

**UNDER the Construction Contracts Act 2002**

**IN THE MATTER of an adjudication**

**BETWEEN            DARREN WELLS**

Claimant

**AND                    ZAHRA BASSAM TABAR and MEHDI  
SHAHBAZPOUR**

Respondents

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**ADJUDICATOR'S DETERMINATION**  
**Dated 1<sup>st</sup> December 2014**

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BUILDING DISPUTES TRIBUNAL  
TE TAKAPUNGA MŌ NGŌ TAITOHE WHARE

**Name of Adjudicator** Robert John Green

**Date of determination** 1 December 2014

**Claimant**

**Name** Darren Wells  
**(the Builder)**

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**Respondent**

**Name** Zahra Bassam Tabar and Mehdi  
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**(the Owners)**

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**Details of dispute**

**Date of Notice of Adjudication** 20 October 2014

**Date of Notice of Acceptance** 21 October 2014

**Date of claim** 29 October 2014

**Date of written response** 04 November 2014

### **Nature of Dispute**

The adjudication relates to a dispute that has arisen between the Builder and the Owners in relation to a contract for alterations and additions to an existing dwellinghouse located at 59 Dale Crescent, Pakuranga.

The dispute concerns whether the Builder is entitled to payment of the amount claimed in his claim for payment given to the Owners on or about 6 December 2013 as a debt due and owing under sections 22 & 23 of the Act, or in the alternative, on the merits under the contract.

### **Relief sought**

a. The Builder seeks a determination that the Owners are liable to pay him the sum of \$4,725.25 as a debt due and owing under ss 22 & 23 of the Act on the basis that the Owners failed to provide a payment schedule in response to his payment claim and failed to pay the whole or any part of the claimed amount by the due date for payment, or in the alternative, that he is entitled to payment of that amount on the merits under the contract; and

b. The Builder seeks a determination that the Owners are liable to pay his costs and expenses of the adjudication in the sum of \$2,102.00 and the whole of the adjudicator's fees and expenses pursuant to sections 56 & 57 of the Act.

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## DETERMINATION

[1] For the reasons set out in this determination, and rejecting all arguments to the contrary, I determine:

[a] The respondents, Zahra Bassam Tabar & Mehdi Shahbazpour are not liable to pay the claimant, Darren Wells, any amount as a debt due under sections 22 & 23 of the Act.

(s48(1)(a)), (s59(5)(a))

[b] The respondents, Zahra Bassam Tabar & Mehdi Shahbazpour, are not liable to pay the claimant, Darren Wells, any further amount under the contract.

(s48(1)(a)), (s59(5)(a))

[c] The claimant, Darren Wells, is liable to pay the respondents, Zahra Bassam Tabar & Mehdi Shahbazpour, the sum of **\$1,500.00** in respect of their legal costs and expenses of the adjudication within 2 working days of the date of receipt of this determination.

(s56(1)(b), (s59(5)(a)))

[d] The cost of this, my determination, is fixed at **\$1,500.00** (inclusive of GST) and shall be met in full by the claimant, Darren Wells.

(s57(3)(b))

[e] The claimant, Darren Wells, has paid the amount of **\$1,500.00** as security for my fees and expenses in this

matter and accordingly there is no further amount to be paid by either party in respect of my fees and expenses.

(s57)

[f] As a result of my determinations at paragraphs [a] to [e] above, the claimant, Darren Wells, is liable to pay the respondents, Zahra Bassam Tabar & Mehdi Shahbazpour, the sum of **\$1,500.00** within 2 working days of the date of receipt of this determination.

(s57(2)), (s59(5)(a))

**Important:** If the determination includes a requirement that you must make a payment, it is important that you read the statement of consequences set out at the end of this determination.

## **INTRODUCTION**

- [2] On or about 4 October 2013 the Owners entered into a construction contract (the **Contract**) with the Builder to carry out certain alterations and additions to an existing dwellinghouse (the **contract works**) located at 59 Dale Crescent, Pakuranga (the **property**).
- [3] The Contract was partly written and partly oral.
- [4] On or about 17 October 2013 the Builder and a colleague, Dean Kini, commenced work at the property.
- [5] From time to time as the contract works progressed the Builder made claims for payment in terms of the Contract and the Owners made payments in the sums claimed.

