IN THE COURT OF APPEAL OF NEW ZEALAND

CA28/2017
[2018] NZCA 36

BETWEEN	CUSTOM STREET HOTEL LIMITED Appellant
AND	PLUS CONSTRUCTION NZ LIMITED First Respondent
	PLUS CONSTRUCTION CO LIMITED Second Respondent

Hearing:	19 October 2017
Court:	Kós P, Harrison and Clifford JJ
Counsel:	R B Stewart QC, I Rosic and S S McMullan for Appellant A R B Barker QC and J G Walton for Respondents
Judgment:	7 March 2018 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Kós P)

[1] This appeal concerns the meaning of default provisions in a standard construction contract called NZS 3910:2003 (the contract). Each side has purported to cancel the contract, asserting breach by the other. What is to happen in such a case?

Background

[2] The appellant, Custom Street Hotel Ltd (Custom), owns the former Reserve Bank building at 67 Customs Street East, Auckland (the site). It wished to convert it into a hotel. On 1 November 2013 it entered a construction contract with the respondents, Plus Construction NZ Ltd and Plus Construction Co Ltd (collectively, Plus) for $14.45 million plus GST. But problems overwhelmed the project. Plus says that was because of Custom's failure to obtain consents. Custom says Plus could still have made progress, that it failed to resource the project adequately and that it simply abandoned the job.

[3] In July 2014 Plus stopped work on the site. It advanced three claims, initially before an adjudicator, under the Construction Contracts Act 2002 (CCA). The adjudicator, Derek Firth, found fault on both sides. In a decision dated 15 October 2014 he said "the fault for the shambles does not all lie at the door of Plus". But he also found there was much work Plus could have completed despite the relevant consents being incomplete. Time was now at large. Plus was entitled to a reasonable time to complete the work.

[4] The last consent required was then obtained in November 2014. The parties then discussed making a fresh start. A new programme of works was canvassed. Before these discussions ended, Plus complained about non-payment of some of its invoices. On 27 January 2015 it issued a default notice for two outstanding payment claims totalling $258,508. Part of that sum had been due since November 2014. The notice was issued pursuant to cl 14.3.1(b) of the contract. If the principal's defaults were not rectified within 10 working days, rights of suspension or termination arose.[1] The 10-working-day period would expire at midnight on 11 February 2015.

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[1] See below at [16] of this judgment.

[5] Before that, on 5 February 2015, the project engineer (the engineer) suspended work on the site on the basis of alleged breaches by Plus concerning site safety. Plus was not operating on the site in any event. But the engineer advised that "all work on site other than that required to make the site safe is suspended". The suspension was to remain in place "until we are satisfied that you can provide a safe working environment".

[6] At 5.12 pm on 11 February 2015, before the 10-day working period under Plus's default notice expired, Plus sent an email to the engineer purporting to require him to suspend the contract works under cl 14.3.3 of the contract.[2] The project engineer, who was overseas at the time, also received a call from a representative of Plus. The engineer told the representative the contract works were already suspended for health and safety reasons, and it was unclear to him how the contract works could be further suspended. He said that he would give the matter more consideration the next day.

[7] The following morning, on 12 February 2015, Plus wrote to the engineer noting, incorrectly, his "advice that as the work was already suspended you will not be issuing a further suspension notice". The email went on to say that Plus would therefore proceed to terminate the contract. A termination notice was attached to an email shortly sent thereafter.

[8] Later the same day Custom paid the amounts outstanding under the default notice of 27 January 2015. It is common ground Custom did not pay within the 10-day period in the default notice. That is, before midnight on 11 February 2015.

[9] On 20 February 2015 Custom challenged the validity of Plus's notice of termination. It also issued a notice of default itself on the basis that Plus had "abandoned the contract" and "persistently, flagrantly or wilfully neglected to carry out [its] obligations under the [c]ontract".

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2 See below at [16] of this judgment.

[10] Plus throughout has maintained that it had validly terminated the contract on 12 February 2015. It took no steps to rectify the defaults asserted by Custom in its 20 February 2015 notice.

[11] On 11 March 2015 Custom purported to terminate the contract for breach on the premise that Plus had not itself terminated validly. Custom then sought to call on a performance bond.[3] That required certification from the engineer.

