a defendant to account to the plaintiff for the benefits he has received

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[16] *Vercoe v Rutland Fund Management Limited* [2010] EWHC 424.

[17] *Attorney General v Blake* [2001] 1 AC 268 (HL).

[18] At 284.

> from his breach of contract. In the same way as a plaintiffs interest in performance of a contract may render it just and equitable for the Court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

[64] This passage demonstrates that the account for profits is a remedy which is available in exceptional cases to enforce rights arising under contract. Even if the remedy can be claimed in this case, it is clear that it arises out of contract and is therefore caught by, inter alia, cl 45.1(a)(i).

The submission that the cl 45 limitation has not survived

[65] The further point that Mr Connor made was stated in the following way:

> First, the Defendants effectively wish to rely on a time limit in a contract they terminated. There is nothing in the Works Contract preserving the operation of clause 45 post termination. Nor, as is common, is any part of GCC 45 devoted to the effects of termination by the Defendants.

[66] I do not accept this submission. Clause 45 is directed to the situation that will follow from various circumstances including the cancellation of the contract. On its face one can see that cl 45 was devised to deal with a situation that might arise after the contract has come to an end. Certainly as a matter of contractual interpretation there is no reason to read it down as applying only in circumstances where the parties are still carrying out their obligations under the contract. It might apply as well in the full latter circumstance but there is no warrant for restricting it to that situation. I have already made reference to the distinction that Lord Diplock explained between primary and secondary obligations in the passage from *Photo Production v. Securicorp Ltd* which I set out above.[19] Further analysis of the contrast between the two types of obligations was undertaken in his Lordship's speech in *Moschi v Lep Air Services and another*, particularly in the following passages:

> Although this is the general rule as to the effect of rescission of the contract on obligations of which it was the source, there may be exceptional primary obligations which continue to exist notwithstanding that the contract has been rescinded. These are

[19] See paragraph 53 above.

> obligations that are ancillary to the main purpose of the contract—which is, of course, that the parties should perform their primary obligations voluntarily. Mutual promises to submit to arbitration disputes arising as to the performance by the parties of their other obligations arising from the contract may be expressed in terms which make it clear that it was the common intention of the parties that their primary obligation to continue to perform these promises should continue notwithstanding that their other primary obligations had come to an end *(Heyman v Darwins Ltd)*.

[67] It cannot have been the intention of the parties that cl 45 would not survive the cancellation of the contract. Like the arbitration clause which Lord Diplock gave as an example, cl 45 was obviously designed to regulate the way in which the parties would exercise secondary rights that would come into effect on termination of the contract. One of the clearest cases to which the clause was intended to have application was when a party wishes to make a claim for damages. One of the most likely circumstances when that type of claim would arise was in circumstances where the parties had terminated their contract in the sense that they were no longer obliged to perform their primary obligations. Mr Connor did not explain to me what commercial or other objectives would be served by restricting the operation of cl 45 to cases where the parties were still bound to perform their contract – that is, to circumstances where a cancellation had not taken place. I have to say that I can think of none.

[68] My conclusion is that the submission as to the cessation of cl 45 under consideration cannot be sustained.

When time began to run under cl 45

[69] The next point concerns the question of the point at which the 15 day period referred to in cl 45.1, namely the 15 working days, began running. It is stated to commence in the contract:

> After the first day upon which the contract could reasonably have been aware of the matter at issue.

[70] The Court can only make an order striking out if it is clear from the undisputed facts that the plaintiff must have reasonably have been aware of the matter by a date which is 15 working days before the prescribed notice was served.

That date was 23 March 2009. The defendant asserts that at least by 28 January 2009 that point had been reached. I have already set out at [11] the email which the defendants sent to the plaintiff on 29 January 2009.

[71] Mr Connor submitted that it was arguable that the terms of the notice did not completely rule out the possibility that the plaintiff might at some future time be recalled to resume work under the Works Contract. Dealing with that point, I observe that, it is plain from the background that the plaintiff had not been required to perform any tasks under the contract for many months and it knew that the plaintiff had already engaged another contractor. The tenor of the email of 29 January 2009 also spoke in an historic tense. That is evident from the references to the fact that breaches "with H & H became a constant issue and these breaches reflected badly on the job". That indicated that, in the vernacular, the defendant had "moved on" and that collaboration with the plaintiff was at an end. I am unable to agree with the plaintiff that, in these circumstances, it can contest that it was not reasonably aware that its services had been terminated.