- [6] The contract works were largely completed by late November 2013.
- [7] On or about 6 December 2013 the Builder served the Owners with a further claim for payment in the amount of \$7,792.49<sup>1</sup>.
- [8] The Owners did not pay the amount claimed or respond to the Builder's claim for payment with a payment schedule within 20 working days of receipt of the claim.<sup>2</sup>
- [9] The parties fell into dispute over the quality of the Builder's work and the amount to be paid to the Builder under the Contract and on 20 October 2014 the Builder served the Owners with a notice of adjudication initiating this adjudication proceeding.

## REASONS FOR DETERMINATION

- [10] The Builder says that on or about 6 December 2013 he served a payment claim on the Owners by email, via a letter indicating a claimed amount of \$7,792.49 (the **payment claim**).
- [11] The Builder says he believes the payment claim complied fully with section 20 of the Act.
- [12] The Builder submits that under s21(1) of the Act, a payer may respond to a payment claim by providing a payment schedule in response but if a payer fails to provide a payment schedule that complies with s21 of the Act within either the time required by the relevant construction contract, or, if the contract does not provide for the matter, within 20 working days of receipt of the payment

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<sup>1</sup> Invoice dated 30/11/2013

<sup>2</sup> The Contract did not specify a period of time for the provision of payment schedules in response to payment claims and therefore the default period of 20 working days under s22(b)(ii) applied

claim, then pursuant to s22 of the Act the payer becomes liable to pay the whole of the claimed amount on the due date for payment.

- [13] The Builder says no specific period of time for the provision of a payment schedule was specified in the Contract and accordingly pursuant to section 22(b)(ii) of the Act the Owners were allowed to serve a payment schedule in response to his payment claim on or before 8 January 2014, being 20 working days after the date of service on the Owners of the payment claim.
- [14] The Builder says the Owners did not provide a payment schedule in response to the payment claim within the 20 working day period or pay the whole or any part of the claimed amount and therefore under sections 22 and 23 of the Act the full amount of its payment claim became due and owing as a debt due on the due date for payment without set-off or deduction.
- [15] In addition, and as an alternative head of claim, the Builder contends that the contract works have been completed properly and he asserts that the Owners are liable to pay the sum of \$4,725.25 on the merits under the Contract.

#### **Default liability – debt due**

- [16] At the crux of this dispute is the question of whether any liability for payment of the amount claimed by the Builder in the payment claim has accrued by operation of the default liability provisions in sections 22 and 23 of the Act.

#### **The regime for making and responding to payment claims under the Act and the relevant law**

[17] In *Marsden Villas Ltd v Wooding Construction Ltd*<sup>3</sup>, Asher J set out an overview of the Act's objectives:

[16] The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain time frame and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor's claim...

[17] The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, and the quick resolution of disputes. The processes that it sets up are designed to side-step immediate engagement on the substantive issues such as set-off for poor workmanship which were in the past so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principal is concerned, the regime set up is "sudden death". Should the principal not follow the correct procedure, it can be obliged to pay in the interim what is claimed, whatever the merits. In that way if a principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and sub-contractors, will have to bear the consequences of delay in terms of cashflow.

[32]... The payment claims may contain all sorts of errors. The structure of the Act is to give the principal the opportunity to respond to those errors by providing a payment schedule within the mandatory time.

[18] As far as the payer is concerned the regime set up under the Act is 'sudden death'. Should the payer not follow the correct

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<sup>3</sup> *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 [C-19]

procedure within the mandatory time, the payer can be obliged to pay in the interim what is claimed, whatever the merits.

### **Payment claims**

- [19] The Owners purchased the property to do it up, extend it, and resell it to make a profit.<sup>4</sup>
- [20] Accordingly the Contract is a commercial construction contract as defined in s5 of the Act.
- [21] Under section 20 of the Act, a payee is entitled to serve payment claims for progress payments including any final payment under the contract<sup>5</sup>. Payment claims are defined in section 20 of the Act as follows:
- (1) A payee may serve a payment claim on the payer for each progress payment, -
    - (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
    - (b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).
  - (2) A payment claim must-
    - (a) be in writing; and
    - (b) contain sufficient details to identify the construction contract to which the progress payment relates; and

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<sup>4</sup> Respondents' Bundle ZTMS21

<sup>5</sup> Section 5

- (c) identify the construction work and the relevant period to which the progress payment relates; and
- (d) indicate a claimed amount and the due date for payment; and
- (e) indicate the manner in which the payee calculated the claimed amount; and
- (f) state that it is made under the Act.

### **Payment schedules**

[22] If the payer does not agree that the payee is entitled to the payment claimed under the contract or does not agree with the way in which a progress payment has been calculated, the appropriate remedy is for the payer to protest this by serving a compliant payment schedule in response within the mandatory time<sup>6</sup>.

