IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-002301
[2014] NZHC 2118

BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Plaintiff
AND	NZ WINDFARMS LIMITED Defendant

Hearing: 21-24 July 2014

Counsel: G P Blanchard for Plaintiff
J Smith QC and R G Smedley for Defendant

Judgment: 3 September 2014

JUDGMENT OF WHATA J

Introduction

[1] Concrete Structures (NZ) Limited (CSL) and NZ Windfarms Limited (NZ Windfarms) entered into a construction contract under which CSL was engaged to assist in the construction of a wind farm. The wind farm was duly constructed, but there were several problems along the way. CSL seeks to recover about $250,000 plus interest for variations that were not approved by NZ Windfarms' engineer. The critical issue before me therefore is whether or not the sought after variations should have been approved.

Background facts

[2] In March 2006 CSL entered into a contract with NZ Windfarms to carry out civil engineering and construction work at NZ Windfarms' Te Rere Hau Windfarm Development, Palmerston North. There were two key aspects of the contract namely to upgrade and maintain roads to enable access to the various tower locations and to construct the bases for the towers.

The contract

[3] The contract included the following particulars:

(a) The contract was a measure and value contract that included a schedule of quantities and prices;

(b) The contract price was $832,218.30 including GST or such other or lesser sum shall become payable under the contract;

(c) NZS 3910:2003 ("3910") was incorporated into the contract as the general conditions of contract except as where modified by the special conditions;

(d) Murray Fletcher was appointed by the defendant as the engineer to the contract;

(e) Clause 5.11.3 of the contract contained provisions concerning the obtaining of licences and consents under the contract:

> 5.11.3 The Principal shall at the Principal's expense obtain all licences, which may be required for the construction of the Contract Works and for the use of the Contract Works when constructed except as otherwise provided for in 5.11.4.

(f) Clause 5.11.6 of the contract provided that:

> 5.11.6 If licences, obtained by the Principal or by the Contractor are subject to conditions affecting the carrying out of the Contract Works, those conditions shall be notified to the other party and to the Engineer. If the compliance with these conditions causes delay in the completion of the Contract Works or additional Cost to the Contractor which in either case the Contractor could not reasonably have foreseen when tendering the compliance will be treated as if it was a Variation.

(g) Clause 6.2.1 of the contract provided that the dual role of the engineer in the administration of the contract was:

i. As an expert adviser to and representative of the defendant; and

ii. To independently of the contracting parties, fairly and impartially make decisions entrusted to him under the contract, to the value of the work and to issue certificates.

(h) Clause 6.7.1 of the contract provided that if the suspension of the whole or part of the works became necessary the engineer was required to instruct the contractor in writing to suspend the progress of the whole or any part of the works for such time as the engineer may think fit, and the contractor was required to comply with the instructions.

(i) Clause 6.7.3 of the contract provided that unless a suspension was due to default on the part of the contractor, the suspension was to be treated as if it was a variation.

(j) There are detailed provisions dealing with variations. Given their significance to the case I deal with them separately below at [45].

(k) Clauses 12.7.3 and 12.7.4 of the contract provided that in the event of unreasonable deduction of any amount from any contractor's payment claim, or final payment claim required the principal was to pay the contractor interest compounding monthly at a rate of interest equal to 1¼ times the average monthly interest rate payable by the contractor for overdraft facilities.

The claims

[4] CSL makes five different claims for variations to the construction contract. The first three relate to delays. The fourth and primary claim relates to works through inclement weather in winter.[1] There is also a claim for miscellaneous matters. This is addressed at [50].

---

[1] As I will explain below, CSL pleaded that the Engineer should have suspended the works through winter. This was abandoned at the hearing in favour of an amended claim for variation. Refer to [14] below.

Tower foundations suspension

[5] The first of the delays involved the suspension of the tower foundation work in the period 21 March to 24 March 2006. CSL complains that it was required to demobilise its work force from the tower foundation sites pending the obtaining of the land use consents. CSL says that as a result of this suspension it was delayed in carrying out the tower foundation work for four working days. The defendant does not accept that the delay in obtaining the land use consent was the problem; rather CSL was at fault because it unilaterally decided to commence the Tower works ahead of schedule.