[12] On 16 March 2015 Plus sought an interim injunction to restrain the engineer from issuing a certificate under the bond and to restrain Custom from claiming under that bond.

[13] On about 18 March 2015 the parties entered into a settlement agreement in respect of the injunction proceeding. The agreement records that the parties were in dispute as to whether the engineer was entitled to issue a certificate, and Custom entitled to make demand under the bond. The parties agreed that those issues would be determined by the engineer. That was despite the fact they were partly questions of law. If the engineer determined that he was entitled to issue a certificate, he would do so, Custom would make demand on the bank that had provided the bond, and the amount paid out would be paid into an escrow account pending the outcome of arbitration. The parties agreed to refer that dispute to arbitration before the Hon Rodney Hansen QC (the arbitrator).

[14] On 25 March 2015 the engineer certified that $24,948,392 was properly due and payable under the contract, this being the projected additional cost of completing the contract works via another contractor. The following day the engineer issued a certificate under the bond, certifying that the contractor had failed to perform its obligations under the contract, and failed to rectify its default within the time set out in a default notice, and that "[t]he amount claimed under the bond is properly due under the contract". The engineer certified that the bond amount of $3,612,500 was payable.

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3 See below at [17] of this judgment.

Three contracts

[15] Three contracts are at the heart of the questions we have to consider.

The contract

[16] The contract is the standard NZS 3910:2003. The relevant provisions for present purpose are these:

> **7.1 Indemnity**
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> **7.1.1** Except as otherwise provided in the Contract Documents the Contractor shall indemnify the Principal against:
>
> (a) Any loss suffered by the Principal which may arise out of, or in consequence of the construction of, or remedying of defects in the Contract Works;
>
> (b) Any liability incurred by the Principal in respect of injuries to Persons or damage to property which may arise out of, or in consequence of the construction of, or remedying of defects in the Contract Works;
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> (c) Any Costs the Principal may incur in respect of that loss or liability.
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> …
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> **14.2 Default by the Contractor**
>
> **14.2.1** The Principal may at its option after giving notice to the Contractor either terminate or resume possession of the Site in the event of:
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> (a) The Contractor failing to execute the Contract Agreement under 2.7 or the Contractor's bond under 3.1 where required by the Contract Documents; or
>
> (b) The Contractor subletting the whole or substantially the whole of the Contract Works without the consent in writing of the Principal; or
>
> (c) The Engineer certifying in writing to the Principal that in his or her opinion the Contractor has abandoned the contract or is persistently, flagrantly or wilfully neglecting to carry out its obligations under the contract;
>
> and the Contractor's default has not been remedied within 10 Working Days of receiving the notice.
>
> …

14.2.3 If the Principal elects to resume possession of the Site under the provisions of 14.2.1 … it may:

(a) Forthwith expel the Contractor without terminating the contract or relieving the Contractor from any of its obligations under the contract; and

(b) Complete and remedy defects in any part of the Contract Works remaining to be completed and for that purpose may let contracts for such work or employ any Persons other the Contractor; and

(c) Take possession of, use and permit other Persons to use Materials, Plant, Temporary Works and other things which are on the Site owned by the Contractor and are necessary for completing and remedying defects in the Contract Works; and

(d) Require the Contractor to arrange within 10 Working Days the assignment to the Principal or its nominee without payment the benefit of any agreement for the supply of Materials or execution of work under the contract.

In any such case the Contractor shall not be entitled to any further payment until the completion of the Contract Works.

14.2.4 On completion of the Contract Works, any Plant, Temporary Works and surplus Materials of which the Principal has taken possession shall be handed back to the Contractor. The Engineer shall enquire into the Cost to the Principal of completing the Contract Works and certify accordingly. Should the amount certified exceed the Cost to the Principal had the Contract Works been completed by the Contractor, the difference between the two amounts shall be certified by the Engineer and paid by the Contractor to the Principal. Should the amount certified be less than the Cost to the Principal had the Contract Works been completed by the Contractor, the difference between the two amounts shall be paid by the Principal to the Contractor.

