IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

7/8 A. No. 146/79

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BETWEEN THE FLETCHER CONSTRUCTION COMPANY LIMITED a duly incorporated company having its registered office at Fletcher House, Great South Road, Penrose, Auckland, Contractor

A N D FLETCHER INDUSTRIES LIMITED a duly incorporated company having its registered office at Fletcher House, Great South Road, Penrose, Auckland

Plaintiffs

A N D WAIKATO HOSPITAL BOARD a body corporate under and by virtue of the Hospitals Act 1957, of Pembroke Street, Hamilton

First Defendant

A N D A.K. PLANK CONSTRUCTION LIMITED an incorporated company having its registered office at 54 Aberfoyle Street, Hamilton, General Contractor

Second Defendant

Hearing: 14 July 1980

Counsel: I.F. Williams for Plaintiffs
R. Wilson for First Defendant
J.D. Bathgate for Second Defendant

Judgment: 29 July 1980

JUDGMENT OF GREIG J.

There were before me a motion of the second defendant to strike out the statement of claim, staying proceedings, cancelling charges under the Wages Protection & Contractors Liens Act 1939 and other consequential matters and a motion by the first defendant seeking leave to make payment into court and dismissing the first defendant from the action.

The latter motion was not proceeded with and the second defendant's motion was proceeded with only in respect to the cancellation of the charges for contractors liens.

It is to be noted that at the same time motions in respect of an order of this court cancelling charges for contractors liens in an action between Fletcher Mechanical Limited as plaintiff and the same first and second defendants in an action in Hamilton Registry A19/79 were called for hearing but were not proceeded with, counsel for the plaintiff in that action formally withdrawing its application under these earlier proceedings.

The background of this matter is that the second defendant contracted with the first defendant for the construction of a new theatre suite and chance recovery block at the Waikato Hospital in Hamilton. The second defendant contracted with the Fletcher Group to sub-contract part of the main contract. Work under the main contract and the sub-contract was commenced and after some considerable amount of work had been done a dispute arose as to the amount of payment to be made. This dispute is unresolved but I was informed by counsel that steps are being taken to have the dispute settled by way of arbitration.

While the parties were disputing Fletcher Mechanical Limited the plaintiff in action A 19/79 issued a notice of charge on 25 January 1979 claiming a charge for contractors lien. The first defendant has since retained and still retains a sum of $162,703.16 which it seems would otherwise be payable by the first defendant to the second defendant in terms of the main contract.

Upon application by the second defendant an order was made by Bisson J. on 1 June 1979 cancelling that charge for contractors lien. The grounds for that were that the plaintiff in that action, Fletcher Mechanical Limited, was not and never had been the sub-contractor with whom the second defendant had contracted and therefore had no right or claim to a charge.

The two plaintiffs in this action issued notices of charge for contractors liens which are dated 22 May 1979 and they then commenced this action on 10 July 1979. The charge claimed is in the same amount as the previous charge and is of course in respect of the main contract and sub-contract but purports to correct what it may appear to be a mistake in the original charge.

The claim by the second defendant for cancellation of the charge is on the ground that the work under the main or head contract was completed on 9 March 1979 and that no action being commenced in respect of that charge within 60 days of that completion date by virtue of s.34 (6) of the Act the charged is deemed to be extinguished. There is no dispute as to the effect of the Act but the alleged date of completion is disputed.

I consider that this interlocutory application must be decided on the same principles which the court applies in its inherent jurisdiction to dismiss an action peremptorily which is frivolous, vexatious or otherwise an abuse of its procedure. That jurisdiction is to be exercised sparingly and only in exceptional cases.

It must be plain that the action cannot by any possibility succeed and it is not an appropriate jurisdiction

where there are disputed questions of fact. It is improper to deprive the plaintiff of his opportunity to have the matter heard in court unless on the facts which are undisputed it appears that the plaintiff cannot in any event succeed. Where there is a dispute of fact then the plaintiff ought to be entitled to have that dispute canvassed in court unless some agreement can be reached on the facts.

It is notoriously difficult to ascertain in many cases the date of completion of a contract particularly when the contract is a large, complex one which takes a considerable time to carry out. That difficulty is increased when there are references to practical completion and other terms and phrases which enable the owner or employer to take over the work before it can be said that everything has been done.

The completion date alleged by the second defendant is confirmed by Mr Plank in two affidavits that he has filed and it is recorded in a schedule to the statement of claim by the plaintiffs as the completion date. It is to be noted in the latter record the date is used for the calculation of alleged damages and is not in itself an express acknowledgment that that is the completion date. It may be noted in passing that in that schedule under the heading Chronological Order of Events the date 30 September 1978 is recorded as the date on which Fletchers advise practical completion of their contract, that is to say, the sub-contract.

