

# "CASHFLOW" THE LIFE BLOOD OF THE BUILDING INDUSTRY

The importance of maintaining interim payments

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*The Court of Appeal continues to reinforce Parliamentary intent.*

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Lord Denning's observations in 1970:

*There must be a 'cashflow' in the building trade. It is the very lifeblood of the enterprise.<sup>1</sup>*

seem to be enjoying a resurgence, despite a certain level of residual unwillingness<sup>2</sup>. The Court of Appeal quotes Lord Denning with approval again in *Salem Limited v Top End Homes Limited*<sup>3</sup>.

## Facts

Top End Homes had been contracted by Salem to convert and refit premises in Whangarei, which Salem had already let to the Ministry of Education. The contract was a *cost plus* contract, with varying margins being applied to cost, depending on the relevant activity. The work was late, and payments totalling \$920,477.13 had been made to November 2004 (against an initial "quote" of \$589,000).

Top End made a final claim of \$279,687.56 in January 2005. Unfortunately, Salem did not respond with a *payment schedule* in accordance with sections 21 and 22 of the Construction Contracts Act 2002, and Top End was able to procure summary judgement against Salem in July 2005.

## Appeal

On appeal to the Court of Appeal, Salem argued that Top End's claim was not properly a *payment claim* in terms of section 20(2)(c) of the Construction Contracts Act. Apart from its belief that the payment made in November the previous year had been agreed to be the final payment, Salem argued that the claim did not specify the work and period to which the claim related, applied the wrong percentages to the work and omitted deductions for retentions. Salem also counterclaimed for \$58,905 delay costs.

As Salem had accepted that the claim was a valid payment claim in earlier proceedings, the case was disposed of relatively simply. The Court of Appeal held that Salem had already conceded the point, and the appeal was dismissed.

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<sup>1</sup> *Dawnays Ltd v FG Minter* [1971] 2 All ER 1389, cited with approval in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, at 214 (HL) Lord Diplock

<sup>2</sup> see the decision of Gendall AJ in *Brooklyn Holdings v Able Handyman Services*, discussed in [http://www.johnwalton.co.nz/bits/contract\\_act.pdf](http://www.johnwalton.co.nz/bits/contract_act.pdf)

<sup>3</sup> Judgment of the Court of Appeal given by Panckhurst J on 12 December 2005 (CA160/05)

What was interesting, however, was the Court of Appeal's response to two arguments raised by counsel for Salem (there was a third, but it is of no particular relevance to this discussion).

The first related to the opportunity to raise a counterclaim in the context of an appeal against summary judgment. Salem's point was that the summary judgment only determined who was to be out of pocket in the meantime. The Court of Appeal's response provides stark relief to Gendall AJ's reasoning in *Brooklyn Holdings v Able Handyman Services*<sup>4</sup>:

*What is plain is that ss 20 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.*<sup>5</sup>

The second point was more in the nature of a substantive merit argument, that justice is not served by a deficient payment claim being enforced. The Court also gave this point short shrift, observing:

*... Salem should have filed a payment schedule ... In these circumstances, Salem has no option but to pursue these aspects outside the summary judgment process.*<sup>6</sup>

### **Comment**

The case is not only useful for reinforcing Lord Denning's *lifeblood* approach which is reflected in the Act, but also for reminding the industry that the first response should be a payment schedule, but if this opportunity is missed, the summary proceedings do not have to be the end of the matter. A summary judgment, or determination of an adjudicator under the Act, requiring an owner to pay a contractor does not preclude the matter from being reopened if and when a dispute is finally dealt with, whether in Court or at Arbitration.

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<sup>4</sup> See footnote 2 above

<sup>5</sup> At para 22

<sup>6</sup> At para 25