14.2.5 If the Principal elects to terminate the contract under 14.2.1 it shall give written notice to the Contractor of its election. The contract shall thereupon be terminated. The Principal may thereupon expel the Contractor from the Site and may take all or any of the further steps in 14.2.3(b), (c) and (d), and may claim damages for the Contractor's breach of contract. If the Principal completes the Contract Works or arranges for them to be completed then 14.2.4 shall apply, but any amount payable to the Contractor thereunder shall be subject to any damages to which the Principal shall be entitled as a result of the Contractor's breach. …

14.3 Default by the Principal

14.3.1 In the event of the Principal:

(a) Failing to execute the Contract Agreement under 2.7 or the Principal's bond under 3.2 where required by the Contract Documents; or

(b) Failing to pay the Contractor the amount due under any Payment Schedule; or

(c) Obstructing the issue of any Payment Schedule or any certificate; or

(d) Becoming bankrupt or going into liquidation or having a receiver or statutory manager appointed and the assignee, liquidator, receiver or statutory manger as the case may be failing within 10 Working Days to make arrangements satisfactory to the Contractor for continued payment of amounts due under the contract; or

(e) Abandoning the contract; or

(f) Persistently, flagrantly or wilfully neglecting to carry out its obligations under the contract;

the Contractor may notify the Engineer of the default.

…

14.3.3 If the Principal's default is not remedied within 10 Working Days after the giving of such notice under 14.3.1 or 14.3.2 the Contractor may require the Engineer to suspend the progress of the whole of the Contract Work under 6.7. Following such suspension the Contractor shall be entitled without prejudice to any other rights and remedies to terminate the contract by giving notice in writing to the Principal.

...

The performance bond

[17] On 16 January 2014 ANZ Bank New Zealand Ltd provided Custom with a contractor's performance bond of up to $3,612,500 (being 25 per cent of the contract price). The bond was payable on receipt of the engineer's certificate, in these terms:

2. The Engineer's Certificate shall state, in the Engineer's opinion:

(A) That the contractor has failed to perform its obligations under the construction contract; and

(B) That the contractor has been given notice of the failure and has failed to rectify that failure within the time set out in the notice; and

(C) The amount claimed under the Bond is properly due under the contract.

The settlement agreement

[18] As noted earlier, the settlement agreement of March 2015 provides a two-step process for determination of the "the Dispute":

> Plus does not agree that the Engineer is entitled to issue a certificate or that [Custom] is entitled to make a demand on the Bond. The parties to refer to this as (the '**Dispute'**).

The agreement then provides for the engineer to determine that Dispute by formal decision pursuant to clause 13.2.4 of the contract.[4] Then on receipt of the engineer's decision it is "deemed referred to arbitration". Clause 12 of the settlement agreement provides:

> **12** If the arbitrator's decision is that the Engineer was entitled to issue the Certificate and [Custom] was entitled to make a demand on the Bond for the amount certified, the arbitrator shall direct the amount certified to be paid to [Custom] from funds held by the Escrow firm. If the arbitrator's decision is that the Engineer was not entitled to issue the certificate and/or [Custom] was not entitled to make a demand on the Bond, the arbitrator shall direct the funds held by the Escrow firm to be paid to Plus.

Award

[19] The arbitrator found the engineer was not entitled to issue the certificate. Plus validly terminated the contract on 12 February 2015 and could not have been in default when the engineer issued his certificate to that effect on 19 February 2015. Additionally, the engineer wrongly certified $24,948,392 was payable under either cls 14.2.5 or 7.1.1. Instead, a claim by Custom for additional costs of completing the works was governed by cl 14.2.4 and could only be determined upon completion of the Contract Works.

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4 The engineer's decision was described above at [14] of this judgment.

Judgment

[20] Custom obtained leave to appeal to the High Court on five questions of law.[5] The case came before Gilbert J who dismissed the appeal in its entirety.[6] We set out the reasoning of the Judge later in this judgment when we discuss the questions referred for our determination.

[21] In a separate decision Gilbert J granted Custom leave to appeal to this Court on four of those five questions of law.[7] The questions now before this Court are these:

(a) **Question 1**: Must the nature of Plus' breach be repudiatory before Plus is disentitled from terminating the contract?

(b) **Question 2**: Must Plus validly terminate the contract under cl 14.3.3 of, if applicable, the Contractual Remedies Act 1979?

(c) **Question 3**: Can Custom, on a proper interpretation of cls 14.2.4 and 14.2.5, recover the additional cost of completion prior to completing the contract works?