Road works suspension

[6] Road works had to be suspended on 30 March 2006 to resolve issues identified by the Palmerston North City Council (Council). CSL claims that the Council advised it that NZ Windfarms had not completed the necessary resource consent requirements to be able to carry out the roading work and that the work should not continue. CSL says it was forced again to demobilise and that it was delayed in carrying out the roading work for approximately two days. It says that the engineer has failed to issue a variation to take account of this delay. NZ Windfarms says that the issue arose because of non-compliance by CSL.

Further tower work delay

[7] There was then a further delay relating to the tower foundation work on or about 24 April 2006. A building consent had not been obtained for the necessary works but NZ Windfarms says that the plaintiff knew consent had not been granted and agreed to find alternative work. Nevertheless the plaintiff claims that it was forced to demobilise its work force away from the tower foundation sites and that the suspension was in no part due to CSL's work and that as a result of the suspension CSL incurred additional costs to demobilise and remobilise its work force and that the suspension spanned nine working days.

Winter work

[8] The main claim relates to winter work. CSL contends that there was unusually inclement weather in the period April 2006 to July 2006 affecting the way that CSL could carry out its contractual obligations. CSL says that it advised the engineer that it was impossible to perform the work due to the extraordinary inclement weather conditions and sought a suspension of the works. It claims that the engineer failed or refused to suspend the works, and instead issued variations to enable work to continue. The primary variation is said to be the relaxation of the compaction standard which then enabled CSL to work through winter instead of seeking an extension of time. Overall CSL submits that the duration of the earthworks was significantly extended and the earthworks were significantly disrupted due to NZ Windfarms' requirement for CSL to work through winter.

[9] NZ Windfarms accepts that the engineer subsequently issued a variation to place 200 mm layer of river run metal on the road to the workface to facilitate working continuing through winter and relaxed requirements for compaction. But NZ Windfarms says that the problem was that CSL under resourced the works in winter, and that the variations simply assisted CSL complete the works as it had already promised to do.

Progress payment claims

[10] CSL claims it made various progress payment claims concerning the above matters in the period March 2006 to February 2007 including as follows:

(a) A variation claim as a result of the first and second suspension of work at the tower foundations when the defendant did not have the necessary land use and building consents;

(b) A variation claim as a result of roading work being suspended when the defendant had not satisfied the necessary PNCC resource consent conditions;

(c) A variation claim as a result of additional P & G costs and inefficiency costs as a result of having to carry out roading and earthworks during winter that otherwise would have been carried out in summer;

(d) A claim for additional road earthworks in excess of the tender quantities;

(e) A variation claim in respect of two other minor items.

[11] NZ Windfarms denies that any variation claims were made in the proper form. In any event, the engineer rejected the claims as having no valid basis.

Dispute resolution

[12] Attempts at dispute resolution and adjudication were fraught. Some matters were resolved by the adjudication. Other matters stalled while a debate about proper notice was resolved. The Court of Appeal ultimately found that appropriate notice was given, with the result that the substantive matters are now before me by agreement.[2]

Evidence

[13] The plaintiff produced evidence by Messrs Pohlen and Romanes of CSL, Mr Gair of Gair Contracting Ltd (GCL) and Mr Draper, an independent expert engineer. A single brief was produced on behalf of NZ Windfarms by Mr Murray David Fletcher. Mr Fletcher was the engineer to the contract. Messrs Pohlen, Romanes, Gair and Fletcher were primary actors in the narrative of events. Their evidence essentially chronicles their perspective of what occurred and why. I do not propose to restate their evidence as I address the primary facts in my assessment below. Mr Draper provides expert evidence on CSL's approach to calculating the P and G and loss of productivity claims and the rates and factors used by CSL in its calculations. For reasons that will become clear, the significance of this evidence is diminished given my findings on the winter work claim.

---

2 *Concrete Structures (NZ) Ltd v NZ Windfarms Ltd* [2010] NZCA 450.

Preliminary issue - pleadings

[14] CSL's second cause of action was based on an allegation that the engineer was required to suspend works for the winter. That claim was abandoned at the hearing. Mr Blanchard sought instead to raise a fresh cause of action, namely that the engineer wrongly failed to approve a variation for works associated with the relaxation of the loading specification. Initially Mr Blanchard sought to persuade me that he could run this claim without amendment, presumably to avoid any limitation issue. But I accept Mr Smith QC's submission that a revision of this nature needed to be properly pleaded. Indeed it was not until I had heard full argument on the issue that the specific nature of the claim became clear.

