N2LR

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 297/78

160

No Special Consideration

BETWEEN EARLE HOGG PIPE-LINING COMPANY LIMITED a duly incorporated company having its registered office at Hawera, a Pipe-Lining Contractor

Plaintiff

A N D THE ATTORNEY-GENERAL in and for the Dominion of New Zealand for and on behalf of the NEW ZEALAND ELECTRICITY DEPARTMENT

Defendant

Hearing: 26, 27 and 28 February 1979

Counsel: G.F. Little for Plaintiff
Larsen for Defendant

Judgment: 4th April 1979

JUDGMENT OF QUILLIAM J.

This is a claim and counterclaim arising out of a contract between the plaintiff and the New Zealand Electricity Department for the laying of a pipeline. The amounts claimed on either side have been the subject of agreement between the counsel (for which I am grateful) and I have been required to consider only the issue of liability.

On 23 December 1976 the parties entered into a contract under which the plaintiff was to lay a pipeline for the Department between Whirinaki and Napier. That contract was of a familiar type and involved a fixed contract sum based upon the plaintiff's tender for the work. On 21 May 1977 that contract was cancelled and was replaced by a fresh written contract. The circumstances in which that second contract came to be made are of importance, particularly as they become relevant to the way in which that contract is to be interpreted. The performance by the plaintiff of the original contract was plainly unsatisfactory. In particular there was a consistent failure by it to comply with the contractual obligations to supply details of expenses incurred and of the way in which certain aspects of the work were to be done. The plaintiff's financial position was evidently somewhat

precarious throughout and, indeed, it had been unable to obtain from a bank a bond as required by the contract for the due performance of the contract. The work involved in the contract included laying the pipeline across the Esk River at a depth of 14 feet below the river bed. It was recognised that this was likely to be an aspect of the contract which could involve varying degrees of difficulty depending upon the time of year at which it was carried out. The original contract provided for completion of the whole of the works by 23 April 1977, but by that date it was far from complete and the Esk River crossing had not been started. A firm of civil engineers, namely, Kerslake and Partners, had been retained by the Department to supervise the contract. A member of that firm, Mr Greenaway, who was then resident in Napier was deputed to carry out the day to day supervision.

By May 1977 the position had been reached where it was clear the plaintiff would be unable to complete the original contract. Its tendered price was plainly too low and performance generally was unsatisfactory. The position was met by the cancellation of that contract and the substitution of the new one. This contract was in an entirely different form so far as the financial provisions were concerned. In place of a fixed contract sum the contract provided "this contract will be of the cost reimbursement with fixed profit sum type and shall be subject to a maximum cost limitation". As that expression indicates payment was to be based upon a reimbursement to the contractor of actual costs incurred by it with a provision for a fixed percentage of profit on those costs and with an overall maximum on the total amount payable by the Department. In other respects the contract appears to have been generally in a fairly usual form although there were some stringent provisions as to the procedure to be followed by the plaintiff in the submission of claims for payment. This had become necessary because of the plaintiff's failure to provide regularly the invoices and other details upon which payments needed to be based.

It is the plaintiff's case that as from 21 May 1977, the date of the new contract, there was faithful and regular compliance with the requirements as to accounting,

but clearly this was not so. The accounting procedures improved considerably but still there was a failure to provide invoices regularly and in a satisfactory form. This fact, together with the fact that outstanding records for the period prior to 21 May 1977 were not supplied at all until after the contract had terminated, meant that the supervising engineers were never able to make a precise calculation as to the financial state of the contract. This was, of course, of particular significance in relation to the fact that there was a prescribed maximum payable by the Department. The reason for the new contract being in the form it was is clearly referable to the plaintiff's previous inadequate performance. The Department evidently preferred to have the plaintiff continue with a contract it had already started rather than to have to engage another contractor altogether to complete the work. The intention was to provide a method of financing the balance of the contract which would enable the plaintiff to remain in business but would impose strict safeguards for the Department's protection. It was presumably for the same reason that during the course of the second contract, notwithstanding the plaintiff's failure to comply with its obligations, the Department made a number of payments upon the basis of estimates by the engineers. This was to ensure that wages and the cost of machine hire could be met.

