

13/5/82

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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A. No. 90/77

NZLR

Notly CA 3/2/83.

**Special  
Consideration**

to be reported  
in Butts  
Conveyancing Reports.

BETWEEN

THE ELECTRIC CONSTRUCTION  
COMPANY OF NEW ZEALAND  
LIMITED a duly incorporated  
company having its registered  
office at Auckland, lift  
suppliers

Plaintiff

A N D

SAMCO SARGENT CONSOLIDATED  
LIMITED (In Receivership) a  
duly incorporated company  
having its registered office  
at Ground Floor, White Heron  
House, 60 Parnell Road,  
Auckland, Property developer

First Defendant

A N D

SAFE CUSTODY NOMINEES LIMITED  
(In Liquidation) a duly  
incorporated company having  
its registered office at  
Auckland, Financier

Second Defendant

A N D

MERBANK CORPORATION LIMITED  
(In Liquidation) a duly  
incorporated company having  
its registered office at  
Auckland, Merchant Banker

Third Defendant

Hearing: 11th and 12th March, 1982, and  
6th April, 1982.

Counsel: Baragwanath and Stones for Plaintiff.  
Newhook for Defendants.

Judgment: 12 May 1982

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JUDGMENT OF SPEIGHT, J.

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The First Defendant, which will be referred to as "Samco", owned at all relevant times a block of land in the City of Auckland upon which it was erecting an office block to be known as Swanson Towers. The work was to proceed in several stages with different parts of the building having different heights.

Five passenger lifts were required, two of them for stage one and three of them for stage two. Samco contracted with the Plaintiff (hereinafter called "E.C.C.") for the supply and installation of the lifts, this arrangement being evidenced by a written contract of the 5th October, 1973. The total price was \$138,592, with provision for variations and escalation. As a matter of interest, because it will be of some relevance later, the cost of the lifts and ancillary machinery alone, as distinct from the installation work, was approximately \$80,000. During the course of the construction Samco was obliged to raise finance and it had certain mortgages to the Waikato Savings Bank Ltd., and to Safe Custody Nominees Ltd. (the Second Defendant). These mortgages, though they remained in force for a considerable period, have now been paid off and those mortgagees are of no concern to the case. During 1974, when only part way on with the work, Samco encountered grave financial difficulties in all its operations, namely, in the construction of this building and on a number of other large projects in and about the City of Auckland. One gathers, though it is of no particular relevance, that these had been brought about by financial involvement with some of the J.B.L. syndicates which had collapsed at about that time.

For the purpose of completing this contract and other contracts, Samco turned to Merbank Corporation Ltd. (hereinafter called "Merbank"), which company, as is well known, was involved with Securitibank Ltd. At that time Securitibank and Merbank were of good financial repute and were involved in many large scale financial operations. Merbank agreed to finance a number of uncompleted Samco contracts to the extent of - in the case of Swanson Towers - providing 100 per cent of the funds then needed for completion. As part of its arrangement Merbank lent money to Samco and took by way of security a mortgage which was registered against the land - this in late 1974. As a result of the known financial difficulties being encountered by Samco, E.C.C.

were not then willing to proceed with any part of its contractual obligations but was induced to do so by the arrival on the scene of Merbank and the funds which it made available for the completion of the project. Eventually, however, Merbank too, as part of the Securitibank organisation, has gone into liquidation and this action is being defended on behalf of Merbank by its liquidator who is also the receiver of Securitibank. The Swanson Towers building was completed and it has been sold by agreement between all the parties, viz. Merbank, Samco and all the sub-contractors including the Plaintiff Company, and some funds are held pending the determination of conflicting claims but there is not enough to pay everyone. E.C.C. has only been paid in part for its work pursuant to the contract, and there is outstanding to it a sum of \$34,794. The issue involved in these proceedings is whether or not a lien which was registered against the property on behalf of E.C.C. has priority over the mortgage of earlier date registered by Merbank, and nice questions arise as to priorities, depending upon the interpretation of the Wages Protection and Contractors' Liens Act, 1939. In fact the lien and the mortgage are no longer registered against the land. They were released for the purposes of sale but some of the proceeds of sale, after the payment of other debts including the earlier mortgages, is held in a solicitor's trust account to abide the outcome.