[15] Against this, paragraph 55 of the latest amended statement of claim expressly refers to CSL's claims for variation for works through the winter period and that those claims were evidenced by the progress payment schedules provided to the defendant. Putting aside for one moment the issue of limitation, it seems to me that the factual basis for variation of a claim is foreshadowed at paragraph 55 if not ventilated in the form of a cause of action by failure to approve a variation to the works. The current pleadings also refer to the relaxation of the compaction specification and the work through winter. Accordingly I do not consider that the defendant is prejudiced by the amendment to the pleadings in the manner sought, given that the facts underlying the claim must have been known to the defendant for some time.

[16] I deal with the issue of limitation below.

Issues

[17] I consider that the following issues require resolution (following the late amendment to the pleadings):[3]

[3] This is largely drawn from the agreed statement of issues.

Delays

1. Who should bear the cost (if any) of the alleged four day suspension of tower foundation work between 21 and 24 March 2006? ("Tower foundation suspension");

2. Who should bear the cost (if any) of the alleged two day suspension of work between 30 and 31 March 2006? ("Road works suspension");

3. Who should bear the cost (if any) of the alleged suspension of work between 24 April and 4 May 2006? ("Further tower work delay").

Inclement weather

4. Should the engineer have approved a variation claim for the winter works? And

5. Who bears the risk of inclement weather?

("Winter works")

Miscellaneous

6. Who pays for the miscellaneous items?

Limitation defence

7. Is the [second] cause of action time barred?

Contractual interest

8. Is contractual interest payable on any proven default?

[18] I propose to deal with each of the issues in turn.

Tower foundation suspension

[19] The central factual issue is whether NZ Windfarms agreed to modify the works programme so that CSL could undertake the construction of the tower bases in March 2006. Mr Pohlen was adamant that Mr Fletcher approved an amendment to the tender construction programme to allow the works to occur in March instead of April. He emphasised that the tender contract methodology expressly contemplated that the tower works and road works may, where possible, be undertaken at the same time. Mr Fletcher says that he made it clear that the resource consent required the completion of the road works first and that he was surprised that the towers works had already commenced on 20 March. He says that had the tower works commenced when scheduled there would have been no need for any suspension.

[20] I think there is room for a difference of recollection on this issue. But I do not think that Mr Fletcher would have agreed to an amendment to the construction programme that would inevitably involve a clear breach of the resource consent conditions. Condition 9 states:

> 9. The Consent Holder shall compete (sic) the roading works required and specified in the approved engineering plans (condition 8) prior to the commencement of the construction works on the wind farm.

[21] The road works had not been completed by 20 March 2006. Works on the tower bases should not have commenced before or on that date.

[22] Subsequent actions taken by Mr Fletcher to regularise the position by obtaining approval to weatherproof the tower works is consistent with him taking a prudent and compliant approach to the consent requirements. Conversely it does not support the inference that he was prepared to push on with non-compliant works.

[23] In these circumstances, I find that CSL did not have the requisite permission to commence the tower works and must bear the cost of the delay caused by the first suspension.

Road works suspension

[24] CSL was ordered to suspend road works in the period 30 March 2006 and 31 March 2006. CSL contends that the Council stopped the works because NZ Windfarms had not responded to a Council letter seeking confirmation of certain items. NZ Windfarms says the works were stopped because of poor traffic management by CSL and its subcontractor on the road works, GCL.

[25] A careful review of the contemporaneous record makes it tolerably clear that the reason for the stoppage arose from NZ Windfarms' failure to respond to the Council's letter. This is largely confirmed in a file note dated 30 March 2006 of a conversation between Messrs Fletcher, Pohlen and Freear (of NZ Windfarms) which records:

> Subject: PNCC letter of 9 March 2006
>
> John/Chris
>
> Attached is the mistery (sic) letter from PNDC (sic) of 7 March 2006. Our reading of the letter is that we have approval to proceed subject to meeting the various conditions. These include supplying road opening notice and traffic management plan. Both were supplied early last week. The four items, Land, Pavement Material, As Builts & Cut Batters, are all being dealt with as we proceed.
>
> There is obviously confusion between Council Officers and ourselves which we will get sorted out today and tomorrow. Mike Romanes is still meeting with Martin Skinner of PNCC today, I have asked both to ensure that minutes are taken.
>
> Regards
> Murray