The present action concerns that part of the work which involved the Esk River crossing. That aspect proved to be more difficult than was anticipated. The plaintiff's estimate of the cost of that work had originally been $3,200 plus an allowance of about $6 a metre. On 11 May 1977, which was shortly before the second contract was signed and at a time when the plaintiff was generally recalculating its prices, a new estimate was made for the crossing of $14,310 plus what was known as the footage (or metreage) allowance. Work on the crossing started on 15 June 1977. On 21 June the plaintiff made another estimate of the cost and this time arrived at a figure of $20,054 (apart from the footage allowance). It was agreed that the actual cost of the work was $34,532. The plaintiff claims that it is entitled to recover the whole of its actual cost for the work. The defendant says that the provisions of the contract as to a

maximum sum apply so as to mean that once that sum had been reached no further payment was required to be made.

Work on the crossing ceased altogether on 6 August 1977. The case was argued upon the basis of three questions, namely:

1. Did the employer repudiate the contract on 5 August 1977?

2. Was the employer entitled to repudiate?

3. Did the plaintiff abandon the contract on 6 August?

It is necessary to set out the circumstances surrounding the work involved in the crossing. There seems no doubt that when the original contract was entered into it was based on the understanding by both parties that the Esk River crossing would have been carried out in summer conditions. The contract was dated 23 December 1976 and was to be completed by 23 April 1977. It was known that the river was subject to periods of flooding, particularly during the winter months, and it hardly requires an expert to understand that to dig a trench across a river will be simpler and quicker if it is done during a period when there is less rather than more water flowing. The failure of the plaintiff to commence the crossing prior to 15 June 1977 was almost, if not entirely, due to its own inadequate performance of the contract. The evidence of Mr Hogg, a director of the plaintiff, was that he was delayed mainly through his inability to hire a suitable dragline machine. It had been decided that such a machine was the appropriate type of equipment for the work but a machine of sufficient size proved difficult to locate. He also said that there were delays in the arrival of the necessary pipes and of the concrete coverings for those pipes. I am satisfied that the pipes could have been ordered sooner than they were and that the responsibility for seeing that the orders were placed in time was that of the plaintiff. Mr Hogg's attitude was that this was a contract in which the plaintiff and the Department bore equal responsibility because it was intended that they should work in full co-operation. He said that when he had difficulty finding a suitable dragline the supervising

engineers took over the task of trying to find one and were as unsuccessful as he was. As a matter of construction of the contract I have no doubt that the responsibility for carrying out the work and for procuring any necessary machinery and equipment was that of the plaintiff. The role of the engineers was, as is usual in such contracts, a supervisory one only.

Finally a suitable dragline was located in Rotorua and taken to the site. Mr Hogg's evidence was that he had previously been engaged in about twelve river crossings and from that experience he anticipated that underneath the shingle and silt bed of the river he would find material such as clay which is readily extracted by a dragline. When the work started it was found that the full depth to which he was required to go, namely, 14 feet, consisted of running shingle. This is a type of material which is unstable and difficult to work because it continually shifts and tends to fill in an excavation which has been made. The result was that he had to remove very much greater quantities than had been contemplated and had to dig a much wider trench. Added to this difficulty was the fact that after six days work had been completed there was a period of heavy rain culminating in a flood on 21 June which filled in the trench and rendered useless the work which had by then been done. After the flood subsided the digging started again on 26 June and after a further six days had reached the stage at which it was at the time of the flood. There was still a problem in keeping the excavated channel clear and this was met by hiring a smaller dragline to operate from the opposite side of the river to the larger one. The engineers were on the site at regular and frequent intervals, normally two or three times a day, and Mr Hogg said that every decision was discussed with and approved by them. On 12 July another small dragline was brought in. This was owned by a Mr Orlowski who had been employed on the site to do bulldozing work. There was a conflict as to whether Mr Orlowski's dragline was hired by Mr Hogg or Mr Greenaway, but I am satisfied it was Mr Hogg who made the decision to hire it although certainly with Mr Greenaway's knowledge and concurrence.