(d) **Question 4**: Can Custom recover the additional cost of completion without first having its claim admitted and determined as to liability and quantum?

[22] The fifth question determined by Gilbert J, which is not now before this Court, was whether the arbitrator erred in holding Custom could not rely upon the amounts claimed under the indemnity clause in the contract as amounts "properly due under the contract". Gilbert J held the arbitrator did not so err.[8]

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5 *Custom Street Hotel Ltd v Plus Construction NZ Ltd* [2016] NZHC 1180.
6 *Custom Street Hotel Ltd v Plus Construction NZ Ltd* [2016] NZHC 2011 [HC substantive judgment].
7 *Custom Street Hotel Ltd v Plus Construction NZ Ltd* [2016] NZHC 2934.
8 HC substantive judgment, above n 6, at [60].

The appeal

[23] The Arbitration Act 1996 governs this Court's jurisdiction. It limits appeals to questions of law arising from the award.[9] Under cl 5(10) of sch 2 to the Arbitration Act a "question of law":

> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
>
> (b) does not include any question as to whether—
>
> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
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> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

Questions of evidential adequacy and fact are beyond this Court's remit; the Court must accept the factual findings made by the arbitrator.[10]

Question 1: Must the nature of Plus' breach be repudiatory before Plus is disentitled from terminating the contract?

Award and judgment

[24] The arbitrator held Plus had not repudiated the contract or evinced an intention to do so. It was not prevented from relying on Custom's breach to terminate the contract. The engineer was wrong to certify under cl 2(A) of the bond that Plus had failed to perform its obligations under the contract.

[25] On appeal Gilbert J held the circumstances disentitling were not limited to repudiation of a contract.[11] Breach of an essential term or other serious breach entitling the other party to cancel the contract under s 7 of the Contractual Remedies Act 1979 (CRA) would suffice.[12] Custom could only terminate under the terms of the contract for breaches by Plus if Plus failed to remedy its default within 10 working days of receiving notice of the engineer's certificate.[13] The engineer's certificate was

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9 Arbitration Act 1996, sch 2, art 5.
10 *Carr v Galloway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 at [14] per McGrath J.
11 HC substantive judgment, above n 66, at [25].
12 Now distributed among ss 36–40 of the Contract and Commercial Law Act 2017.
13 HC substantive judgment, above n 6, at [26].

not issued until 19 February — after Plus' notice purporting to cancel the contract. The alleged breaches by Plus could only justify cancellation prior to the expiry of the 10-working-day notice period if they amounted to a repudiation of the contract by Plus. The arbitrator was therefore correct to focus on whether Plus had repudiated the contract. Having found as a fact Plus did not repudiate, and remained ready and willing to perform, the arbitrator had not erred.[14]

Submissions

[26] Mr Barker QC, for Plus, takes little issue ultimately with the Judge's reasoning on this question. In short he accepts that an extant, unremedied breach does not have to be repudiatory to prevent a party from cancelling. But, relying on the decision of the Supreme Court in *Kumar v Station Properties Ltd*, the breach would have to be of an essential term to preclude exercise of a right of cancellation.[15]

Discussion

[27] We consider the Judge stated correctly the law delineated by the Supreme Court decisions in *Kumar* and *Ingram v Patcroft Properties Ltd* in this passage of his judgment:[16]

> [25] It is clear that the circumstances in which a party may be disentitled from cancelling a contract are not limited to those where that party has repudiated the contract; a breach of an essential term or other serious breach entitling the other party to cancel the contract under s 7 of the Contractual Remedies Act could be sufficient. However, such breach will only disentitle the party from cancelling the contract where it would otherwise benefit from its own wrong.

[28] The position may be stated thus: Custom was in breach of its payment obligations to Plus, a breach it only rectified after Plus gave notice of cancellation. After the adjudicator's decision time for performance by Plus was at large. The parties had not yet resolved the new programme of works by which Plus's further performance might be assessed. It followed that Plus was not, at the time it gave notice of termination, itself in breach of an essential term. Accordingly: (1) the question of

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14 At [26].

15 *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99.

16 HC substantive judgment, above n 6. See also *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433 at [40].

whether giving notice amounted to taking advantage of its own wrong did not arise; and (2) it could only be disentitled from cancelling if it had repudiated the contract. The arbitrator found as a matter of fact that it had not done so. That factual finding must be respected on appeal.