[26] I have also considered the concerns raised in an email from the Council on traffic management matters. Commonsense suggests that the majority of these matters could have been dealt with without lengthy suspension.[4] Further, the same email records:

---

[4] The listed concerns were:

- No correct Hi Viz vests worn onsite – Must be orange reflective vests
- No STMS onsite – Needs correct yellow reflective vest
- No Construction Zone approved. All unregisted [sic] vehicles must be noted and recorded for council & Land Transport records
- Information sign at start of site is too small & has no contact phone number
- Under the TW1 sign is an illegal company sign saying "NO ENTRY" on a public road
- TW1 Road work sign must be on each side with "NEXT 5km" supplementary underneath

Meet Steve Galbraith, Gair Contracting Foreman, onsite (0920hrs). Concerns:

- With plans that the Council have – Tender Documents only.
- **That a letter sent to Jim Dale, Connell Mott MacDonald, had not been responded too – therefore work should not be progressing.**
- About site issues above
- Steve holds a "Temporary Controllers Certificate" for Working on the Roads. Level should be Site Traffic Management Supervisor (STMS).

(Emphasis Added)

[27] In these circumstances, NZ Windfarms must pay CSL for the costs of the suspended works on 30 and 31 March 2006.

Further towers works suspension

[28] The tender construction programme envisaged works on the towers commencing in April. By 10 April building consent still had not been obtained to allow the pouring of the concrete for the tower foundations. An email from Mr Fletcher to Mr Pohlen on this date records:

> 2 Building Consent. Spoke to head building inspector on last Friday. He is aware of work on the site as he knows the guys tying the steel. He said that the consent should be ready by the end of this week, until then you can complete the site concrete and place and tie the steel, shutter up etc. You are not to pour the main concrete until we receive the building consent.

[29] On 24 April Mr Pohlen wrote to Mr Fletcher (cc Mr Freear), noting:

> We record that Tower Base 15 is completed ready for concreting, and that this was booked for Wednesday 26th April.

- 30/100k signs must be on both sides. The 30 sign must have the word "TEMPORARY" underneath it
- Every 400m there should be a double side 30k sign with the word TEMPORARY underneath them.
- First site excavator clearing out drain channel – spoil on road surface that would belly out a car.
- 2nd Excavator – corner widening – held up for 5minutes – had to reverse 300m to let loaded work truck pass.
- 3rd Excavator – corner widening – road completely closed – no truck to load to. No way through –reversed 400m to turn around and go back.
- Initial Establishment Site – Shipping container in the Road Reserve – no approval. No toilet facilities noticed.
- Blocked road culvert near first site with swale water flowing cross road width – limited traction here.

> Further to your advice that the issue of the Building Permit is still outstanding, we have cancelled this pour.
>
> Due to the delays to date we have stood our crew down and will endeavour to find alternative work to mitigate any further costs/losses. In the event that you wish us to remain on site and are happy to pay further standing charges please advise immediately.

[30] This is then followed by a letter dated 26 April stating that Mr Freear had contacted him and advised that the "crew should remain away from the site, pending the issue of a Building Permit". He also states:

> I trust that Chris has since spoken to you, and request that in accordance with Section 6.7 of the General Conditions of Contract, you issue a Contract Instruction suspending the Tower Foundations portion of the works.

[31] There is no response to this letter until about 3 May, in the form of a letter from Mr Fletcher enclosing a copy of the building consent. There is however another letter dated 5 May detailing at length criticisms of CSL's project management, including references to unsafe practices. More specifically it records the following:

> In regard to your facsimile dated 26 April 2006 regarding Mr Chris Freear's instruction to remain away from the site pending the issue of a Building Consent.
>
> 1 The main concrete work cannot be carried out with[out] a Building Consent. While the Consent has now been issued, this was not the only reason why the work could not proceed.
>
> 2 No concrete work can proceed until you have provided us with the tower co-ordinates as set out.
>
> 3 The road must be made safe prior to concrete trucks using the road. There has been debate over this, however, with the Department of Labour letter, there is clearly work to be done prior to concrete trucks using the road. It is the Contractor's responsibility to organise and co-ordinate work in such a way to ensure that work dependent on other work is carried out first and that safety is maintained.
>
> 4 While you are instructed to suspend work on the supply and placing of concrete for the five tower concrete bases, this does not constitute a variation to the contract.