After the three draglines had been working together for a few days it was found there were still problems in getting the trench down to the required 14 feet. Consideration was then given to the possibility of using divers. Mr Hogg suggested that the material in the trench which was preventing the pipeline from going to the required depth could be removed by air lifting, that is, by a suction device operated by divers. Mr Greenaway was aware of two firms which did such work and although he was not convinced this method would achieve the desired result he supplied Mr Hogg with details of the two firms. Shortly after Mr Hogg was able to engage the services of one of those firms, Oceaneering Co. Ltd, and this was either approved by Mr Greenaway or at least he raised no objection to it. The divers started work on 14 July and proceeded with it until at least 5 August. They made progress although there were setbacks as, for example, on two occasions when logs were encountered. It was also Mr Greenaway's view that the work did not proceed as well as it should have done because of lengthy absences from the site of Mr Hogg and a consequent lack of supervision.

Work on the contract stopped on 6 August and it is necessary to recount the circumstances which led directly to this. It was the constant complaint of the supervising engineers that the plaintiff would not supply vouchers and detailed claims on a regular basis. Although, as I have said, the supply of such information had improved there can be no doubt that it was still not in conformity with the requirements of the contract. In particular there was a persistent failure to supply details for the period to 21 May 1977. In fact, those details were not supplied until 30 August. The dissatisfaction of the engineers with the failure to supply the required details is plainly to be seen from the correspondence over the relevant period. Letters written to the plaintiff by Mr Young of Kerslake and Partners on 27 June and 19, 21 and 29 July 1977 all testify to this. The result was that Mr Young was not able to make any precise calculation as to the full amount which had become payable to the plaintiff under the contract. He was issuing certificates for progress payments on the basis of his estimate of the position. This he calculated from such material as was available. There came

a time when he began to realise that the maximum prescribed by the contract may have been exceeded. He first placed this on record in a letter to the plaintiff of 29 July in which he confirmed a discussion with Mr Hogg of 27 July. What he said in his letter was:

> " At that meeting we stated that in our opinion commitments already made plus the cost of completing the contract now exceed the maximum price payable by N.Z.E.D. (Provisional items excluded) and recommended that you review the contract financial situation urgently. "

Later in the same letter he said:

> " We now instruct that you submit a complete and accurate statement of all outstanding liabilities and commitments for cost reimbursible items to this office not later than Wednesday 3rd August. This statement is required to enable us to ensure that sufficient funds are held to complete outstanding work. We cannot guarantee that payment of future claims will be made until we can give N.Z.E.D. this assurance. "

The particulars referred to in that letter were not received by him by 3 August and the following day he went to Napier, inspected the contract works and met Mr Hogg. At that meeting he received from Mr Hogg, orally, a statement in summarised form of his outstanding commitments and liabilities. From the information supplied in this way Mr Young was able to make an estimate of the financial state of the contract. This summary had to include an estimate of the amount relating to the period prior to 21 May as the necessary information for that period had still not been received. Upon this basis Mr Young estimated that the plaintiff had then overspent the permitted maximum by about $40,000. He told Mr Hogg this. There followed a discussion as to what courses were open to the plaintiff. There is some conflict as to this discussion but I accept Mr Young's account of it, supported as it is by entries made in his diary at the time. He said that the options open to the plaintiff were discussed, and it may be that the possibility of the plaintiff having to abandon the contract was mentioned but he left it to Mr Hogg to decide what he should do. He told Mr Hogg that it was unlikely

the Department would be prepared to increase the amounts payable under the contract. Mr Hogg said that he could not carry on in the circumstances and requested a meeting with the Department's Stores Manager. Mr Young then returned to Wellington and Mr Hogg went to Auckland to consult his solicitor. On the following day, 5 August, Mr Young rang Mr Hogg and told him the Stores Manager had no wish to discuss the matter with him and considered there was no point in it. He said that the Department was not interested in making extra payments to the contract and told Mr Hogg that he was in breach of the contract by reason of late completion. Mr Hogg asked what he could do and Mr Young said he was in no position to advise him and suggested he should consult his solicitor. He mentioned that abandonment was a possible course of action available to the plaintiff. Mr Hogg's account of this conversation is that Mr Young told him he would either have to continue the contract at his own expense or abandon it but again I accept Mr Young's account of what was said, particularly as it is supported by a letter he wrote to the plaintiff on 8 August setting out what had been said in the conversation of 5 August. He concluded the conversation by asking Mr Hogg to let him know what action he proposed to take before he actually took it. Next day Mr Hogg removed virtually all his equipment from the site and work ceased at that point.