Conclusion

[29] The answer to Question 1 is "no", but in any event Plus had neither repudiated the contract nor breached an essential term at the time it gave notice of cancellation.

Question 2: Must Plus validly terminate the contract under cl 14.3.3 or, if applicable, the Contractual Remedies Act 1979?

[30] Question 2 really asks this question: is a suspension of the contract works by the engineer in response to a default notice a precondition to the contractor's right to terminate under cl 14.3.3? It will be recalled that the engineer had not actually suspended works in response to the 27 January default notice issued by Plus. In part, because he had already suspended works for health and safety reasons. For convenience, we set cl 14.3.3 out again:

> **14.3.3** If the Principal's default is not remedied within 10 Working Days after the giving of such notice under 14.3.1 or 14.3.2 the Contractor may require the Engineer to suspend the progress of the whole of the Contract Work under 6.7. Following such suspension the Contractor shall be entitled without prejudice to any other rights and remedies to terminate the contract by giving notice in writing to the Principal.

Award and judgment

[31] The arbitrator observed that if there was a default left unremedied within the 10-working-day limit the contractor was entitled to "require" the engineer to suspend the whole of the contract works. The engineer must then give effect to that requirement. The arbitrator found that a failure by the engineer to take this "purely formal step" of issuing an instruction to suspend work would not deny the contractor its substantive rights to terminate under cl 14.3.3.

[32] Gilbert J came to the same result by a different path. He disagreed with the arbitrator's interpretation of cl 14.3.3. He preferred instead to rely upon s 7 of the

CRA, which provided for the cancellation of contracts.[17] Clause 14.3.3 did not preclude the application of s 7. It merely dealt with the manner of exercise of the right of suspension and the consequence of its exercise. The contractor retained the right to terminate even if it had first affirmed the contract by first exercising the right to require suspension of works. But it was not a prerequisite, and the contractor could elect to terminate as soon as the 10-working-day period had expired.

Submissions

[33] Mr Stewart QC, for Custom, submits that notice to suspend *and* suspension by the engineer were essential prerequisites for termination under cl 14.3.3. The words "[f]ollowing such suspension" must be given effect to, and the clause should be construed strictly. The High Court was wrong to rely on the CRA: its availability was not pleaded and the question on which leave was given to the High Court was confined to the validity of termination under cl 14.3.3.

Discussion

[34] We do not accept Custom's submissions on Question 2 for two reasons.

[35] First, we start with the availability of cancellation rights under s 7 of the CRA. This was the basis on which Gilbert J found for Custom on Question 2. Plus's notice of 27 January 2015 was expressed to be given pursuant to cl 14.3.1(b). Whether Plus had terminated validly was a preliminary issue in the arbitration, affecting the first point of claim: whether Plus was in breach of its obligations, thereby triggering cl 2(A) of the performance bond. We do not read the pleadings, argument or authorities as limiting justification for cancellation to cl 14.3.3. The question of substance is whether Plus was entitled to give notice of cancellation, not whether the legal basis it asserted at the time was correct. The law of contract is not much concerned with assertions of law made by laymen. Apart from issues concerning formation of contract, it is primarily concerned with the legitimacy of post-contractual acts. A secondary concern is to hold contracting parties to their word when there has been detrimental reliance on what was said. That is seldom the case with mere assertions

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17 HC substantive judgment, above n 6, at [31].

of law, and it is not suggested it is the case here. As a matter of common law, rescission of a contract could be maintained even if the wrong basis therefor had been asserted.[18] The Supreme Court has recently confirmed that that principle survived enactment of the CRA.[19]

[36] We agree with Gilbert J that justification for cancellation under s 7 also remained available to Plus, essentially for the reasons given by him.[20] While cl 14 extends the statutory suspension rights the contractor would have under the CCA, it did not exclude contractor's rights under the CRA. That construction is consistent with s 72 of the CCA, and its successor, s 24A.[21]

[37] Secondly, we consider Plus in any event entitled to terminate under cl 14.3.3 despite the absence of a suspension notice by the engineer under that clause. We do not construe cl 14.3.3 as establishing a suspension condition precedent to termination. Defaults by the principal qualifying for suspension or termination under cl 14.3.3 all concern essential terms. We do not think the intention underlying the clause is that a contractor who has notified breach of an essential term, which breach has not been remedied within the requisite 10 working days, must seek (and achieve) suspension before exercising a right to cancel. Some questions might usefully be posed. What if (as here) the engineer does not act on the notice? What if (as also here) the works are already suspended (so that the act of suspension is practically immaterial)? Is the 10-day remediation period extended by notice to suspend? If so, how long for? If not, as seems likely, then what purpose is served in any case by requiring a notice of suspension which is immediately overtaken, a scintilla of time later, by a second notice — this time of cancellation?