[72] For those reasons I consider that the strike out application must succeed at least insofar as the cause of action based on contract is concerned.

[73] The second cause of action which was purportedly based on "wrongful repudiation" I have already discussed. From that discussion it will be apparent that my conclusion is that to the extent that this claim adds anything additional to the plaintiff's overall proceeding, it, too, must be based in contract and accordingly should be struck out as well and I order accordingly in regard to both of these causes of action.

Fair Trading Act claim

[74] The plaintiff's third cause of action is under the Fair Trading Act 1986 ("FTA"). A central part of this cause of action is the advice that the defendants gave the plaintiff concerning the reasons why no work would be programmed during the winter of 2008. It is the plaintiff's position that in April 2008 it wrote to the defendant because it had concerns about the lack of programmed work which the defendant had scheduled for it. On April 8 2008 the defendants advised that work

would be ceasing over the winter of 2008 and possibly for longer. In the letter that they sent on that date, the defendants stated:

> As previously indicated, we have completed an assessment of drainage works against our ARC winter works application and other key project milestones. Unexpectedly this does not provide the sustainable levels of work that were envisaged. Although we will continue to assess the programme further, it is clear that an unavoidable cessation of works over the winter months and possibly longer will be encountered.

[75] The plaintiff says that up until this time its understanding had been that work would be available and it would need to have crews available for that purpose during the winter of 2008.

[76] The letter of 8 April 2008 was said to amount to conduct that was misleading or deceptive in that it falsely or misleadingly represented to the plaintiff that the defendants had agreed to continue to acquire the plaintiff's services. The plaintiff gives the following as particulars of loss it says it has suffered:

> (a) [the plaintiff] delayed in the issue of any Prescribed Notices under the Works Contract until 23 March 2009 when it became clear that [the defendants] did not intend to issue [the plaintiff] with directions to continue the works under the Works Contract.

[77] A declaration is sought that the conduct complained of constituted breaches of the FTA and there is a claim for a judgment "to meet the losses" which were set out in the earlier part of the statement of claim.

[78] Mr Price characterised this particular claim as being a difficult one for the plaintiff to establish. He submitted that it was not enough for the plaintiff just to establish that the matters represented in the letter of 8 April 2009 did not come to pass. The plaintiff was required to go further and show that at the time when the statement was made the defendants had no such intention.

[79] I understand that Mr Connor does not contest that that is an accurate statement of what the plaintiff will be required to prove. Mr Price also said that the plaintiff's claim failed to plead any basis for a casual nexus between the alleged misrepresentation as at April 2008 and the plaintiff's failure to issue its First

Prescribed Notice until 23 March 2009. Mr Price referred to the fact that by the end of winter 2008, that is around November 2008, the plaintiff knew that it had not been called back and that the defendants had retained another contractor to carry out the work. Therefore, even if the pleaded misleading conduct caused a misunderstanding on the part of the plaintiff about its status the casual effect of any such misrepresentation had been exhausted by November 2008 and no loss could be proved.

[80] My understanding of the claim broadly accords with Mr Price's summary of it. Essentially what the plaintiff is saying is that it was lulled into a false sense of security about the security it enjoyed in its position as a contracted party to the State Highway 20 Project. Had it known otherwise, it would have promptly issued a prescribed notice of claim when the defendant made its position explicit which it did by sending the email dated 28 January 2009. The Court on dealing with a strike out application is not required to come to any conclusions as to whether the plaintiff will eventually be able to satisfy the various factual elements which show that there was misleading or deceptive conduct which caused the plaintiff to act or omit to act in the way that it says it did and the connection between those events and loss being incurred. There is no doubt that even if the statement of claim is presently deficient because it fails to set out an explicit statement of the link which the plaintiff will seek to draw between the deceptive conduct and the loss that that could be done in an amended pleading. There is no question, either, that cl 45 of the contract does not bar a claim under the FTA and nor is there any issue about the claim having been commenced in time under that Act.