There is voluminous documentary evidence and some excerpts need to be referred to. The contract between E.C.C. and Samco for the supply of lifts and their installation which was dated 5th October, 1973, provided that the first progress payment would be against shipping documents, this, of course, in relation to the one consignment which would contain all five lifts and associated machinery to be delivered in Auckland. Thereafter progress payments would be at monthly intervals for material and labour expended on site, less 10% reduction. It is clear that E.C.C. were entitled to their first progress payment on the shipping documents before they made delivery to the site of the lifts which

were being imported from England. In the middle of 1974 there were discussions between Samco and E.C.C. confirming that they were in financial difficulties in relation to the project and stating that it seemed a distinct possibility that only Stage One could be completed because of lack of funds, for which purpose they might wish to modify the lift contract. At this stage E.C.C. had ordered the lifts from their suppliers in England and these were due to be despatched in November 1974. Cancellation of that shipment would lead to inevitable delays if the whole or even Stage One of the project was to proceed. Consequently an arrangement was entered into whereby E.C.C. would continue to import the lifts subject to the need for Samco to confirm reasonably promptly whether any or some of them could be paid for, it being understood that E.C.C. would be able to sell elsewhere in New Zealand if that became necessary. This arrangement was confirmed in writing in two letters, one from Samco to E.C.C. dated 24th October, and a reply from E.C.C. of the 5th November. They read as follows:-

"

SAMCO SARGENT CONSOLIDATED LTD.

24th October, 1974.

Mr. P. Vodanovich,  
Auckland Area Manager,  
Electric Construction Company,  
P.O. Box 724,  
AUCKLAND.

Dear Sir,

Re: Swanson Towers Project

Confirming our discussion regarding the lifts for the above project as follows:

- (1) We previously advised that we had only made financial arrangements sufficient to enable us to complete Stage 1 (building 3), and that we wished you to cancel, or at least hold temporarily the importing of the lift for Stage 2 (buildings 1 and 2).
- (2) We also agreed that because the order had been partially processed, it was possible that there would be certain sums we would already be liable for with regard to the equipment for buildings 1 and 2.
- (3) After discussion and investigation it was decided

that the best course of action would be for you to proceed with the importing of the lifts, which were unlikely to arrive until early in the New Year.

If by the time these lifts became available, Samco Sargent had not made satisfactory financial arrangements for the completion of the buildings, then you would undertake to divert them to other contracts or sell them on our behalf.

- (4) In arriving at (3) above, our decision was influenced by the fact that to proceed in this manner would result in the loss (if any) to Samco by adopting this procedure was likely to be less than if we made a definite cancellation of the order at its present stage of despatch, i.e. goods on the wharf in England.

Trust the above items record your understanding of our discussion.

Yours faithfully,

SAMCO SARGENT CONSOLIDATED LTD.

(Signed) P. P. SARGENT.

Managing Director.

THE ELECTRIC CONSTRUCTION COMPANY OF N.Z. LTD.

5th November, 1974.

Samco Sargent Consolidated Ltd.,  
P.O. Box 4078,  
AUCKLAND, 1.

ATTENTION: MR. P. P. SARGENT.

Dear Sir,

RE: SWANSON TOWERS PROJECT - LIFTS.

Thank you for your letter of the 24th October, 1974.

Our latest advice from the Works, is that the lifts will be packed ready for shipment early November. Shipping space has been at a premium ex the U.K. so it could still be a little time before they are actually shipped and we will advise you as soon as we receive the name of a ship.

