

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2020-404-572  
[2020] NZHC 871**

BETWEEN THE FLETCHER CONSTRUCTION  
COMPANY LIMITED  
Applicant

AND SPOTLESS FACILITY SERVICES (NZ)  
LIMITED  
Respondent

Hearing: 17 April 2020

Appearances: A M Callinan for Applicant  
S C Price, J K Stewart and R A Donald for Respondent

Judgment: 30 April 2020

---

**REASONS FOR JUDGMENT OF PETERS J**

---

This judgment was delivered by Justice Peters on 30 April 2020 at 4.45 pm  
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Simpson Grierson, Auckland  
MinterEllisonRuddWatts, Auckland

[1] On 21 April 2020, I issued a results judgment in this matter as follows:<sup>1</sup>

Pending further order of the Court, pursuant to s 24A(2)(e) Construction Contracts Act 2002, I order Spotless to lift its suspension on notification to Spotless that FCC has deposited the amount of payment claim 44 (\$2,067,715.86 excluding GST) with a stakeholder, to be held on interest bearing deposit, and to be disbursed in accordance with further order of the Court.

[2] These are my reasons.

[3] By without notice application for interlocutory injunction dated 16 April 2020, the applicant (“FCC”) sought the following orders:

- (a) Restraining the respondent from taking any step to suspend its subcontract works on the Commercial Bay Project located on the corner of Quay, Custom, Albert and Queen Streets in Downtown Auckland (Commercial Bay) until further order of the court, including restraining the defendant from taking any further steps to give effect to the Notice of Intention to Suspend dated 18 March 2020 and the Suspension Notice dated 14 April 2020 purporting to suspend its subcontract works from 5pm on 14 April 2020;
- (b) For any further relief the court thinks just; and
- (c) For costs.

[4] I heard the application on 17 April 2020, on a *Pickwick* basis. Although the application had been threatened for some time, FCC only filed its application and supporting documents, and served the respondent (“Spotless”), on 16 April 2020. Spotless was represented by counsel at the hearing on 17 April 2020 but I accept their preparation would have been hampered due to shortness of time.

## **Background**

[5] FCC is the head contractor on the “Commercial Bay” development situated at the northern, or harbour, end of Queen Street, Auckland. The overall development is being undertaken by Precinct Properties New Zealand Limited, or an associated company (“Precinct”).

---

<sup>1</sup> *The Fletcher Construction Company Ltd v Spotless Facility Services (NZ) Ltd* [2020] NZHC 780 at [3] (footnotes omitted).

[6] Spotless is one of FCC's subcontractors.

[7] Commercial Bay comprises a 40-level office tower, of which PricewaterhouseCoopers ("PwC") is the anchor tenant, and a retail development which includes more than 100 retail/food and beverage tenancies. FCC, if not Spotless, considers the development will be, or should be, completed quickly once construction work recommences on site, as to which see below. This, in turn, will enable PwC and other tenants to complete their fitouts and commence operations.

[8] FCC subcontracted Spotless to undertake the "mechanical services works" for the development. Ms Pollard, a commercial director of FCC on Commercial Bay since August 2018, summarises these works as involving:

... all the mechanical infrastructure and pipework needed for climate control (heating and cooling), and to ensure the fresh air intake and air quality and ventilation needed for the building.

[9] Since 11.59 pm, 25 March 2020, New Zealand has been at what is known as Alert Level 4 of its response to the COVID-19 pandemic, and all but essential construction work has been halted. It has been anticipated for several weeks that New Zealand would move to Alert Level 3, which occurred at 11.59 pm, 27 April 2020, meaning at least some construction work will be able to resume on the site.

## **Dispute**

[10] On 14 April 2020, Spotless advised FCC it would suspend work on the site from 5 pm that day. This application by FCC followed, essentially to require Spotless to continue working on the site.

[11] Spotless contends it was entitled to suspend because FCC's payment schedule 44 ("PS44"), responding to Spotless's payment claim 44 ("PC44"), was invalid because it did not comply with the requirements of s 21 Construction Contracts Act 2002 ("CCA"). Spotless is correct that it was entitled to suspend if PS44 was invalid.<sup>2</sup>

---

<sup>2</sup> Construction Contracts Act 2002, ss 23 and 24A; *Oceania Football Confederation Inc v Engineered Solutions & Systems Ltd* [2019] NZHC 1439 at [128]; *Fowler Homes Southern Lakes Ltd v Bose* [2017] NZHC 1707 at [88]; and *Metalcraft Industries Ltd v Christie* HC Whangarei CIV-2006-488-645, 15 February 2007 at [2].