The contract made on 21 May is a substantial document of some 193 pages. It incorporates some General Conditions which are varied in certain respects by some Special Conditions. Clause 18 (ii) of the General Conditions provides:

> " All Contractor's Equipment ... shall be used solely for the purpose of the Works and shall not be removed by the Contractor without the permission in writing of the Engineer .... "

It is the defendant's case that the removal of equipment by the plaintiff on 6 August was in breach of that provision. Clause 12 of the General Conditions, as amended by cl. 6 of the Special Conditions, provides that if the engineer shall certify in writing that in his opinion the contractor has abandoned the contract then it is lawful for the Department,

on giving notice in writing to the contractor, to exercise the remedies prescribed in that clause. It is unnecessary for present purposes to set them out.

The first question to which I have earlier referred is whether the Department, through Mr Young, repudiated the contract on 5 August 1977. The plaintiff's case is that Mr Young told Mr Hogg on that day that he must either continue the contract at his own expense or else abandon it and that the Department was not prepared to put any more money into the contract. It is argued that this was a repudiation of the contract because it was putting it beyond the plaintiff's ability to proceed and was a firm statement that the Department would pay nothing further anyway. It is said that the plaintiff was entitled to proceed notwithstanding the provision in the contract as to a maximum sum. This was because the defendant had by then waived the maximum so far as it related to the work involved in the Esk River crossing or, alternatively, that the defendant is estopped from relying on the maximum price limitation. As a further alternative the plaintiff contended that there had been a frustration of the contract because completion within the maximum price limitation had become impossible of performance.

The principle as to repudiation, which has been consistently applied, is that expressed by Lord Blackburn in Mersey Steel and Iron Co. Ltd v Naylor, Benzon & Co. (1884) 9 A.C. 434 at p. 442, in this way:

> " As to the first point, I myself have no doubt that Withers v. Reynolds 2 B. & Ad. 882 correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'If you go on and perform your side of the contract I will not perform mine' ... that in effect amounts to saying, 'I will not perform the contract.' In that case the other party may say, 'You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract.' "

In the course of adopting that statement of principle, Lord Denning in Federal Commerce and Navigation Ltd v Molena Alpha Inc. & others (1978) 3 All E.R. 1066 at p. 1082 explained it by saying:

> " I would go by the principle as I have always understood it that if the party's contract, objectively considered in its impact on the other party, is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his repudiation and treat the contract as discharged from that time onwards. "

It is necessary then to consider whether what Mr Young said to Mr Hogg on 4 and 5 August indicated to Mr Hogg an intention that the Department would not be bound by the contract. In my view the evidence does not establish that this was the case. On 4 August when Mr Young went to Napier he told Mr Hogg of his belief that the contract had already exceeded its maximum. He asked to be supplied with complete schedules of all outstanding invoices and commitments. Mr Hogg acknowledges that this was so. What Mr Hogg does not acknowledge is that Mr Young required those schedules in order that he could see whether his fears were justified but I have no doubt that was the purpose. Certainly no finality was reached that day. Mr Hogg asked that he be given the opportunity of meeting the Department's Stores Manager and one can conclude that Mr Young indicated he was prepared to pass on that request because he did indeed do so. Mr Young also told Mr Hogg that he thought it unlikely the Department would increase the amount payable under the contract but that was as far as the matter went that day.