These are standard and popular sized units and under normal conditions and times would be readily saleable. We are confident that we will be able to dispose of these units for you and have immediately set in motion enquiries for their disposal and have some early prospects. Unfortunately the same problem that you are experiencing in raising finance also applies to many others, so we cannot give a definite time element. We assume from your letter that you will not be in a position to finally inform us whether or not the project will go ahead until the lifts arrive. We will require payment upon presentation of shipping documents in the normal manner and storage until you have advised us that we can dispose of the units and we are successful in finding a buyer. To assist you in budgeting, we give hereunder the approximate landed cost. These are based on

the exchange rate ruling at the 30th October, 1974 and as we do not have the exact C.I.F. charges until the goods arrive, these prices are subject to final adjustment when all costs are known.

Job No.	730615	Two Lifts	Stage 2	\$30,500.00
Job No.	730616	One Lift	Stage 2	\$11,000.00

The above are net cost claims and no provision has been made for retentions.

The two lifts for Stage 1, reference 730617, will be progressed claimed in the normal way and after allowance for a 10% retention, the Progress Claim No. 1 will be for approximately \$35,500.00.

Unless we hear to the contrary, we will take the prices quoted on the foregoing page for the Stage 2 lifts as the basis for trying to dispose of these lifts, but will not finalise any sale until we have your approval to proceed. Please note that if it becomes apparent any time between now and the date of arrival of these lifts that the Stage 2 will not go ahead or it will be deferred for say, a period of twelve months, then please advise us so that we can talk in more specific terms with intending buyers.

We trust the foregoing is all in accordance with your understanding of our arrangements, but if we can be of further assistance please do not hesitate to contact us.

Yours faithfully,

THE ELECTRIC CONSTRUCTION COMPANY OF N.Z. LTD.

(Signed) P. J. VODANOVICH,

Auckland Area Manager,  
Lift & Escalator Division.

Consequent upon this E.C.C. advised various sub-contractor who had been making components locally to cancel some of the work, although it was prepared to cover any loss which the sub-contractors might already have incurred.

I have heard evidence from Mr. Styants of E.C.C., from Mr. Sargent of Samco, and from Mr. Moore, formerly of Merbank. It is apparent from their evidence that as Samco's financial position deteriorated it asked for financial help from Merbank and an arrangement was entered into between Merbank and Samco that Merbank would provide all the finance necessary to complete the building, that it would install its own financial controllers over the operation and lay down very stringent terms as to supervision and also as to

disbursal of money. In payment for this Merbank would receive a fee of \$200,000. The details of this arrangement were not made known to E.C.C. though they are documented in a very lengthy agreement between Merbank and Samco called a "Joint Venture Agreement". The evidence of Mr. Styants of E.C.C., confirmed by that of Mr. Moore, is that in early 1975 there was a conversation between these two gentlemen, and later between Mr. Styants and a Mr. Campbell who was a Merbank employee appointed to supervise Samco's operations. From the conversations that Mr. Styants had with Sargent, Moore and Campbell he became aware that as at January, 1975, Samco were out of funds and were unable to pay even the first instalment under the contract, namely, payments against shipping documents, to secure the release of the lifts which were just then arriving on the Auckland wharves. Styants indicated to the other parties that E.C.C. would not accept any undertaking from Samco and would not release the lifts unless satisfactory arrangements were made for payment then and in the future. It appears that at this stage Merbank and Samco were very heavily involved together not only in this project but in others. Merbank had already advanced sums of money and had registered a mortgage over the site. Having received no prospect of payment from Samco, Mr. Styants had conversation with Mr. Campbell, and also with Mr. Moore. In summary, Mr. Moore told Mr. Styants that there was a firm arrangement between Samco and Merbank, that it was a "Joint Venture Agreement", and that this agreement would cover the initial payments for the lifts which were then sitting on the wharves. He said that Merbank was going to provide finance to complete the whole transaction, which would mean the installation of all five lifts, and that its funds would be available to complete the work. Mr. Styants' words were "They would assume responsibility for payment" and he said his understanding of the relationship between Samco and Merbank was that "It was a partnership and that the Companies were jointly assuming responsibility". Mr. Moore gave evidence and in

cross-examination he agreed in essence that this conversation had occurred, that he understood quite clearly that if E.C.C. were not re-assured as to the availability of funds, they would not supply or install the lifts. He acknowledged that it was a marginal financial enterprise that Merbank was entering into, and that to ensure that money was available to meet its fee it was crucial that the building be completed promptly, and that delay would be disastrous to Samco and to Merbank's prospects of a profit from the operation.