[81] There are no grounds that I can discern which would justify an order striking out this part of the statement of claim.

The damages claim – relevance of the contractual provisions for valuation of the work

[82] The defendant refers to the fact that under the contract it has the right to make changes to the valuation of the work where the amount of work actually undertaken

by the plaintiff differs from what is provided for in the works contract whether for reasons of breach or otherwise.[20]

[83] It is necessary to make brief mention of the substance of the plaintiff's claim for damages. That is because the orders which I propose making will not finally conclude matters between the parties, there being one cause of action which is able to proceed. The point concerns the method of calculating damages. The plaintiff has taken what the parties were agreed was the conventional approach to assessing damages for breach of contract in a situation of this kind. However, in this case there is what might be approximately described as a "code" prescribing the way in which damages are to be fixed which differs from the usual common law approach. That is to say, the contract itself contains a mechanism at cl 33 which provides for and restricts the parties to a specific method of calculating loss. I do not consider that the argument about the application of cl 33 and valuation of the extent of the plaintiff's claim needs to be considered further in the context of the strike out application. Certainly, the plaintiff's claim overall could not be struck-out and nor could specific causes of action be dismissed for the reason only that the plaintiff apparently proposes to adopt a contentious and possibly wrong approach to calculation of damages.

Application for further discovery

[84] The defendants seek particular discovery concerning documents which relate to the quantum of the claim against them.

[85] An affidavit has been filed by a Mr Apps who is a chartered accountant. Mr Apps has qualified himself as being an expert forensic accountant. He has given evidence for the defendants. For the plaintiffs, a Mr Wellham, who is a chartered accountant, has given evidence. Mr Wellham has not strictly qualified himself as an expert in the area of forensic accountancy. Nonetheless, he does have relevant evidence to give concerning the nature of the plaintiff's business, the way it manages its finances, what records it keeps and their functions.

[20] Statement of defence at [10].

[86] Both parties apparently agree, subject to any effect that cl 33 may have, that the correct formulation of the loss in this case is to arrive at a figure of damages which will compensate the plaintiff for the loss of the revenue which it would have earned had the contract run for its full duration, while at the same time giving credit for avoidable costs which it will not now be required to expend.

[87] The plaintiff takes the view that establishing loss is quite a simple matter. Essentially it says that the relevant information is, first, the actual profit that the plaintiff achieved up to the point where the contract was terminated. It says that it actually earned a gross margin of 65.1 per cent. Mr Wellham says that whether that margin is high or low is irrelevant and the views of other accountants such as Mr Apps on that subject will not affect the question.

[88] Mr Apps, though, says that that level of disclosure does not give sufficient certainty as to the basis of calculation of the loss. Mr Apps also says the figures actually achieved to date cannot be accepted unequivocally because they represent profit performance which he infers from Mr Wellham's evidence has not been achieved by the company in its overall operations and on other construction projects that it has been involved in. Secondly, he refers to the explanation that Mr Apps gives as to why the profitability on this contract was so high. Mr Wellham said that that came about because the plaintiff was not required to supply pipes or backfill. These constituent parts of the contract were sourced by the defendant at its expense.

[89] Mr Apps says that it is necessary to consider the wider profitability of the company and how that is arrived at, because the comparison may disclose errors in the calculation of the gross profit margin achieved on the SH 20 Project. He says, for example, that there may have been some inadmissible treatment of the costs which, although properly attributable to the SH 20 Project, have not in fact been charged against it.

[90] Mr Apps says that a job costing report which has been provided by the plaintiff in regard to the SH 20 Project shows that even if that ledger is accurate and correctly captures all costs, then this:

> discloses a project-specific margin for the SH20 works of 31.7 per cent – which differs greatly from the 65.1 per cent asserted in [the plaintiff's] quantification of its losses. This also assumes that the plaintiffs [sic] would have enjoyed this margin over the remainder of the contract duration, a point that I cannot establish without reference to the plaintiff's initial budgets, which would establish expectations of [the plaintiff's] management.

[91] On the subject of budgets, he generally says that it would be relevant to his estimate of costs to see whether the plaintiff actually anticipated a gross margin of 65.1 per cent prior to commencement of the project.