[32] I do not consider that this response satisfactorily deals with the failure by NZ Windfarms to obtain building consent within the timeframe contemplated by the tender construction programme. In reality, whatever the work practices employed by CSL, it could not commence the tower pours until building consent was obtained. It was in fact and law, a condition precedent to commencement of any such work. In addition, had the

work practices of CSL been a major concern, I would have expected that the detailed catalogue of criticisms would have been given to CSL well before 24 April and certainly in immediate response to the letter from Mr Pohlen of that date, especially if they were going to relied upon for refusing to approve a variation in accordance with cl 6.7.1.

[33] In the result, I am satisfied on the balance of probabilities that the primary and major reason for the stoppage was the failure to obtain building consent. Conversely I am not persuaded that CSL's allegedly poor construction standards materially contributed to this stoppage. I reject also any suggestion that NZ Windfarms was not properly on notice of this claim. The abovementioned correspondence clearly placed the engineer on notice whatever the precise requirements of the construction contract.

The winter works

[34] The road works were affected by inclement weather, including heavy rain and on occasion snow. Mr Gair was responsible for the road works. He attests to the fact that the conditions were very trying. Various extensions were sought and obtained for the works.[5] As Mr Blanchard put it, by 24 May 2006 the contract had reached a cross roads. CSL and GCL claimed that the works had become impossible and something needed to be done. Mr Pohlen suggested three alternatives with indicative costs, namely:

(a) Continuing work through winter until completion at an estimated cost of $150,000;

(b) Continuing work through winter with relaxed compaction standard and using borrowed fill ex windfarm site at an estimated cost of $120,000;

(c) Winter close down and remobilise next spring at an estimated cost of $80,000.

[35] The second option specifically noted that the specified compaction standard has not been achieved and that the cut materials that they are using are variable and moisture sensitive and is currently wet of optimum.

---

[5] As at 7 May 2006, 21.5 inclement weather days had been claimed whereas the contract tender only provided for 10 days.

[36] A response was received from Dr Jan Kupec of Connell Wagner on the same day stating:

> We are willing to reduce our acceptance criteria to Maximum Dry Density in order to progress the job. The required densities are only few per cent of the optimum moisture content and we infer that the material:
>
> a) is highly variable, being cut waste from roading;
> b) is slightly off optimum moisture content; and
> c) Can be selected from suitable sources, i.e. rotten rock outcrops.
>
> We are willing to accept average densities of 95% of MDD for all fill operations. This should allow for soil variation, slightly too wet or too dry in-situ material and rapid construction progress. We also note that due to highly variable fill the occasional test may indicate slightly lower bound results. Which we ask you to forward to us for discussion.
>
> I would appreciate if you would be able to confirm the above with Murray Fletcher or myself in order to clarify the timing and inform our client.

[37] Mr Fletcher also endorsed the use of additional gravel fill for the length of the roads to assist progress. The cost of this was subsequently approved by way of formal variation. But additional costs of the winter works said to be enabled by the relaxation of the compaction standard were never approved.

[38] Mr Blanchard submits that CSL must be entitled to the costs of the winter works enabled by the variation to the compaction standard, as without that variation CSL would have been able to obtain an extension of time and avoided those costs. He submits that NZ Windfarms approved the variation so that it could meet its own contractual obligations to third parties.

[39] I am unable to accept this argument. My reasons follow.

[40] First, as Mr Smith submitted the contract apportioned the risk of inclement weather to CSL for the purpose of time extensions and claims based on unforeseen weather conditions. More specifically, special cl 10.3.1 allows ten days for inclement weather. Further extensions are permitted for inclement weather, but cl 10.3.7 of the special conditions states:

> Approval of an extension of time by the Engineer shall not be grounds for payment of Time Related Expenses. Any costs associated with an extended contract period shall be borne by the Contractor.

[41] Under cl 9.5 a contractor can claim increased costs for unforeseen physical conditions as a variation. But cl 9.5.1 specifically excludes weather conditions from the definition of unforeseen physical conditions, unless those conditions occur as a result of weather away from the site.

[42] A corollary of these combined provisions is that CSL must have appreciated that weather related losses per se were not recoverable. It would be remarkable then that CSL could claim essentially time based weather related costs under the auspices of a variation relaxing the specification requirements.

[43] Second, the relaxation variation reduced the standards for compliance, but did not by itself increase the scope of works. This has two related consequences. CSL was not "required" to do any works that it was not already contracted to provide and therefore was not "required" by the variation to extend the period of works. Quite the opposite, the variation was beneficial to CSL because it shortened the period of required works.