However, FCC contends PS44 was not invalid. This dispute will have to be resolved at a later date but, in the meantime, the issues for me are:<sup>3</sup>

- (a) Whether there is a serious question to be tried, that is a question which is not vexatious or frivolous, that Spotless was not entitled to suspend or, in other words, that PS44 was valid;
- (b) If so, where the balance of convenience lies; and
- (c) Standing back, what is the overall justice of the position.

### **Serious issue to be tried**

[12] The CCA makes provision for a payment claim by, in this case, Spotless as a subcontractor, and a payment schedule in response by, in this case, FCC as a contractor. Sections 20 and 21 CCA respectively govern the contents of each.<sup>4</sup> Section 21(3) is particularly important in the context of this case. Section 21 provides:

#### **21 Payment schedules**

- (1) A payer may respond to a payment claim by providing a payment schedule to the payee.
- (2) A payment schedule must—
  - (a) be in writing; and
  - (b) identify the payment claim to which it relates; and
  - (c) state a scheduled amount.
- (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
  - (a) the manner in which the payer calculated the scheduled amount; and
  - (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and

---

<sup>3</sup> *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 at 133; and *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12].

<sup>4</sup> The contract between FCC and Spotless includes provisions relating to the submission of payment claims and schedules but counsel argued the application on the provisions in the CCA.

- (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

[13] Section 21(3) is particularly relevant because it states what the payment schedule must "indicate" if the scheduled amount, being the amount the payer, FCC, proposes to pay, is less than the claimed amount, as occurred in this case.

[14] The parties referred me to various authorities in which the Court has considered whether a payment claim and/or schedule meets the requirements of the CCA. Summarising the main points that arise from these, technical deficiencies will not invalidate a payment claim or schedule; a payment schedule must give the payee all the information it needs to understand the payer's position, so that the payee may decide whether to pursue its claim and the case it would be required to meet at adjudication; and there must be an attempt by the payer to address the payee's claim.<sup>5</sup>

#### *PC44*

[15] Spotless submitted PC44 on 24 January 2020, claiming \$2,067,715.86 plus GST as the sum due from FCC for work done between 1 and 31 January 2020.

[16] PC44 is an itemised list of more than 500 items, of which 320 relate to agreed "base" contract works and 219 relate to variations. \$851,660.09 of Spotless's total claim was for base contract works and \$1,216,055.77 for variations.

[17] As the "44" suggests, PC44 was the 44th claim Spotless had submitted and, on my reading of it, brought Spotless's gross claim to date, excluding GST, to more than \$49 million.

[18] PC44 includes, for each individual item of work, the contract value for that item, the previously certified (or agreed) amount, the amount of the current claim, and the "claim to date", being the sum of the previously certified amount and the amount

---

<sup>5</sup> *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA) at [42]; *Westnorth Labour Hire Ltd v SB Properties Ltd* HC Auckland CIV 2006-404-1858, 19 December 2006 at [29]-[30]; and *SOL Trustees Ltd v Giles Civil Ltd* [2014] NZCA 539, [2015] 2 NZLR 482 at [58]-[59].

of the current claim. On the face of PC44, Spotless sought a payment in respect of approximately 70 of the base contract works and approximately 25 of the variations.

*PS44*

[19] FCC provided PS44 on 21 February 2020. This follows a similar format to the payment claim but instead of reproducing the amount of the current claim, identifies any variance between the amount claimed and the amount FCC agrees is due. The document also includes a column of “comments”. Spotless’s complaint is that FCC failed to indicate the manner in which it calculated the amount it proposed to pay, being the “scheduled amount” in the terminology of the CCA, and to indicate FCC’s reason or reasons for the differences or variances.<sup>6</sup>

[20] Of Spotless’s claim for \$2,067,715.86, FCC rejected approximately \$1,295,360.98, specifically \$542,964.10 of the sum claimed for base contract works and \$752,396.88 of the sum claimed for variations.

[21] On the face of it, this left approximately \$700,000 payable to Spotless. However, FCC also included “contra charges” totalling \$4,831,058.61. The inclusion of the contra charges caused a deficit of \$4,058,703.65 in FCC’s favour. Prior to that FCC’s total contra charges had been \$29,048.29.

[22] On 26 February 2020, Spotless advised FCC that it considered PS44 was invalid. This advice led to correspondence between the parties and their solicitors in the course of which, on 18 March 2020, Spotless gave notice of its intention to suspend works in the absence of payment of its claim within five working days. FCC did not pay and Spotless declined FCC’s requests to retract its notice.

[23] On 23 March 2020, the Prime Minister, Ms Jacinda Ardern, advised the country it was moving to Alert Level 3 immediately, and to Alert Level 4 at 11.59 pm on 25 March 2020. This brought work on the site to a halt.