On the following day, 5 August, Mr Young rang Mr Hogg and it is really that conversation upon which Mr Hogg relies in saying that there was a repudiation. I have already set out my findings as to that conversation. One of the significant features of it is that the conversation concluded with Mr Young asking Mr Hogg to let him know what action he proposed to take. This is confirmed by Mr Young's subsequent letter of 8 August to the plaintiff. If there had already been a repudiation by Mr Young it is difficult to understand why

he should have retained any interest in what Mr Hogg did next. I think it is clear that the conversation had gone no further than a discussion as to the courses which were open to the plaintiff in view of the fact that the maximum appeared to have been exceeded. As I have already said it was not even firmly demonstrated at that stage that this was the case. It is true that Mr Young said the Department was not interested in making extra payments to the contract but this meant no more than that the Department insisted on adhering to the terms of the contract and was not prepared to agree to a variation of it. I can see no basis for holding that Mr Young had conveyed to Mr Hogg a clear intention that the Department was not to be bound. Indeed, he was really doing no more than drawing Mr Hogg's attention to the fact that the plaintiff remained bound by the contract. I am accordingly not prepared to hold that there was a repudiation by the Department.

I come then to the first of the alternative arguments for the plaintiff which was that there had been a waiver by the Department of the provision in the contract as to a maximum sum. This argument is based on the proposition that the engineers had been fully aware of additional measures being taken to achieve the Esk River crossing and had at least acquiesced in them if not in fact initiated them. There is no doubt that the engineers were closely concerned with the day to day performance of the work. Mr Greenaway in particular was on the site virtually every day and sometimes several times a day. He took part in discussions as to the employment of additional equipment and from time to time made suggestions as to what should be done. Mr Hogg's attitude to this was that the contract was being performed by the plaintiff and the Department jointly and that the decisions made were just as much those of the engineers as of the plaintiff. I do not accept that this was so. The respective positions of the plaintiff and the engineers is clear and is provided for in the contract in the way one might expect with such a contract. It provides that the work is to be carried out by the contractor (that is, the plaintiff) and that the responsibility of the engineer is a supervisory one. The relevant part of the General Conditions of contract is cl.19 (i) (ii) and (iii) which is as follows:

" 19. (i) After the tender has been accepted by the Purchaser, all instructions and orders to the Contractor shall, except as herein otherwise provided, be given by the Engineer.

(ii) The Contractor shall be responsible for ensuring that the positions, levels and dimensions of the Works are correct according to the drawings, notwithstanding that he may have been assisted by the Engineer in setting out the said positions, levels and dimensions.

(iii) All the Works shall be carried out under the direction and to the reasonable satisfaction of the Engineer. "

It is clear that the engineers were acting within the scope of this authority and nowhere do I find the evidence to establish that they went beyond this. The evidence of Mr Hogg suggested that in more than one instance they did so but Mr Greenaway's evidence is to the contrary and where they are in conflict I prefer the evidence of Mr Greenaway. It should be added, however, that even if the knowledge by the engineers of what the plaintiff proposed to do could be said to amount to acquiescence it cannot be said that there was such acquiescence with a knowledge that the plaintiff had already exceeded the maximum because it was never known with certainty that this had occurred until after the work had ceased. Although the maximum is stated to be a sum of $168,600 this was a figure which was capable of being increased, and in fact the parties are now agreed that the correctly calculated maximum proved to be a sum of $172,929. The responsibility for arranging the work, deciding what equipment was required, hiring that equipment and carrying out the work remained throughout with the plaintiff.

The second alternative argument for the plaintiff was that the defendant was estopped from relying on the provision in the contract as to a maximum price because the Department's representatives had acquiesced in the carrying out of the work and the employment of additional machinery at a time when they knew payment could only be made for that extra work and machinery by exceeding the maximum. I have

already held that, by the time the work stopped, it was not known by the engineers or the Department precisely what the position was as to the financial state of the contract. This argument must accordingly fail on that ground, but I think I should add some further comment. The earliest occasion, as disclosed in the evidence, on which Mr Young was aware that the maximum may have been exceeded was 19 July. He was unable to make a correct assessment of the position and accordingly he wrote to the plaintiff on 21 July pointing out that previous requests for financial details had not been complied with and again asking for the necessary information as a matter of urgency. The last piece of additional equipment brought on to the site was Mr Orlowski's dragline which started working on 12 July. The last change in the method of operation of the work was the introduction of the divers. They started work on 14 July. From that time on the work proceeded until stopped by the plaintiff on 6 August. It is clear therefore that from the time Mr Young suspected the maximum may have been exceeded there was no acquiescence by him or by anyone else on the Department's behalf in the incurring of any new form of expense. The fact that the operation was permitted to continue was not a matter for decision by the Department but was the responsibility of the plaintiff alone. Accordingly, on no basis can it be said that any question of estoppel arose.