[92] Mr Apps seeks the pre-tendering cost calculations prepared by the plaintiff to find out what their expectation of profit was.

[93] Before dealing with particular aspects of the documents which the defendants seeks discovery of, it needs to be borne in mind that this application is being decided on the basis of the *Peruvian Guano* test, so that documents are considered relevant and discoverable if they could lead to a train of enquiry which might enable the defendants to advance their case or which might damage the plaintiff's case.

[94] Dealing first with the general contentions by each of the opposing accountants, I make the following comments. Obviously the defendants do not need to take the plaintiff at its word concerning the accuracy of their accounts. There may be errors in them. Further, the plaintiff's basis for the damages calculation, assuming as it does that because a profit was achieved in the past that level of profit will be achieved in the future, is not logically compelling. Conditions might change. They might become less favourable during the life of the contract, resulting in higher expenses, slower progress or any number of factors which could cause the gross profit margin to deteriorate.

[95] Further, Mr Wellham, in explaining the admittedly high gross profit margin, has mentioned the factors concerning the supply of pipes and backfill. This makes an assumption that contracts incorporating the obligation to supply those items will generally calculate out as being less profitable. That is an assertion which may or may not be true. Overall, my view is that the defendants should be entitled to test these assumptions.

[96] The next issue is whether the documents which have been identified by Mr Apps as being required to assist him in the areas that he says he needs to enquire further into, are reasonably and fairly required for that purpose.

[97] The first category of documents that Mr Apps identifies are those at [24(a)] of his affidavit dated 25 May 2012. These are the annual financial statements for the financial years 2006-2008 and 2009. These annual accounts precede the SH 20 Project, and also cover a period of time after the plaintiff had ended operations on that project. I agree that these documents should be discovered, in terms of the *Peruvian Guano* test.

[98] In [24(b)], Mr Apps says that the defendants would be assisted as well if they were provided with copies of general ledgers and annual trial balances used in preparing the annual financial statements for each of the financial years from 2006 to the current date or similar. He says that:

> Such information provides much further detail as to the timing and categorisation of items of revenue and expenditure and as such will assist in providing an understanding of the cost structures of H & H as they are likely to apply to the SH20 works and the likely actual costs and saved costs in respect of the SH20 works.

[99] I have an impression that this is a very extensive range of documents. There is a limited explanation of how they would assist Mr Apps in the affidavit. That is to say, it is not clear to me how they would so assist the defendants in critiquing the damages claim. Balancing the extensive range of documents sought against the lack of clarity about how they would assist, I do not consider an order ought to be made for further and better discovery in respect of those matters.

[100] In [24(c)], Mr Apps identifies further documents that would be of assistance to the defendants. These are:

> Monthly management accounts, or similar documents, relied upon by the plaintiff when managing their business from financial years from 2006 to the current date.

[101] These, he said, would assist in providing an understanding of the plaintiff's cost structures as they are likely to apply to the SH 20 works as well as the likely actual costs and saved costs in respect of those works.

[102] I consider that this, again, casts the net too wide. I would, however, be prepared to direct the discovery of the relevant documents for the financial year leading up to the commencement of work on the SH20 project (the year 2008) and the year in which the revenue from that project would have come to account, which I understand to be the year ending 2009.

[103] In [24(d)], the defendants identify tax returns for the plaintiff for the 2006 to the current tax years, together with assessments etc. I accept that in a general way financial accounts for the period bridging the year when the plaintiff was working on SH 20 would be relevant, and accordingly the information in this category is to be supplied for the 2008 and 2009 years which would bridge the period of the work done under the contract.

[104] I also accept that the information identified by Mr Apps at [25(a)] ought to be the subject of further discovery. The documents specified in [25(b)], though, seem to me to be too wide-ranging. I decline to make an order in respect of those documents.

[105] I understand the relevance of [25(c)]. I am unclear about the extent of any search that would be required for these documents and whether or not it would be oppressive for them to be obtained by the plaintiff. I decline to make an order in respect of them.

Costs

[106] The parties should confer on the issue of costs and if they are not able to agree they should submit memoranda not exceeding five pages on each side within **14 days** of the date of this judgment.