From the installation point of view it is clear that all parties knew that refusal by E.C.C. to supply lifts would require re-ordering through Europe with a consequential delay of twelve months to complete the building, and this would be disastrous. Mr. Moore also acknowledged that E.C.C. were refusing to give credit to Samco but would regard Merbank as creditworthy and that it was because of the request by Merbank that E.C.C. proceeded with the job. He also agreed in cross-examination that when the expression "joint venture" was used between himself and Mr. Styants, it would be reasonable for Mr. Styants to understand that that phrase implied a joint acceptance of responsibility, and that Mr. Styants would be entitled to believe that Merbank were standing behind Samco and jointly involved with it in the project. Consequent upon this discussion there was an exchange of letters from E.C.C. to Merbank on the 20th February, and a reply from Merbank on the 7th March. The letters read as follows:-

" THE ELECTRIC CONSTRUCTION COMPANY OF N.Z. LTD.

20th February, 1975.

Merbank Corporation Limited,  
P.O. Box 3992,  
AUCKLAND.

ATTENTION: MR. G. MOORE, MANAGER PROPERTY DEVELOPMENTS.

Dear Sir,

RE: SWANSON TOWERS - LIFT INSTALLATION.

We confirm the telephone conversation Messrs. Moore/Styants



of the 20th February, 1975.

The overseas content of the above lift installation is now on the wharves at Auckland ready to be delivered to the site. The gross value of this equipment is \$85,299.00 and after the 10% Liens Retention we are seeking payment of \$76,770.00. We are requesting urgent payment to enable us to meet our commitments in respect of this shipment.

We believe that the equipment can be accommodated on site but would require both a firm undertaking on liability for payment and a date of payment before delivery.

Please be assured of our fullest co-operation in any aspect of facilitating the resolving of the immediate problems and in the longer term of executing the complete contract. We are sure you will appreciate the grave concern we have experienced in the past weeks and this continues until we are assured that our claim will be met which in turn allows us to honour our commitments to others. We would also look concurrently for some information on the operation of the joint venture and the arrangement for payment for future progress claims.

We have not endeavoured to put any detailed information in with this initial letter but assure you once again of our fullest co-operation in providing such information that you may require to expedite the above matters.

Yours faithfully,

(Signed) B. J. STYANTS.

General Manager.

MERBANK CORPORATION LIMITED.

7th March, 1975.

Electric Construction of N.Z. Ltd.,  
39 Nugent Street,  
AUCKLAND.

Attention: Mr. B. J. Styants - General Manager.

Dear Sir,

Re: Swanson Towers - Lift Installations  
Your reference BJS/JCR 1230 & 1232.

Thank you for your letters of the 20 February regarding payment for certain items of lift equipment to be installed in the Swanson Towers Project.

We would confirm our verbal advice that this Corporation intends providing the funds necessary to complete the project and that provision is now being made for payment of your account for the lift equipment, subject to your completion of the necessary documentation for payment for off-site materials.

It is anticipated that payments to sub-contractors will be effected in the normal manner, i.e., through Samco Sargent, and will be subject to the terms and conditions contained in

the Contracts with Samco Sargent, including any retentions for liens and maintenance.

We trust that this letter assures you of the continuation of the project and of future payment, and we would assume that consequently you are able to proceed with your own contracted works without delay or additional expense.

Yours faithfully,

(Signed) G. A. MOORE.