[23] A scheduled amount is defined in section 19 of the Act as being an amount of progress payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim.

[24] Under section 21(2) of the Act, a payment schedule must:

- (a) be in writing; and
- (b) identify the payment claim to which it relates; and
- (c) indicate a scheduled amount.

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<sup>6</sup>*Top End Homes v Salem Ltd* HC Whangarei, 19 July 2005 CIV-2005-488-000332

- [25] Under section 21(3) of the Act, if the scheduled amount is less than the claimed amount, the payer must indicate:
- (a) the manner in which the payer calculated the scheduled amount; and
  - (b) the payer's reasons for the difference between the scheduled amount and the claimed amount; and
  - (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason for withholding payment.
- [26] If a payer fails to provide an effective payment schedule, being one that satisfies the requirements of section 21 of the Act, within the time required by the relevant construction contract, or if the contract does not provide for the matter, within 20 working days after the payment claim is served, the payer becomes liable to pay the whole of the claimed amount on the due date for the progress payment to which the claim relates pursuant to section 22 of the Act<sup>7</sup>.

### **Discussion**

- [27] The Act provides a straightforward mechanism by which the payer may respond to a payment claim, and where appropriate, to reject the claim in whole or in part by serving a payment schedule in response to avoid liability for the whole of the claimed amount under section 22 of the Act.
- [28] Aside from disclosing to the payee the undisputed portion of its claim that it is entitled to receive on the due date for payment (or

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<sup>7</sup> *Invent Solutions Limited v Chan Developments Trustee Limited* HC WN CIV 2008-485-2834 1 April 2009 at [16]

in the event of non-payment by the due date, the amount that the payee will be entitled to sue for as a debt due) the payment schedule must also disclose the matter(s) in relation to which the payer has withheld payment and the reasons for the same such that the payee can properly assess its future options and make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.<sup>8</sup>

[29] If the Owners disputed the Builder's entitlement to the amount claimed under the Contract in the payment claim, the proper remedy was for the Owners to protest that by serving a compliant payment schedule in response within the mandatory time to avoid the draconian provisions of section 23 of the Act. In *Salem Limited v Top End Homes*<sup>9</sup> the Court said:

What is plain is that ss20 to 23 of the Act are designed to facilitate regular and timely payments between the parties to a construction contract. If a property owner does not respond to a payment claim by serving a payment schedule, then the contractor is entitled to recover the amount of his claim as a debt due. Put colloquially, the payer is under an obligation to pay first and argue later. This, we are satisfied, is the intention of the legislation. No doubt it reflects the philosophy referred to earlier that cashflow is the very lifeblood of the building industry. Contractors (and their sub-contractors in turn) are entitled to be promptly paid when they have invoked the payment regime under the Act and the payer has not responded as the Act requires.

[30] It follows therefore that if the Owners failed or neglected to provide an effective payment schedule in response to the Builder's payment claim they would be liable to pay the whole of the claimed amount on the due date for payment, whatever the

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<sup>8</sup> *West City Construction Ltd v Edney*<sup>8</sup>, HC Auckland CIV-2005-404-001066 1 July 2005, Venning J, *Metalcraft Industries Ltd v Linda Christie* HC WHA CIV-2006-488-645 15 February 2007, Harrison J at [15]

<sup>9</sup> *Salem Limited v Top End Homes* CA 169/05 12 December 2005

merits, provided first that the Builder had issued a valid payment claim.

### **The validity of the payment claim**

- [31] The Owners contend that the Builder's payment claim was invalid for various reasons including among others, that the amount claimed exceeded the agreed contractual cap, that the ground advanced for exceeding the cap was erroneous, that the Builder later acknowledged the balance claimed was erroneous due to the failure to account for payments made on account by the Owners, and that no claim was made for the trade invoices referred to at paragraph 30.<sup>10</sup>
- [32] The Owners' argument in relation to the purported errors and the contractual cap is a spirited one but it cannot be correct as a matter of law.
- [33] No inquiry into the bona fides of the payee's entitlement to the sums claimed in payment claims issued under the Act is necessary for the effective functioning of the statutory mechanism for responding to payment claims to avoid liability for payment of the whole of the claimed amount under section 22 of the Act.
- [34] It is not a precondition to the making of a valid payment claim under section 20 of the Act that the payment claim be made with a contractual entitlement to the monies actually claimed or that otherwise the claim is made in good faith.
- [35] The Supreme Court has held in Victoria that there is no implied pre-condition to the making of a valid payment claim that the payee makes the claim with a bona fide belief in its entitlement to

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<sup>10</sup> Claimant's Bundle Appendix C

the moneys claimed or that otherwise the claim is made in good faith. In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor*,<sup>11</sup> Justice Vickery was persuaded with the benefit of full argument that he was wrong to have found in a previous case<sup>12</sup> that a payment claim must be made bona fide in order to be valid.