[44] Third, I do not think that NZ Windfarms could have reasonably expected that relaxing the compaction standard would expose them to the full additional costs of the weather related costs. Notably provision was made and agreed for the additional gravel. But nothing was agreed for the relaxation or the additional time specifically involved with the ongoing road works enabled by this relaxation. Mr Pohlen's letter of 24 May refers to "additional downtime due to work out of season" in relation to his options. But there is no clear explanation that this in fact means all additional work over the winter period. On its face it simply refers to "downtime" not additional works.

[45] Fourth, I think that given the care taken with variations in the contract, NZ Windfarms could have expected a detailed breakdown of the additional costs attributable to the relaxation prior to the works continuing. Yet there is nothing even approximating to the procedures envisaged by the contract for the valuation of variations. It is worth noting in this regard the specific requirements of s 9 of the contract dealing with variations and valuation of variations.[6] Clause 9.1.1(c) contemplates variation for changes in character or quality of work. The relaxation of the compaction standard qualifies under this heading. Clause 9.3 then provides a detailed methodology for valuation of changes by

---

[6] Refer s 9 NZS 3910:2003.

agreement (9.3.1), before the work is done (9.3.2) and where the change in work needs to be measured, there shall be an exchange of evidence supporting calculations of those measurements (9.3.3). If there is an applicable schedule of prices, it should be applied to derive the Base Value[7] of the additional works (9.3.4) and where there is no such schedule, and it would not be reasonable to derive new prices under the schedule, then the Base Value should be determined on the basis of Net Cost.[8] Allowances are then to be provided for such things as on site overheads (9.3.8) and where the contractor is entitled to an extension of time, for related costs together with an allowance for profit (9.3.10). It appears that none of these clauses were considered, let alone complied with, at the time of the variation or subsequently.

[46] Fifth, the value of the claimed additional works was not quantified until well after they had been completed. Not only is this contrary to the process envisaged at cl 9, but an essential term, that is the price of the additional works, was uncertain throughout. Indeed, CSL left open the value of the works and simply submitted process payments claims for "Additional P & G costs associated with increased scope of work, inefficiencies due to working in winter period" with the relevant sums described as "TBA". I accept that Mr Fletcher did not immediately reject the claims. But that would have been hard to do given that they were not quantified at all. An outright rejection could have been perceived to be arbitrary, invoking dispute resolution procedures and adding still further cost and delay to the project. In any event, the lack of certainty on a key term, ie price until well after the works were completed strongly militates against the inference that NZ Windfarms agreed to it when it relaxed the compaction standard.

[47] Sixth, I accept that cl 9 contemplates some latitude on the timing of valuation of works that is when practicable. But I do not consider that it was impracticable for CSL to submit evidence as to the value of the works contemporaneously with the progress claims or indeed before the works were undertaken. GCL kept a record of its road work attendances. It would have been a simple enough matter to collate from those records a

---

7 BASE VALUE refers to the prices or rates applicable to the circumstances and nature of the work or part of the work.

8 NET COST means the actual or assessed expense or direct cost to the Contractor of the Variation, plus return on investment in Plant, after deduction of trade discounts and exclusive of the Contractor's On-Site Overheads, Off-Site Overheads and Profit.

suitable rate for the additional works and submit the rate to NZ Windfarms for approval. Ultimately that is what CSL in fact did when it finally quantified its claim.

[48] Seventh, I do not accept that CSL could simply have sought a time extension to avoid all work during the winter and thus avoided the additional cost while leaving the risk of delay with NZ Windfarms. Any extension would have to be assessed on a case by case basis so as to determine whether an extension was reasonably necessary. I am highly doubtful that Mr Fletcher would have simply approved an unqualified cessation. Furthermore, the entire risk of delay did not sit solely with NZ Windfarms. CSL had managed to exclude liquidated damages for delay. But CSL remained liable for unliquidated damages for non-compliance with time for completion. The counterfactual was therefore implausible and does not lend weight to CSL's case.

[49] Accordingly for reasons of process and substance, I do not consider that the relaxation of the compaction standard provided a proper basis for a variation for winter works.

Miscellaneous items

[50] CSL makes claims for three miscellaneous items:

(a) Geotextile valued at $3,830.40

(b) Filter cloth valued at $2,240

(c) Fencing valued at $3,870.