J.P. Doogue
Associate Judge

Annexure 1:

45. CLAIMS

45.1 LW and the Main Contractor shall not be liable to the Contractor and the Contractor shall not be entitled to make any claim:

(a) in respect of a matter:

- (i) arising our of or in connection with a breach of the Works Contract by LW;
- (ii) arising out of or in connection with the subject matter of the Works Contract; or
- (iii) arising out of in connection with any direction or approval by LW; or

(b) in respect of a claim or proposed claim by the Contractor:

- (i) under or in connection with any provision of the Works Contract;
- (ii) for any payment under the Works Contract;
- (iii) for any valuation or other determination made by LW under the Works Contract;
- (iv) for damages for negligence;
- (v) for damages or any other remedy under any statute; or
- (vi) for quantum meruit or for restitution or based on unjust enrichment,

unless within the period stated in Annexure A, or if nothing is stated in Annexure A within 15 Working Days, after the first day upon which the Contractor could reasonably have been aware of the matter at issue the Contractor has submitted to LW a prescribed notice.

A prescribed notice is a notice titled "Prescribed Notice" which includes particulars of all of the following:

- (c) the breach, act, omission, direction, approval or other circumstance or event on which the claim is or will be based;
- (d) the provision of the Works Contract or other basis for the claim or proposed claim;
- (e) the quantum or likely quantum of the claim; and
- (f) any measures taken by the Contractor to reduce the impact of the circumstance or event on which the claim is based.

Updates of the quantum or likely quantum of a claim for ongoing events or circumstances on which the claim is based shall be submitted by the Contractor to LW at weekly intervals until the events or circumstances have ceased.

With respect to the preceding two paragraphs, the amount of any claim which the Contractor is entitled to make under this Clause 45 shall be valued:

(g) In accordance with Clause 33.6; and

(h) After taking into account measures which were reasonably available to the Contractor to reduce the impact of the circumstance or event on which the claim is based.

This clause 45.1 shall not have any application to:

(i) any claim for payment to the Contractor of the Contract Amount, for which the provisions of Clause 35 shall apply;

(j) any claim for payment for a variation directed by LW, for which the provisions of Clause 33 shall apply; or

(k) any claim for an extension of time to the Date for Substantial Completion, for which the provisions of Clause 28 shall apply.

however, Clause 45.1 shall apply where LW has made a valuation or determination under any of those clauses and the Contractor disagrees with that valuation or determination.

Nothing in this Clause 45.1 shall limit the operation or effect of any other notice provision, time-bar provision, condition precedent or limitation clause contained in the Works Contract.

45.2 In addition to the requirements of Clause 45.1, if a claim or proposed claim relates to a matter which is or will be relevant to a claim between LW and the Main Contractor or the Main Contractor and the Principal, the Contractor shall do everything necessary to enable LW to submit notices and claims to the Principal in respect of the matter at issue in a timely manner and to progress the resolution of the claim in accordance with the requirements of the Main Contract. In respect of such notices and claims:

(a) the Contractor acknowledge sthat it is aware of the time and other requirements of the Main Contract relevant to the submission of such notices and claims and the resolution of claims and disputes. These requirements are set out in Annexure G;

(b) LW and the Contractor shall work together to enable LW to put the Contractor’s views to the Principal and to seek a reasonable outcome of the matter at issue having regard to LW’s and any other contractors’ and other persons’ direct or indirect interests in the matter at issue; and

(c) the Contractor’s entitlement in respect of the matter at issue shall not exceed the Principal’s (or if relevant the Engineer’s or independent tribunal’s) valuation of the Contractor’s claims after making reasonable allowance for LW’s costs, overheads and, where relevant, profit in respect of the matter at issue.

45.3 The Contractor acknowledges that –

(a) a notice or claim required to be submitted by the Contractor to LW must be in writing and must be clearly identified as a notice or claim and must state the provision of the Works Contract relevant to the notice or claim; and

(b) unless stated otherwise, if the Contractor submits a notice or a claim in respect of a matter later than the time for submission of such notice or claim stated in the Works Contract, such matter shall be time barred and the Contractor shall be deemed to have waived its entitlement (if any) in respect of such matter.

45.4 The Contractor acknowledges that nothing in this Works Contract creates any rights or entitlements in favour of the Contractor against the Main Contractor or the Principal.