[36] Accordingly I reject the Owners' challenge to the validity of the payment claim on the ground that the amount claimed and the method used to calculate that amount were erroneous.

[37] However, I have viewed the document that is said to be a payment claim and there is a fundamental and fatal difficulty for the Builder in terms of default liability. The payment claim does not state on its face that it is a payment claim made under the Act.

[38] Section 20(2)(f) of the Act provides that a payment claim:

must ... state that it is made under the Act.

[39] The District Court, in *Civil Construction Group Limited v Dhuez Ltd*<sup>13</sup>, and the High Court, in *Welsh v Gunac South Auckland Ltd*<sup>14</sup> have held that failure to comply with this provision is fatal.

[40] However in the latter case Allan J stated, obiter, that:

It may be that in a given case a Court might properly conclude that an omission to comply with s 20(2)(f) is not determinative. An example might be the case of a major construction project in which a single payment claim appearing in the middle of a series of similar documents happens to omit the necessary reference to the Act. In those circumstances, it could not properly be said that the principal had been misled, or is in

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<sup>11</sup> [2012] VSC 235

<sup>12</sup> *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2011] VSC 199 at [101]

<sup>13</sup> District Court, Auckland, CIV 2006-4-102, 19/5/06, Joyce DCJ.

<sup>14</sup> High Court, Auckland, CIV 2006-404-7877, 11/2/08, Allan J.

doubt as to what is intended. A Court might well then hold that the document ought to be read along with all previous payment claims in the series. But I express no firm view as to that. It is a matter for another court at another time.

- [41] In *Winslow Properties Ltd v Wooding Construction Ltd*<sup>15</sup>, Cooper J held that a claim that failed to state that it was a payment claim under the Act was nevertheless valid, because it was accompanied by a covering letter, the first paragraph of which referred to the claim as “*Progress Claim No 18 which is a payment claim under the Construction Contracts Act 2002*”.
- [42] In *Invent Solutions Ltd v Chan Developments Ltd*<sup>16</sup> the Court held that the misdescription of the Act as the Construction Contracts Act “2003” did not invalidate the claim.

## **Result**

- [43] In the present case, the letter stated “*if payment is not received in full within 3 working days, proceedings will be issued without further notice and upon expiry of the prescribed period pursuant to the payment claim under section 20 of the Construction Contracts Act 2002 (the Act)*” and included a copy of the notice to be provided to a residential occupier explaining the consequences of not responding to a payment claim and not paying the claimed amount, or the scheduled amount in full under the heading “THE NEXT 2 PAGES IS VERY IMPORTANT.”<sup>17</sup>
- [44] However and notwithstanding those statements, the invoice that followed was simply stated to be “Final notice to pay”. Nowhere

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<sup>15</sup> High Court, Auckland, CIV 2006-404-4969, 14/12/06, Cooper J. The decision is reported at [2007] DCR 408. It was followed in *Hawkins Construction Ltd v Ecosse Afrique Enterprises Ltd* (High Court, Wellington, CIV 2008-485-2327, 25/2/09, Gendall AJ).

<sup>16</sup> High Court, Wellington, CIV 2005-485-2834, 1/4/09, Gendall AJ.

<sup>17</sup> S20(3)&(4)

on its face did it purport to be a payment claim made under the Construction Contracts Act 2002.

- [45] The language of s20(f) is mandatory, not permissive. While some want of precision is permissible the essential message must be clear and unequivocal.
- [46] I am not satisfied that the builder has provided that essential message in this case.
- [47] On the evidence, the Builder has fallen well short in my view. The Payment Claim did not state that it was made under the Act. There was no accompanying covering letter which referred to the claim as a "*Payment claim under the Construction Contracts Act 2002*" as in *Winslow*. Neither was this a case of a one-off omission of the necessary reference to the Act in a series of compliant payment claims as referred to in *Welsh v Gunac*.
- [48] On its face, the purported payment claim is simply a demand for payment. The document fails to comply with s20(f).
- [49] In my judgment the critical deficiency with s20 compliance cannot be overcome in this case by reference to the surrounding material. Therefore I am driven to conclude that the Payment Claim was invalid for the purposes of the Act and the Builder's claim for payment as a debt due under ss22 and 23 of the Act is rejected accordingly.