[51] Mr Pohlen says he called Mr Fletcher to get approval for the geotextile and filter cloth rather than make additional undercuts to the subgrade. This was not provided for in the contract. Apparently there was no objection to this registered by Mr Fletcher. Evidence given by Mr Gair however suggests that when Mr Pohlen tried to but did not reach Mr Fletcher about these items and simply instructed Mr Gair to purchase them. This brings into focus the need to comply with the processes laid out in the contract. Regrettably, whatever the underlying merits of Mr Pohlen's claim, he did not follow those procedures, so that there is no record of the variation having been formally sought let alone

approved. In the absence of this record, and in circumstances where the evidence is equivocal, the plaintiff cannot succeed in this claim.

[52] The fencing is in a different category. While the documentary record is also sparse on this issue, I am satisfied that Mr Fletcher requested that CSL to undertake, among other things, fencing to block walls works on a neighbour's property given a communication from Mr Pohlen dated 10 August 2006 seeking fencing details. There is also an email dated 26 August from Mr Fletcher that Mr Arnold Chamove, the neighbour, was not happy with the works carried out on his land, and that "NZ Windfarms are prepared to pay for any reasonable extra work required by Arnold". Mr Pohlen later responds on 4 September that Mr Chamove "would be satisfied if he received a new fence". Mr Fletcher then says there remain issues with Mr Chamove in a letter dated 19 January 2007. Mr Pohlen replies in a fax to Mr Fletcher dated 2 February 2007 that he has spoken to Mr Chamove who had "no outstanding issues". Against this background, it was and is for Mr Fletcher to justify why he should not pay for the fencing works. He was equivocal at best about this under cross-examination. The most persuasive evidence therefore is that the neighbour is now not unhappy, so the reason for not paying has gone away.

[53] Accordingly, NZ Windfarms must pay for the fencing works.

Limitation

[54] In light of my findings on the winter works claim I apprehend that the limitation issue is now moot. It was originally pleaded by way of affirmative defence to the "second cause" of action. At the time of this pleading it was addressing a claim based on the Contractual Remedies Act 1979 and misrepresentation, but that claim did not resurface in subsequent pleadings. The current version of the second cause of action relates to the winter works and the failure to approve a variation. As noted above, Mr Smith objected to this late amendment and also submitted it was now time barred. I do not agree. The essential claim was filed in time (September 2008). The key facts upon which the claim is based have been pleaded throughout. The action is not therefore time barred.

Contractual interest

[55] CSL claims that contractual interest is payable on the unpaid suspension or variation claims, because they were "unreasonable deductions" for the purpose of cl 12.7.3. NZ Windfarms contends that cl 12.7.3 is a punitive clause deliberately designed to discourage not simply non or late payment of amounts due and owing and/or late certification, but an "unreasonable" deduction. In this context it is said that "unreasonable" means serious default, including irrational, perverse, or bias behaviour.[9] There is also the suggestion that the test is essentially subjective, namely that if the engineer honestly considered that the deduction was reasonable, then absent irrationality[10] or impropriety, the decision should be deemed to be reasonable.[11]

[56] Given the central importance of cl 12.7.3 I repeat it in full here:

> **12.7.3** In the event of unreasonable deduction of any amount from any Contractor's payment claim or final payment claim being made in any Payment Schedule, and where such amount is later paid by the Principal or found by an adjudicator to be payable by the Principal, the Contractor shall be entitled to interest compounding Monthly on that amount from the date on which it would have been payable if the unreasonable deduction had not occurred down to the date of payment.

[57] The plain meaning of "unreasonable" in context[12] connotes something more than simple default, but does not require proof of bias or impropriety as suggested by NZ Windfarms. The Oxford dictionary helpfully refers to "going beyond what is reasonable or equitable, excessive".[13] Therefore the litmus test is simply whether the decision of the engineer to decline to make payment was reasonable or fair in the particular circumstances, acknowledging that the construction process relies heavily on timely payment for costs incurred.

---

9 Citing authority that emphasises the importance of impartiality: *Canterbury Pipelines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA).

10 In the sense of a deduction that "no reasonable engineer, properly directing himself or herself to the facts, could possibly take on the information available".