It was suggested that Fletchers have accepted that March date by reason of an affidavit of T.G. Young of 20 February 1980. In that affidavit there appears this statement:

> "Mr Plank's summation as to the terms of the head contract and the sub-contract are broadly correct."

I do not accept that that is an admission as to the date of completion of the contract but merely admits Mr Plank's description in the affidavit as to the terms and conditions of the head contract and sub-contract. There is in support of the date of 9 March 1979 exhibited to one of Mr Plank's affidavits the architect's certificate of practical completion. That, while not conclusive, is certainly supportive evidence.

To the contrary was the evidence of Mr Young given at the hearing before me in which it was indicated that certain work under a guarantee and maintenance period had not yet been completed. That guarantee and maintenance period is for 12 months after the date of handing over the completed works by the contractor and the acceptance by the architect. In the notices of charge the plaintiffs claim that the work under the sub-contract is still being done. Exhibit "B" which was produced at the hearing of this matter is a letter dated 11 March 1980 from the second defendant to Fletchers which records that Fletchers is still under the maintenance period. As noted this is 12 months from the date of completion or rather the date of handing over, which may well be the same thing, but it certainly indicates that the contract may not have been completed on the 9th March 1979.

On the evidence that is before me I am quite unable to conclude whether 9 March 1979 is the date of completion of the head contract.

In those circumstances it would be inappropriate to make the peremptory order for striking out or cancellation that is sought and I am not prepared to do so.

The second defendant sought to have the claim of lien or charge cancelled or the effect of it modified under

the provisions of s.44 of the Act on the grounds that there is serious prejudice and embarrassment to the second defendant, that there is a multiplicity of claims and indeed plaintiffs, that the plaintiffs have now changed the whole basis of their claims, that the second defendant has a substantial counter-claim against the plaintiffs and that there has been unreasonable delay by the plaintiffs in prosecuting this matter.

The plaintiffs in response claim that the prejudice involved is in the circumstances not serious enough, is customary when the provisions of the Act are called in aid in respect of any head contract or sub-contract, that if the charge is cancelled the plaintiff may not be able to make recovery of the amount it claims due and that in the circumstances there has been no unreasonable delay.

I have some sympathy with the second defendant in this matter. The provisions of this Act which are principally to protect workers and small contractors invariably cause delay and in some cases with detriment to all the parties who are involved in a contract or sub-contracts when charges are claimed and proceedings ensue. It appears that no other sub-contractor in this matter makes any claim and it may be questionable whether the provisions of the Act were intended to provide protection to an organisation like Fletchers in relation to a contract of this size and complexity. It seems further that while no doubt Fletchers are entitled to exercise their rights under the Act there has been some administrative difficulties, to say the least, in identifying the actual sub-contractor and as a result three notices of charge have been made and two sets of proceedings commenced.

The claims for damages in the proceedings now made by Fletchers are substantial, complex and may be novel. Having regard to the undoubted complexity of

the contract and of the claims now made I cannot say that in this particular action commenced in July last year that there has been any unreasonable delay on the part of the plaintiffs. In any very large building contract it takes considerable time to calculate and identify all the matters which are in dispute and these problems are increased when a claim is made in respect of preliminary and general items in a contract which depend upon fluctuations in prices and costs over a number of years.

The second defendant is no doubt prejudiced by the inevitable delays and the retention of moneys which would otherwise be payable. I do not think that in all the circumstances of this case the prejudice involved is any greater in quality or in degree than is suffered by any contractor when charges are claimed under the Act. The fact is that there is a dispute as to what is owing between the plaintiffs and the second defendant. An amount is allegedly owed and unpaid to the plaintiffs and under the provisions of the Act the second defendant must await the resolution of the dispute before the moneys payable by the first defendant can be released.

This is not a case in which I can fix a particular sum for retention less than the amount now retained because of the complexity of the disputes as between the parties and the presently incalculable amounts of the claims on either side.

In the result therefore it is not a proper case to cancel or modify the charges under s.44 of the Act.

Because I have dealt with this matter in circumstances in which there is some doubt as to the true

facts it seems that it would be better if I did not make any final order in respect of the motions before me. I will therefore adjourn the motions sine die with right to the second defendant and any other party who has moved in this litigation to bring any matter on before me at three days notice to the other parties.

In the circumstances I make no order as to costs.

Solicitors for Plaintiffs: Shief Angland Dew & Co.

Solicitors for First Defendant: Swarbrick Dixon & Partners

Solicitors for Second Defendant: Tompkins Wake & Co.