### **CLAIM ON THE MERITS**

- [50] The Builder asserts that all work has been completed properly and in accordance with the contract documents and the Owners are liable to pay him the sum of \$4,725.25 under the Contract.

- [51] The difficulties for the Builder with this aspect of the claim are palpably obvious and my reasons may be shortly stated.
- [52] The parties agree that the cost of the contract works was capped at \$17,000.00.<sup>18</sup>
- [53] The Owners assert they have paid \$18,226.19 to the Builder, either directly, or at his direction, to Dean Kini and various suppliers.
- [54] The Owners have produced bank statements as evidence of those payments. I accept that evidence.
- [55] The Builder appears to assert that he is entitled to payment in excess of the \$17,000.00 capped value of the building work on the grounds that during the course of the contract works the Owners asked him to undertake works relating to the ensuite door as a variation to the Contract and/or that the Owners had withheld payment and no resolution to his claim for payment was able to be reached in November 2013.
- [56] That cannot be correct as a matter of fact or law. First, the Builder freely acknowledges that he has not undertaken the extra work to the ensuite door<sup>19</sup> so no additional payment is due, and second, there is simply no legal basis for the Builder to unilaterally vary the terms of the contract which relevantly include that the contract price for labour and materials was capped at \$17,000.00. If the Owners were in breach of contract for failing to pay amounts properly claimed and payable under the Contract by the due date for payment, the proper remedy for the Builder was to bring a

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<sup>18</sup> Acknowledged by the Builder at para 17 of the claim and page 2 of the 6 December 2013 letter to the Owners demanding payment in the sum of \$7,792.49.

<sup>19</sup> Page 3 of the purported payment claim dated 6 December 2013

claim for damages, not to change the terms of the Contract as to price.

[57] Accordingly, I am driven to the ineluctable conclusion that the builder is not entitled to any further payment under the Contract and his claim on the merits is rejected accordingly.

### **COSTS**

[58] Each party has sought a determination that the other party is liable to meet its legal costs and expenses and the adjudicator's fees and expenses in full under sections 56 & 57 of the Act.

[59] The Builder advised he has incurred costs and expenses in the aggregate amount of **\$2,102.00** including GST in relation to this adjudication.

[60] The Owners advised they have incurred costs and expenses in relation to responding to the adjudication claim in the sum of **\$1,500.00** including GST. The Owners seek indemnity costs on the ground that the claimant had been paid in excess of his contractual entitlement before he applied for adjudication and according to his own statements in the claim and payment claim he is not entitled to anything in excess of the acknowledged contractual cap of \$17,000.00.

[61] The Builder has paid the amount of **\$1,500.00** prescribed by BDT as security for my fees and expenses in this adjudication.

[62] The power to determine liability for the costs and expenses of a party in adjudication proceedings is addressed at section 56 of the Act which provides:-

## **56 Costs of adjudication proceedings**

- (1) An Adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the Adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-
  - (a) bad faith on the part of that party; or
  - (b) allegations or objections by that party that are without substantial merit.
- (2) If the Adjudicator does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[63] The power to determine the apportionment of the adjudicator's fees and expenses is addressed at section 57 of the Act.

[64] Under section 57, the parties to an adjudication are jointly and severally liable to pay the adjudicator's fees and are each liable to contribute to the adjudicator's fees and expenses in equal proportions, or the proportions that the adjudicator may determine. An adjudicator may make a determination that a party pays all, or bears a greater proportion of his or her fees, if in the adjudicator's view, the claimant's claim or the respondent's response was without substantial merit, or a party to the adjudication acted in a contemptuous or improper manner during the adjudication.

[65] I think it is fair to summarise the legal position by saying that an adjudicator has a limited discretion to determine liability for costs against any of the parties, which discretion should be exercised judicially not capriciously. There is clearly an overarching presumption that the parties will bear their own costs and an equal proportion of the adjudicator's fees and expenses in

adjudications under the Act unless the particular circumstances dictate otherwise.