[38] We see the purpose of cl 14.3.3 as clear. It creates a right to suspend, after 10 working days.[22] But it is a right, not a requirement. The construction of cl 14.3.3 is informed by the retained right to cancel in the CRA. It makes little sense that a

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18 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (QB); and *Pearce v Stevens* (1904) 24 NZLR 357 (SC).

19 *Kumar v Station Properties Ltd*, above n 15, at [66].

20 HC substantive judgment, above n 6, at [32]–[38].

21 See also *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 281 per Cooke P.

22 The benefit to the contractor being that it is not itself in breach by suspending work in the face of the principal's breach. A similar (but narrower) right to suspend exists under s 24A of the CCA.

contractor that wishes to exercise that cancellation right must first go through a charade of "suspending" and see its right to cancel mangled or misplaced if the engineer does not perform his or her duty to suspend. As we see it, therefore, cl 14.3.3 must be read as creating a right to cancel once the *right* to suspend exists. And that "following such suspension" must be read accordingly: that the right to cancel is triggered once the right to suspend is triggered. They are not true alternatives, because the contractor may suspend first, and then cancel. But it need not seek suspension before cancelling. That is the most logical construction of the contract, consonant with the reasonable expectations of the contracting parties.

Conclusion

[39] We conclude that formal suspension of the contract works by the engineer is not a precondition to the contractor's right to terminate under cl 14.3.3.

Question 3: Can Custom, on a proper interpretation of cls 14.2.4 and 14.2.5, recover the additional cost of completion prior to completing the contract works?

[40] The arbitrator held any claim for damages based on the additional cost of completing the contract works is governed by cl 14.2.4 and that the quantum could not be assessed until completion of the contract works.

[41] Gilbert J agreed with the arbitrator. As he saw it, cl 14.2.1 conferred two options if the contractor failed to remedy a default within the prescribed 10-working-day limit: the principal could cancel the contract *or* resume possession of the site.[23] Clauses 14.2.3 and 14.2.4 are engaged where the principal elects to resume possession, while cl 14.2.5 applies where the principal elects to cancel. Clause 14.2.3 provides that the contractor is not entitled to further payment until completion of the contract works. Clause 14.2.4 provides that upon completion of the contract works any "Plant, Temporary Works and surplus Materials" taken possession of by the principal are to be returned to the contractor. The engineer is to enquire into the cost to the principal of completing that work and certifies accordingly. If the sum certified is greater than the cost would have been had the contractor completed the works, the difference is to be paid by the contractor to the principal. If less, the principal is to

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23 HC substantive judgment, above n 66, at [44].

pay that difference to the contractor. Where the principal elects to complete the contract works or arranges another to do so a "wash-up" follows based upon the engineer's enquiry and certification as to costs actually incurred, and that only occurs once the contract works are completed. What cl 14.2.4 does not allow is for the contractor to claim damages based on an assessment of the projected costs to complete the works.[24]

Submissions

[42] Mr Stewart submits that the plain wording of cls 14.2.4 and 14.2.5 do not import the temporal restriction imposed by the High Court. First, cl 14.2.4 applies where the principal cancels and arranges for the contract works to be completed or completes the contract work itself. The principal is therefore entitled to the additional cost of completion when it organises or plans for the contract works to be completed. Secondly, the opening words of cl 14.2.4, which do not provide a temporal restriction, relate only to the principal's obligation to return certain materials to the contractor. Thirdly, the clause requires the engineer "enquire" into the cost to the principal of completing the contract works. "Enquire" suggests the engineer make an assessment because the actual cost is unknown. Fourthly, the enquiry is to be made into the cost "of completing the Contract Works". If the intention was as Gilbert J found, that would say "completed". Fifthly, the word "cost" in cl 14.2.4 is defined as including "expense or loss and overhead cost whether on or off the Site" and carries a common meaning throughout the contract that is plainly prospective in nature. Therefore, cl 14.2.4 is not, by definition, limited to costs actually incurred.