11 Citing *Secretary of State for Transport v Birse-Farr Joint Venture* (1993) 35 ConLR 8 and *Royal Borough of Kingston-Upon-Thames v AMEC Civil Engineering Ltd* (1993) 35 ConLR 39.

12 As to the relevance of context, refer *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 44 at [119].

13 Lesley Brown (ed) *The New Shorter Oxford English Dictionary* (Clarendon Press, Oxford 1993) – see definition of "unreasonable".

[58] I reject an essentially subjective test of reasonableness. The engineer when deciding to certify payment was performing a contractual duty, not exercising an unfettered discretion of an administrative law kind.[14] In the absence of clear words,[15] I am not prepared to assume that commercially minded contracting parties engaged on the basis that their entitlements are dependent on whether the engineer was acting irrationally in the sense that no reasonable engineer would act in that way. In the context of deductions, such a threshold test could perversely favour the Principal because the ability to seek contractual interest would be very difficult, even though the clear object of the condition is to encourage timeous payment.

[59] Plainly an adjudicator or Court must bring some commercial commonsense to the assessment, and acknowledge the difficult circumstances under which an engineer must operate. Where appropriate, deference must be given to the engineer's on the ground assessment of the facts. But ultimately the test of reasonableness must be an objective assessment and requires a careful examination of whether the reasons given for non payment were justified.

[60] I now turn to examine each of the defaults. I preface my comments with the observation that none of the defaults involved particularly complex facts, so there is no need for undue deference to the engineer's assessment.

[61] The road suspension was due to the failure by NZ Windfarms to reply to a letter from the Council. The issue of poor road management raised by Mr Fletcher may have aggravated the Council's discontent, but it was not the major reason for the suspension. An engineer, acting reasonably, would have acknowledged this and agreed to account to CSL for associated costs.

---

[14] Even administrative law struggles with the application of this concept – *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL *26*, [2001] 2 AC 532 at 548 per Lord Cooke.

[15] As used in *Secretary of State for Transport v Birse-Farr Joint Venture*, above n 11 and in *Royal Borough of Kingston-Upon-Thames v AMEC Civil Engineering Ltd*, above n 11 cited by Mr Smedley. In those cases the engineer was required to certify "the amount which in the opinion of the Engineer…is due". As Hobhouse J observed in the first case: "Therefore the obligation of the engineer is in each case expressed to be to form an opinion or to decide what he considers is proper" (at 25). By contrast, Section 12 in the present case dealing with payments does not make certification conditional on the "opinion" of the engineer. Rather the engineer must state his reasons, which is a clear pointer to the substantive reviewability of his decision.

[62] The further tower works delay was due to the failure by NZ Windfarms to obtain a building consent. Ample warning was given to the engineer of the problem presented to CSL if pouring of the concrete could not proceed on time.[16] Conversely the problems with CSL work management practices were not outlined in detail until after the period of the delay. As with the previous default, an engineer acting reasonably, would have acknowledged the major reason for the delay, and agreed to account for CSL's associated costs.

[63] Similarly, the costs associated with the fencing should have been approved from 2 February 2007 when there was no objective reason to decline payment for them.

[64] Accordingly contractual interest is payable on all proven claims.

Result

[65] Given my above findings I resolve the key issues as follows:

(a) CSL must bear the cost of the tower foundation suspension between 21 and 24 March 2006;

(b) New Zealand Windfarms must pay CSL for the costs of the roadworks suspension on 30 and 31 March 2006;

(c) New Zealand Windfarms must pay CSL the costs of the further tower work delay between 24 April and 4 May 2006;

(d) The engineer was not required to approve the variation claim for the winter works;

(e) CSL bore the risk of inclement weather;

(f) New Zealand Windfarms must pay CSL the costs of the fencing;

---

[16] There was some suggestion in the evidence that CSL indicated that it would seek alternative work. But that could not be a reason to refuse payment for delay if no alternative work was found. At most, had alternative work been found, this may have reduced the quantum of the loss payable by the engineer.

(g) The second cause of action (the winter works claim) is not time barred; and

(h) Contractual interest is payable on the sums owed for the road works suspension, the further tower delay and the fencing.

[66] I will leave it to the parties to resolve quantum and revert to the Court if necessary within 15 working days.

[67] The parties have 15 working days to seek costs if they cannot be agreed. Submissions on costs must not be greater than five pages in length.

Solicitors:
Kevin A Badcock, Rotorua
Anthony Harper, Christchurch