- [66] The Owners have clearly been the successful party in this adjudication. Each party took the risk that its stance on the matters at issue would be vindicated in an adjudication and on that point it is the Owners' view that the Builder is not entitled to any further payment in respect of the contract works, either as a debt due and owing under sections 22 and 23 of the Act or on the merits under the Contract, that has prevailed entirely.
- [67] I have fixed and allocated my fees and the expenses of this, my determination, at **\$1,500.00** inclusive of GST.
- [68] I am not persuaded that there has been bad faith on the part of any party to this proceeding.
- [69] However, the Builder brought the adjudication claim on the basis of default liability when his own payment claim was plainly invalid and on the merits when he had already been paid more than his contractual entitlement.
- [70] I am satisfied that there are circumstances in this case that warrant a conclusion under s57(4)(a) that the Builder's position was largely without substantial merit.
- [71] I appreciate that the Builder may consider that he had a point to put forward in respect of his statutory and contractual rights in relation to the matters in dispute. However, in my respectful view, the Builder "*should have known about the weakness of [his] case*"

and that he was pursuing the claim “*in defiance of commonsense*”<sup>20</sup>.

[72] In the circumstances, I have concluded that the Builder’s claim was without substantial merit and therefore I determine and direct that the Builder is liable to meet the Owners’ costs and expenses in the sum of **\$1,500.00** within 2 days of receipt of this determination and the whole of my fees and expenses in this adjudication.

[73] The Builder has paid the amount of **\$1,500.00** as security for my fees and expenses in this matter. I have fixed my fees and expenses in this matter in the GST inclusive amount of **\$1,500.00** and accordingly there is no further amount to be paid in respect of my fees and expenses.

### **CHARGING ORDER**

[74] Was a charging order sought by the claimant over land owned by the respondent?

No.

[75] Was a charging order sought by the claimant over land owned by a person other than the respondent?

No.

### **CONCLUSION**

[76] In conclusion therefore, I determine and direct that:

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<sup>20</sup> *Trustees Executors Limited v Wellington City Council* HC, Wellington, CIV-2008-485-739, 16 December 2008 at [52]

- The Owners are not liable to pay the Builder any amount as a debt due under sections 22 & 23 of the Act:
- The Owners are not liable to pay the Builder any further amount under the Contract:
- The Builder is liable to pay the Owners the amount of **\$1,500.00** in respect of their costs and expenses of the adjudication within 2 working days of the date of receipt of this determination:
- I have fixed my fees and the expenses of this, my determination, in the amount of **\$1,500.00** (inclusive of GST);
- My fees and expenses shall be met in full by the Builder;
- The Builder has paid the amount of **\$1,500.00** as security for my fees and expenses in this matter and accordingly there is no further amount to be paid.

#### **CORRECTION (s47(3))**

[77] An Adjudicator may, on his or her own initiative, correct in the determination any errors in computation or any clerical or typographical errors of a similar nature, within 2 working days of the parties being given their copies of the determination. You should read the determination thoroughly as soon as you get it. If you think there are any such errors, you should tell the Adjudicator at once, so they can be corrected within the time allowed.

**DATED** the 1<sup>st</sup> day of December 2014



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**JOHN GREEN  
ADJUDICATOR**

## IMPORTANT

### **Statement of consequences for defendant if defendant takes no steps in relation to an application by a plaintiff to enforce the adjudicator's determination by entry as a judgment.**

If the adjudicator's determination states that you, as a party to the adjudication, are liable to make a payment and you fail before the close of the relevant date, to pay the amount determined by the adjudicator, the plaintiff may do all or any of the following:

- (a) recover from you, as a debt due, in any court,-
  - (i) the unpaid portion of the amount; and
  - (ii) the actual and reasonable costs of recovery awarded against you by that court:
- (b) if the plaintiff carries out construction work under a construction contract, serve notice on you of the plaintiff's intention to suspend carrying out construction work under the contract:
- (c) apply for the adjudicator's determination to be enforced by entry as a judgment in accordance with subpart 2 of Part 4 of the Construction Contracts Act 2002 (the "fast-track" provisions in the Act).

### **Defendant** means a party-

- (a) against whom an adjudication determination is made; and
- (b) who is liable, or will be liable if certain conditions are met, to pay an amount of money under the determination; and
- (c) against whom enforcement of the determination is sought.

### **Plaintiff** means a party-

- (a) in whose favour an adjudication determination is made; and
- (b) to whom amount of money is payable, or will be payable if certain conditions are met, under the determination; and
- (c) who seeks enforcement of the determination.

### **Relevant date** means-

- (a) the date that occurs 2 working days after the date on which a copy of the relevant determination is given to the parties to the adjudication; or
- (b) if the adjudicator determines a later date, that later date.