---

<sup>6</sup> Construction Contracts Act, ss 19 and 21(3).

[24] When it appeared the country would move to Alert Level 3 on or about 24 April 2020, FCC began to make preparations for work to resume on site. On 14 April 2020, Spotless advised FCC it would suspend contract works from 5 pm that day and would no longer carry out even what it described as “essential activities/checks on site” required to be performed weekly (and which Spotless had been performing) to keep the site, and anyone inside, safe.

[25] FCC then made this application.

*Submissions regarding invalidity of PS44*

[26] Mr Price, counsel for Spotless, submitted, correctly, that FCC was required to comply with s 21(3) CCA because the amount FCC proposed to pay, that is the scheduled amount, was less than the claimed amount. Mr Price provided a list of the individual base contract works, variations, and contra charges in respect of which Spotless contended FCC had not complied with ss 21(3)(a) and (b) CCA.

[27] Although I have not examined Mr Price’s list in detail (and nor did counsel for FCC, Ms Callinan, for that matter), I have done some “random checking”. To the extent I can ascertain, this checking indicates Mr Price’s overall submission that PS44 is deficient in the respects Spotless contends, is correct — although Mr Price was incorrect in submitting that FCC had failed to update its “comments” column in respect of a number of items.<sup>7</sup>

[28] Ms Callinan made a number of submissions in response. First, she submitted that FCC’s payment schedules are prepared following a “walk through” of the development by an FCC quantity surveyor and a Spotless representative, at which the two agree the sum to be allowed. This submission is consistent with evidence from Ms Pollard. In particular, Ms Pollard’s evidence is that the “site walk” in respect of PC44 took place on 11 February 2020, with a Ms Cross being present for FCC and Mr Cahill for Spotless. Ms Cross did not agree that the works were as complete as PC44 would suggest, hence her lower certification. Mr Schnell, who gave evidence

---

<sup>7</sup> For example, items 3, 7, 17, 23 and 25, amongst others, have updating information in the comments column of PS44 which does not appear in PS43.

for Spotless, did not respond to this evidence but it may be the relevant affidavit of Ms Pollard was sworn subsequent to Mr Schnell's.

[29] Secondly, Ms Callinan submitted that PS44 should not be assessed in isolation of PC44 or of the many claims and schedules the parties have previously exchanged. Ms Callinan submitted that, on a project of this nature, the parties develop a practice which leads them to understand or infer the reason for a variance without it being necessary to state the reason for each and every item. For instance, Ms Callinan submitted that it can readily be seen that some of FCC's variances were a percentage of the amount claimed, from which the obvious inference was FCC agreed only some of the work claimed for had in fact been completed.

[30] The very significant issue, however, is in respect of the contra charges where FCC added 16 new items totalling \$4,757,955.55. For several of these contra charges, FCC included a comment that Spotless should "Please refer to aconex correspondence for breakdown of claim". For others, FCC comment that "Liquidated damages had been applied", or that there had been "4 weeks slippage" in the works.

[31] Aconex is the centralised communications system for those involved in works on the site. The important point is there was no "aconex correspondence" available to breakdown the claim.

[32] Ms Pollard's evidence in response is that, notwithstanding this, the reasons for the claim were well known to Spotless and had been referred to in previous meetings between the parties, the minutes of which she exhibited to her first affidavit. I note also that, when Spotless wrote to FCC on 26 February 2020, as referred to above at [21], it objected to any contra charge for delay on the grounds it and FCC had resolved all issues as to delay in 2019. This statement provides some support for Ms Pollard's contention that Spotless understood the reason for the contra charges or at least some of the substantial components.

### *Discussion*

[33] It is unnecessary for me to determine whether PS44, taken as a whole, meets the requirements of s 21(3) CCA. As I have said, on the face of it there are the

deficiencies in PS44 that Mr Price identified but I cannot rule out that Ms Callinan's submissions in response, and Ms Pollard's evidence as to the contra charges, will be relevant to the determination of the issue.

[34] Accordingly, I am satisfied there is a serious issue to be tried, in the sense referred to in [10] above, that PS44 was valid and Spotless was not entitled to suspend work on 14 April 2020.

### **Balance of convenience**

[35] The principal arguments for each party regarding where the balance of convenience lies are these.

#### *FCC*

[36] FCC seeks to have all work on site completed as soon as possible. To achieve completion, FCC needs Spotless to complete its works, and other subcontractors likewise.

[37] But for the delay caused by Alert Level 4, FCC contends the due dates for opening were 28 March 2020 for the retail component and 9 April 2020 for the tower. FCC and Precinct will now have to agree an extension to those dates to take account of the delay.