The remaining alternative argument for the plaintiff was that the inability of the plaintiff to complete the contract within the specified maximum price meant there was a frustration of the contract and that the provisions of the Frustrated Contracts Act 1944 should apply so as to entitle the plaintiff to recover the value of the work actually done. This argument, so far as I could understand it, was based on the proposition that the parties intended when they contracted that the plaintiff would complete the whole of the works and the fact that performance of the contract had to cease was due to the reaching of a maximum sum of expenditure. It was said that the intervention of this limitation of payment to the plaintiff meant it had become impossible for it to perform the contract and it was for that reason to be regarded as

frustrated. It seems to me this argument proceeds from an incorrect understanding as to what amounts to the frustration of a contract.

The general principle as to frustration is stated in 9 Halsbury 4th ed., p. 314, para. 450, in this way:

> " The doctrine of frustration operates to excuse from further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place, and (2) before breach, an event in relation to the matter stipulated in (1) renders performance impossible or only possible in a very different way from that contemplated, but without default of either party.
>
> The doctrine of frustration has been variously stated to depend on an implied condition, the disappearance of the foundation of the contract, the intervention of the law to impose a just and reasonable solution, or the fact of a radical change in the character of the obligation; but the last view is now the predominant one. That view requires the interpretation of the terms of the contract in the light of the nature of the contract and the relevant surrounding circumstances, and an inquiry whether those terms are wide enough to meet the new situation. "

Frustration does not arise merely because it turns out to be difficult to perform or onerous as, for instance, by the encountering of unexpected obstacles (ibid. p. 321, para. 455).

It was contended for the plaintiff that the parties contemplated the work could be completed within the maximum price and that this turned out to be incorrect. It was therefore said that the contract had become impossible of performance upon the basis understood by both parties. I am sure that in no sense can the present case be regarded as one of frustration. All that happened was that the plaintiff proved to be unable to do the work as efficiently or as expeditiously as it expected. There is little doubt that

this was its own fault. Although Mr Hogg himself was said to be a man of considerable experience and skill in the various aspects of the work involved he was plainly less competent as a manager, organiser and supervisor. The result was that the plaintiff failed to perform fully its part of the contract. I am not prepared to hold that any question of frustration arose.

I said earlier that there were three questions needing to be considered. The first was as to whether the Department had repudiated the contract and I have held that it did not. In view of that finding I do not have to consider the second question which was whether the Department was entitled to repudiate. The third question was whether there had been an abandonment of the contract by the plaintiff. If there had then this amounted to a breach of cl. 12 of the General Conditions as substituted by cl. 6 of the Special Conditions. In view of the findings of fact I have already made there can be no doubt there was such an abandonment. On 6 August Mr Hogg removed all his men and machinery from the site and all work ceased. This was done without the approval of the engineers as required by cl. 18 of the General Conditions. These provisions in the General and Special Conditions I have already set out earlier. The contract came to an end because of the plaintiff's actions and these amounted to abandonment.

As I understood it I was asked to determine only the question of liability and the findings I have made result in the defendant being entitled to succeed on both claim and counterclaim. I take it the action can now be resolved by counsel upon the basis of the figures which have been agreed to. The defendant is also entitled to costs but I am not aware upon what basis that should be and accordingly I reserve to the defendant leave to apply for an order as to costs if counsel are unable to agree.

I think I should add that, at the close of the evidence in this case, there was insufficient time for counsel to address me orally. They accordingly agreed that they would let me have written submissions, and that those would reach me by 9 March. I duly received the submissions of

counsel for the defendant on that date. As I had not received the submissions of counsel for plaintiff by 26 March I arranged for the Senior Deputy Registrar to ring him and to say that unless I received his submissions by 30 March I would assume he did not wish to make any. Up to the date of delivery of this judgment those submissions have not been received and I have accordingly had to conclude my judgment without that assistance.

Solicitors: Messrs Elwarth, Patel & Partners, AUCKLAND, for Plaintiff

Crown Solicitor, WELLINGTON, for Defendant