Discussion

[43] We set out cls 14.2.3 and 14.2.4 again here for convenience:

> **14.2.3** If the Principal elects to resume possession of the Site under the provisions of 14.2.1 … it may:
>
> (a) Forthwith expel the Contractor without terminating the contract or relieving the Contractor from any of its obligations under the contract; and

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[24] At [48].

(b) Complete and remedy defects in any part of the Contract Works remaining to be completed and for that purpose may let contracts for such work or employ any Persons other the Contractor; and

(c) Take possession of, use and permit other Persons to use Materials, Plant, Temporary Works and other things which are on the Site owned by the Contractor and are necessary for completing and remedying defects in the Contract Works; and

(d) Require the Contractor to arrange within 10 Working Days the assignment to the Principal or its nominee without payment the benefit of any agreement for the supply of Materials or execution of work under the contract.

In any such case the Contractor shall not be entitled to any further payment until the completion of the Contract Works.

14.2.4 On completion of the Contract Works, any Plant, Temporary Works and surplus Materials of which the Principal has taken possession shall be handed back to the Contractor. The Engineer shall enquire into the Cost to the Principal of completing the Contract Works and certify accordingly. Should the amount certified exceed the Cost to the Principal had the Contract Works been completed by the Contractor, the difference between the two amounts shall be certified by the Engineer and paid by the Contractor to the Principal. Should the amount certified be less than the Cost to the Principal had the Contract Works been completed by the Contractor, the difference between the two amounts shall be paid by the Principal to the Contractor.

[44] We agree with the conclusion reached by Gilbert J on this issue. We can state our reasons succinctly. Clauses 14.2.3 and 14.2.4 provide a clear temporal sequence. The latter clause applies only if the contract works have been completed. We reach that view for five reasons.

[45] First, it is what clause 14.2.4 itself says. It begins "[o]n *completion* of the Contract Works". Secondly, Custom's submission that those temporal words apply only to the first sentence would require the clause to be bifurcated, with the first sentence to be isolated and the balance applicable to a different time period. That is an awkward and unnatural interpretation, unlikely to have been intended in a contract drafted by and for practical professionals. Thirdly, we agree with Gilbert J that cl 14.2.4 follows in sequence with cl 14.2.3 and deals with a situation in which the principal resumes possession of the site to complete the works. It is, in practical effect at least, part of cl 14.2.3. There is a natural flow through clauses 14.2.3 and 14.2.4 all of which depend on the principal electing to complete the work itself. Clause 14.2.4 then provides for a wash-up, ex post completion of the works. Fourthly, the language

used later in the clause anticipates the contract works have been completed, referring to enquiry into "the Cost to the Principal of completing the Contract Work" (which must then be certified), and "had the Contract Works been completed by the Contractor" rather than "if". The tense of the scheme is in the past; that the work has been done and that definite sums are in issue. Fifthly, cl 14.2.3 states the contractor is not entitled to any further payment until the completion of the contract works. Given the certification process under cl 14.2.4 may lead to a payment being made to the contractor, that is a further indication the accounting in cl 14.2.4 takes place only on completion.

Conclusion

[46] The answer to Question 3 is "no".

Question 4: can Custom recover the additional cost of completion without first having its claim admitted and determined as to liability and quantum?

[47] The arbitrator held any claim for the additional cost of alternative performance must be brought under cl 14.2.4 and, as under Question 3, could only be assessed upon completion of the contract works. Gilbert J agreed and relied on the reasons he gave in relation to Question 3.[25]

[48] The corresponding conclusion we reach on Question 3 means it is unnecessary now to address Question 4.

Arbitral costs

[49] Custom sought to reopen the award of costs made against it by the arbitrator in the event it succeeded here. Given the outcome here we need not deal with that point.

Result

[50] The appeal is dismissed.

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[25] HC substantive judgment, above n 6, at [49]–[52].

[51] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Gilbert Walker, Auckland for Appellant
AlexanderDorrington, Auckland for Respondents