[38] Spotless does not agree these were the due dates under its contract with FCC and considers it is entitled to an "acceleration" payment, which Spotless puts at \$2.3 million, if it is to expedite works. FCC contends Spotless has suspended works to put additional pressure on FCC to make this payment, and also to pay PC44, when there is a genuine dispute.

[39] FCC is liable to Precinct for liquidated damages if it does not achieve completion by the (to be revised) due dates. Although Spotless says it is able to pay any award of damages, under the terms of the contract between FCC and Spotless, FCC can only require Spotless to indemnify it for up to 10 per cent of any liability FCC may have to Precinct.

[40] Delay also affects other subcontractors, who require Spotless to complete its work before they can progress, and affects tenants, both of the tower and retail development.

[41] FCC contends Spotless's suggestion other firms could carry out the remaining work is unrealistic. Even if FCC could engage another firm, issues would arise as to warranties in respect of the completed works.

[42] FCC acknowledges that, in effect, it is seeking a mandatory injunction, in that it wishes the Court to order Spotless to return to work. However, this is the course that will best preserve the status quo, that is, Spotless continuing to carry out the work it has now been undertaking for several years.

### *Spotless*

[43] Spotless contends, correctly, that it has a statutory right to suspend work if PS44 is invalid.<sup>8</sup> The Court, always vigilant in upholding the scheme of the CCA, should not lightly override a payee's statutory rights.

[44] The dispute over the due dates for completion is genuine; Spotless's performance is secured by bonds in favour of FCC and FCC holds a guarantee from Spotless's parent company; FCC could engage another firm to do the required works; and Spotless does not accept the point made in [40] above, that is that Spotless must complete its work before others can progress.

### *Discussion*

[45] The factors which influenced me to consider the balance of convenience lay in FCC's favour are these.

[46] First, the mechanical services work required of Spotless needs to be carried out to progress completion of the development. I do not consider it realistic for FCC to engage another firm to complete the work at this late stage. Accordingly, I accept there will be significant delay if Spotless does not resume work. Whatever the

---

<sup>8</sup> Construction Contracts Act, ss 23 and 24A.

financial consequences of that delay for Precinct, FCC and Spotless, delay will also have financial and other consequences for other subcontractors and for tenants. These parties have had no involvement in this dispute but, ultimately, are adversely affected by delay.

[47] Of course, if I decline to order Spotless to resume work, FCC may well just pay Spotless the amount claimed in PC44, on the basis that would be the lesser of two evils. But FCC may not pay, in which case all the parties to whom I have just referred are affected.

[48] Secondly, I take Spotless's point that it has a statutory right to suspend if PS44 is invalid. The Court would need good reason to interfere with that right. However, this is not a case where Spotless has suspended because of a concern that, if it continues to work, it may be throwing "good money" or hours after bad, in the sense of a genuine fear, FCC, is, or will be, unable to pay. There is no suggestion FCC will not be able to pay whatever sum may be due to Spotless under PC44, and under any future payment claim. Moreover, when I heard the application 10 or so days ago, Spotless had been out of its money, some \$2 million on its view of the matter, for almost two months. Many payees could not withstand such a delay and would at the very least have referred the dispute to adjudication under the CCA. That Spotless had not suggests it is able to withstand the lack of payment as regards its cashflow.

[49] Lastly, I accept each party can meet an award of damages. Both companies are very substantial. For this reason, the issue of damages and who is able to pay them is not a determinative factor.

[50] Taking all of these matters into account, I consider justice can be done to both parties by requiring Spotless to lift its suspension (s 24A(2)CCA permits a payee to lift a suspension at any time), subject to FCC paying the sum in dispute to a stakeholder.

### **Overall justice**

[51] The critical factor in considering the overall justice of the position is FCC's delay in seeking this injunction, having been notified as long ago as 18 March 2020

that Spotless intended to suspend work. FCC's immediate response to this advice was to say it would seek this injunction but it did not do so. I agree with Spotless that FCC's explanation — the consequences of the Alert Level 4 lockdown — do not in fact account for its delay, and the matter should have been put before the Court in a more timely manner so that Spotless was not put under unnecessary pressure to respond. Ultimately, however, I do not consider Spotless was prejudiced in its response, or that the four weeks in which FCC might have applied but did not caused any other prejudice to Spotless.

### **Conclusion**

[52] For these reasons, I made the orders in [1] above.

[53] This proceeding is to be called in the Duty Judge list at 10 am, 11 May 2020 for further directions. The parties will need to inform the Court of the steps they are taking to resolve their dispute as to PS44.

---

Peters J