Manager  
Property Investments Division. "

Consequent upon this arrangement E.C.C. uplifted the lifts and stored them in their warehouse under an Off-Site Materials agreement dated 10th March, 1975, acknowledging that the \$85,000 worth of lift machinery stored at their premises was the property of Samco. Thereafter the work proceeded, the building was completed with the lifts installed by E.C.C., and some payments made towards the appropriate sub-contract price but with a shortfall of the sum mentioned, viz. \$34,794. As already stated E.C.C. gave notice of lien on the 22nd December, 1976, so as to affect the Samco land, initially only a notice to Samco but later extended to include Merbank. The question arises as to whether this lien takes priority over Merbank's mortgage which was registered on the 6th December, 1974.

Mr. Baragwanath on behalf of E.C.C. advances his claim under a number of alternative propositions which derive from various provisions under the Wages Protection and Contractors' Liens Act, 1939. His first submission arises out of the extended definition of "employer" in Section 20 (1). It reads as follows:-

" 20. (1) In this Part of this Act, unless the context otherwise requires, -

"Employer" means any person who contracts with another person for the performance of work by that other person, or at whose request, or on whose credit, or on whose behalf, with his privity or consent, work

is done; and includes all persons claiming under him whose rights are acquired after the work is commenced; but a mortgagee who advances money to an employer shall not by reason thereof be deemed to be an employer: "

Mr. Baragwanath's argument is that the conversation between Mr. Moore and Mr. Styants and, more particularly, the records contained in the two letters just quoted, bring Merbank within the extended definition of employer. Just to recap briefly: the Samco venture had stalled by January, 1975, and Samco had made it known to E.C.C. that it could not make the first payment to secure the lifts, and E.C.C. had indicated its refusal to deliver. Time was crucial to Samco, but also for Merbank which was now heavily involved in financing the project, and was dependent upon speedy completion for its profit. It was Merbank's request that E.C.C. proceed, in consideration of Merbank's undertaking to provide the funds via the channel of the Samco contract machinery to pay for the work. I can see no answer to the validity of Mr. Baragwanath's contention on this point. Mr. Newhook, however, questions whether the extended definition in fact avails, because it is Section 21 which creates the right of lien and Section 21 (1) reads as follows:-

" 21. (1) Where any employer contracts with or employs any person for the performance of any work upon or in respect of any land or chattel, the contractor and every subcontractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land or chattel, and every subcontractor or worker employed by the contractor or by any subcontractor to do any part of the work shall be entitled to a charge on the money payable to the contractor or subcontractor by whom he is employed, or to any superior contractor, under his contract or subcontract. "

As he points out nowhere else in the Act does the contractor acquire his right of lien and nowhere else in the Act does it appear that there is any benefit to the contractor from the extension of definition of "employer" unless it comes from a

combined reading of Sections 20 and 21. Mr. Baragwanath's submission in response to this is that because of the conjunction of the two sections the words "contracts with or employs any person" in Section 21 (1) has an extended meaning beyond the ordinary concept of contract and is to be extended by virtue of the definition in Section 20 to include not only persons who contract for the performance of work in the ordinary sense of that word, but who procure the performance of work by request, extending of credit, by privity, or consent. The extended definition must have been deliberately worded and in accordance with modern views of purposive interpretation, I would be prepared, if necessary, to rule in favour of this submission but for reasons which will emerge later there are other grounds upon which it appears to me the claim should succeed. On this point it is to be noted that there is a proviso to the employer definition that a mortgagee who advances money to an employer shall not by reason thereof be deemed to be an employer. As has been pointed out in the Honourable J. N. Wilson's book on Wages Protection and Contractors' Lien, this proviso was apparently introduced to overcome earlier decisions in A. & T. Burt, 21 N.Z.L.R. 54, and Commercial Property & Finance v. Official Assignee (1925) 24 N.Z.L.R. 655, whereby pure mortgagees who acquired that status after work had commenced came within the extended definition as employers and were thereby vulnerable to liens. It seems implicit from the reading of the judgments of Williams, J. in both these cases that he accepted that the right of lien (now contained in Section 21) arose in respect of such persons even though they were not in the ordinary meaning of the words "contractors" or "employers".

