

[1] The plaintiff, Eco-Smart Homes Northwest Ltd (**Eco-Smart**), is carrying out a residential development of a property in Rautawhiri Road, Helensville. Eco-Smart engaged the defendant, Jenhash Contracting and Consultants Ltd (**Jenhash**), to build 26 houses at the Helensville property. To that end, the parties entered into 26 residential building contracts. Eco-Smart paid deposits totalling \$320,000 to Jenhash under the contracts.

[2] Eco-Smart says that on 16 November 2022 it validly cancelled the 26 contracts on the grounds of Jenhash's repudiation or breach of the contracts.

[3] On 27 November 2022, Eco-Smart commenced this proceeding, claiming for the return of the deposits and claiming damages for other losses it says it has suffered from Jenhash's repudiation and breach. Eco-Smart applied for summary judgment. It also applied, without notice, for a freezing order. On 15 December 2022, I granted the freezing order.

[4] Jenhash applied to discharge the freezing order and filed a notice of opposition to Eco-Smart's application for summary judgment. Jenhash filed a statement of defence and filed substantial affidavits in support of its application and opposition. Eco-Smart filed affidavits in reply.

[5] Eco-Smart's application for summary judgment and Jenhash's application to discharge the freezing order were scheduled to be heard on 15 May 2023. In April 2023, Jenhash's then solicitor applied for an order declaring he had ceased to be solicitor on the record. That order was made on 24 April 2023, in part because the solicitor was no longer receiving any instructions from Jenhash.

[6] On 8 May 2023, this Court ordered that, given that Jenhash had taken no further steps, Eco-Smart's application for summary judgment and Jenhash's application to discharge the freezing order should be determined on the papers. On 15 May 2023, to allow time to consider the application for discharge, I extended the freezing order until 29 May 2023.

Application for summary judgment

[7] In its formal application, Eco-Smart applied for summary judgment “as to liability but not quantum”. However, the submissions of Mr Bowler, counsel for Eco-Smart, addressed both liability and quantum.

[8] Eco-Smart must satisfy me that Jenhash has no defence to its claim. On a summary judgment application, the Court will generally refrain from attempting to resolve genuine conflicts of evidence.

[9] The first issue is whether Eco-Smart has satisfied me, to the summary judgment standard, that it validly cancelled the 26 contracts. There is no dispute that Eco-Smart sent Jenhash a notice of cancellation on 16 November 2022. The issue is whether Eco-Smart was entitled to cancel.

[10] Eco-Smart says it was entitled to cancel for two reasons. The first is that Jenhash repudiated the contracts by advising Eco-Smart, on 15 November 2022, that it would not be returning to the building sites to carry out any more work.

[11] Mr Mani, the principal of Eco-Smart, deposed in his first affidavit that Mr Shah, the principal of Jenhash, informed him on 15 November 2022 that Jenhash would not be returning to the site to carry out any work. Mr Shah disputed this in his affidavit in opposition. He deposed he had never expressed an intention not to carry out the works. Mr Shah exhibited a WhatsApp message dated 14 November 2022 in which Mr Mani told Mr Shah that he was not to start work on the sites “tomorrow”. Mr Shah deposed that Mr Mani sent that message because Mr Mani mistakenly believed that Mr Shah had been misleading Mr Mani in relation to work on another building site in Massey. At that other site, Jenhash was carrying out building work for another entity related to Mr Mani.

[12] Eco-Smart filed two affidavits in response to Mr Shah’s affidavit. One was from Mr Mani, the other from an employee of Eco-Smart, a Mr Kovic. Mr Mani deposed that there had been a meeting between him, Mr Kovic and Mr Shah on 11 November 2022. Mr Mani said that at that meeting it was agreed that, as a result of various concerns that Mr Mani had raised, Eco-Smart would have until

15 November 2022 to decide “whether or not to continue working with Mr Shah in relation to the Helensville project”. Mr Kovic deposed to the same effect. Mr Mani said this was why, on 14 November 2022, he had told Mr Shah not to start work on 15 November 2022. Further, Mr Mani deposed that Mr Shah had subsequently told him that he would not be commencing work at the Helensville site.

[13] Mr Shah filed an affidavit in reply. He denied that at the meeting on 11 November 2022 there had been an agreement that Eco-Smart would have until 15 November 2022 to decide whether to continue working with Jenhash. He said that after that meeting Jenhash continued its preparation for work on the Helensville site. He denied that he had said that Jenhash would not commence work.

[14] This is not the sort of conflict that is suitable for determination on a summary judgment application. I cannot find that Jenhash has no defence to the claim that it advised Eco-Smart that it would not be carrying out any more work and thereby repudiated the contracts.

[15] The second reason that Eco-Smart says it was entitled to cancel the contracts is that it is an essential term of the contracts that Jenhash is a registered master builder, when it is common ground that Jenhash is not. Eco-Smart relies on this statement on the front page of the contracts:

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[16] Eco-Smart says the first sentence of that passage is an essential term of the contracts. It says that Jenhash’s breach entitled Eco-Smart to cancel the contracts. Eco-Smart also says that Jenhash misrepresented to Eco-Smart that it was a registered master builder and that this misrepresentation entitled it to cancel.

[17] Jenhash disputes this. First, it says the statement on the front page of the contracts is not a term of the contracts. Secondly, it says that Eco-Smart knew, when entering into the contracts, that Jenhash was not a registered master builder.

[18] There is a factual dispute as to whether Eco-Smart knew, when contracting with Jenhash, that Jenhash was not a registered master builder. Mr Mani and Mr Shah have given conflicting accounts. Mr Bowler submits that I should prefer Mr Mani's account. Mr Bowler says that the only documentary reference to master builder status is in WhatsApp messages many months after the contracts were entered into. He says this supports Mr Mani's position that Eco-Smart did not know, when entering into the contracts, that Jenhash was not a registered master builder.

[19] I accept that the messages provide some support for Mr Mani's position. But only some support. The messages are far from unequivocal. I am left with a conflict of evidence that cannot be resolved in Eco-Smart's favour to the summary judgment standard.

[20] This means I am not satisfied, to the requisite standard, that Jenhash misrepresented that it was a registered master builder. As to Eco-Smart's reliance on the statement on the front page of the contracts, I consider it arguable that this statement is not a term of the contract (given the entire agreement clause within the formal contract). Even if it is a term, it is reasonably arguable that Eco-Smart knew, when contracting, that Jenhash was not a registered master builder, and so it is arguable that Eco-Smart would be unable to allege a breach of the term.

[21] For these reasons, Eco-Smart has not persuaded me, to the summary judgment standard, that it validly cancelled the 26 contracts. I therefore decline the summary judgment application.

[22] I make one observation about quantum (as it is relevant to the terms on which the freezing order is to continue). Eco-Smart seeks not only the recovery of the deposits (\$320,000) but also damages of \$156,600. It says those damages represent amounts that Eco-Smart paid to Jenhash for on-payment to suppliers which Jenhash failed to on-pay. However, the evidence from both Mr Mani and Mr Shah strongly suggests that those payments were in respect of the development at the Massey property. They do not appear to have been payments made under the 26 contracts for the Helensville property that are the subject of this proceeding.

Application to discharge freezing order

[23] Mr Bowler submitted that, as Jenhash had taken no further steps, Jenhash's application to discharge the freezing order should be struck out. That submission overlooks r 32.7(3) of the High Court Rules 2016. The effect of r 32.7(3) is that the onus is on Eco-Smart to satisfy the Court that the freezing order should continue.

[24] Mr Bowler has not addressed this onus in his submissions or explained why the freezing order should continue. Nonetheless, I am satisfied that the order should continue.

[25] First, although Eco-Smart has not persuaded me to the summary judgment standard that it validly cancelled the contracts, I am satisfied that Eco-Smart has a good arguable case that it did so (either on the ground that Jenhash repudiated the contracts or that Jenhash misrepresented that it was a registered master builder).

[26] Secondly, I am satisfied there is a serious danger that any judgment Eco-Smart might obtain would be wholly or partly unsatisfied in the absence of a freezing order. That danger arises because I am satisfied there is a serious risk that the respondent may dissipate its assets. This risk was evident when I made the freezing order on 15 December 2022. The risk remains, and if anything has increased, given that Jenhash recently stopped taking steps in this litigation.

[27] The freezing order does not presently specify the value of the assets covered by the order. Rule 32.6(2) provides that if the likely maximum amount of the applicant's claim is known, the value of the assets covered by the freezing order must not exceed that amount together with interest and costs. For the reasons expressed earlier, I consider the likely maximum amount of Eco-Smart's claim is \$320,000. Allowing for interest and costs, I consider that the freezing order should specify \$400,000 as the value of the assets covered by the order.

Result

[28] I dismiss Eco-Smart's summary judgment application.

[29] I continue the freezing order until further order of the Court, subject to the terms of the order being varied by the addition of a term that the value of the assets covered by the order is \$400,000.

[30] Costs are reserved.

Campbell J