There are, however, other equally strong arguments which persuade me that Plaintiff must succeed. It appears to me from a consideration of the dealings between Merbank and E.C.C. that a contract was brought into existence between them. There had been three-sided negotiations as a result of which the original contract

now became a tripartite one and, in particular, there was now a contractual relationship between Merbank and E.C.C. for the performance of work, namely, an agreement that in exchange for an E.C.C. promise to perform the lift installation work, which contract it had justifiably repudiated to Samco, in exchange for Merbank's promise to see E.C.C. paid. Previously it was held that a promise to perform a duty which was already owed to a third party could not constitute consideration, but this situation has been altered by The Eurymadon (N.Z. Shipping Co. Ltd. v. A. M. Sattertwaiite & Co. Ltd., (1975) A.C. 154 at 168 E), so that even if the contract E.C.C./Samco was still on foot, E.C.C.'s expression of willingness to perform the work constituted consideration in exchange for the promise of money by Merbank. But even without that proposition I think the better view is that by January, 1975, Samco had repudiated and a fresh contract arose between E.C.C. and Merbank - see in particular the letters of 20th February and 7th March.

Further alternative submissions were put forward by Mr. Baragwanath which again I think are valid. Section 23 (1) reads as follows:-

" 23. (1) Where any owner is not the employer, the estate or interest of the owner in the land or chattel upon or in respect of which the work is to be done shall be subject to lien or liability as if he were the employer, to the extent to which the owner has consented in writing that he should be liable for the contract price or that his estate or interest in the land or chattel should be liable. "

The definition of "owner" in Section 20 includes a person having a limited estate or interest in the land, and therefore includes Merbank as mortgagee. If the contract with Samco was still on foot and Samco remained the employer (inter alia) then the estate or interest of the mortgagee would be subject to a lien to the extent that it consented in writing that it should be liable for the contract price, and I see no difficulty

in construing the Merbank letter to E.C.C. (supra) as such a consent to liability.

Finally, the fourth and equally valid submission arises out of Section 25, of which sub-sections (1) and (2) read as follows:-

- " 25. (1) Subject to the provisions of this section and the last preceding section, where any land to which a lien attaches is subject to a mortgage registered before the registration of the lien against that land, the mortgage shall have priority over the lien.
- (2) If the mortgagee is a party to the contract in respect of which the lien arises the lien shall have priority over the mortgage. "

The mortgagee, though not an original party, became a party to the later contract, namely, the assumption of contractual liability between the parties as at February, 1975, giving rise to lien priority. On any one of these arguments it appears to me that the Plaintiff is entitled to succeed and there is declaration in terms of para. (c) of the prayer in the Further Amended Statement of Claim or an entitlement to \$34,794 in lieu thereof. There are some other lesser questions which arise and counsel have agreed that if I hold liability to exist, further submissions might be needed on the question of interest which is claimed, and on the form of relief to be granted. Counsel are therefore invited to attend further, but they are reminded that I retire from office on 31st May next.



Solicitors:

Rudd, Garland & Horrocks, Auckland, for Plaintiff.

Nicholson Gribbin & Co., Auckland, for First Defendant.

Towle & Cooper, Auckland, for Third Defendant.

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A. No. 90/77

BETWEEN      THE ELECTRIC CONSTRUCTION  
                    COMPANY OF NEW ZEALAND  
                    LIMITED

Plaintiff

A N D            SAMCO SARGENT CONSOLIDATE  
                    LIMITED

First Defendant

A N D            SAFE CUSTODY NOMINEES  
                    LIMITED

Second Defendant

A N D            MERBANK CORPORATION  
                    LIMITED

Third Defendant

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JUDGMENT OF SPEIGHT, J.

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