12/10 (3) NZLR X

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M 257/83

1262

BETWEEN G.J. MANNIX LIMITED at Tauranga, Builders

Appellant

A N D TAURANGA PLASTERERS LIMITED at Tauranga, Fibrous Plasterers

Respondent

Hearing: 20 September 1984

Counsel: J.L. Saunders for the appellant
A.C. Balme for the respondent

Judgment: Delivered 10 OCT 1984 T.J. McGRORY Deputy Registrar

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is an appeal against the judgment of the District Court given at Tauranga on 25 November 1983. The respondent, Tauranga Plasterers Ltd, had issued a default summons against the appellant, G.J. Mannix Ltd, claiming $1,008.35 being, it was alleged, the balance owing for plastering work carried out on the instructions of the appellant. Mr Saunders for the appellant informed the Court that the appellant accepted it was liable for the sum of $127 but denied liability for the remainder of $881.35.

The issued raised on this appeal is a matter of the

interpretation or construction of the contract, if there was one, between the parties. If there was no such contract proved, then no doubt the matter would have fallen to be resolved on the basis of a claim on a quantum meruit. That, however, does not appear to have been the way in which the case was presented for the respondent in the District Court and the judgment in that court appears to proceed on the basis that there was a contract.

The circumstances in which the claim arose are contained in the evidence given by a director of the respondent company, a Mrs Barbara Joan Martin. The defence did not call evidence and so the evidence of Mrs Martin is uncontradicted. Mrs Martin said that the respondent was asked by the appellant to quote for certain work which he wanted done on a particular property. The parties had had previous dealings over a period. The respondent gave the appellant a written quotation on 19 May 1981. The appellant apparently did not respond to the quotation for several months but about October 1981 Mr Mannix of the appellant company simply telephoned the respondent and said that his job was ready and could they be there. The respondent apparently commenced the work about November. Various payments were made by the appellant who also asked for certain additional work to be done. Eventually the final account was rendered by the respondent to the appellant which included a figure for materials which was greater by the sum of $881.35 than the figure in the original quotation. The appellant declined to pay, though it appears that at first

there were telephone discussions between Mr Mannix and Mrs Martin in which he said that he would do what he could about it.

The original quotation given was apparently in a standard form but at its foot were the following words:

> "PLEASE NOTE due to price fluctuations and labour and materials this quotation is subject to confirmation before the job is commenced"

It is clear that no advice was given to the appellant by the respondent of any increases in respect of the price of labour or materials before the work was commenced in November.

The learned District Court judge found for the respondent. In his oral judgment, given after hearing the evidence for the respondent and after hearing brief submissions by counsel for the parties, he determined first that the quotation contained reasonable notice to the appellant that there may be increases in the quotation and second that before the work commenced no confirmation was given to the respondent nor was any question raised by the appellant as to the price. The judge then held that the combined effect of the long standing course of dealings between the parties over a period and the failure on the part of the appellant subsequent to the work being done to raise any objection to the increased price satisfied him that the defendant had accepted the increased price. He went on to say that he was satisfied that there had been a movement clause in relation to labour and materials in the quotation and that such a clause was a matter of usual business practice and that

because of the time at which the quote was given and the time when the work was actually commenced there was an onus placed on the appellant to check and see whether or not there had been a variation in the cost of labour or materials. He went on to say that he rejected the appellant's submission that there was an unconditional contract.

I am unable to accept the learned judge's reasoning. In my view, the quotation in May was an offer by the respondent to the appellant to do the work on the terms set out in the quotation, one of which was that the price was subject to confirmation by the respondent before the job was commenced. That term, if the offer was accepted, gave the respondent the right to withdraw the price quoted before it commenced work but the appellant was wholly bound by the contract because the term did not give it any rights. The appellant accepted the offer on those terms in October by requesting the respondent to do the work. I think that since this acceptance of the offer was some five months later it would have been open to the respondent to say at that point that the offer had lapsed because of the long delay but it chose not to do so. There was thus, in my view, a contract between the parties in terms of the quotation. In terms of that contract if the respondent did not confirm the price then it was not obliged to carry out the work; but if it did confirm the price then it was so obliged and would then have been entitled to be paid at the quoted price. It also follows, in my view, that if the respondent did not confirm the price but gave a new price then the original

contract was spent or discharged in accordance with its terms. It would, of course, have ben open to the parties to treat the new price as a fresh offer on the part of the respondent to do the work at the new figure which could then have been accepted or rejected by the appellant. I do not accept, however, the interpretaton of the learned District Court judge that the terms of the contract cast an onus on the appellant to check with the respondent and see whether or not there had been any variation in the cost. In my view, the matter of confirmation of the price was the responsibility of the respondent.

Mr Saunders submitted that confirmation in terms of the contract might be either actual or implied. He accepted that there was no evidence of actual confirmation but he submitted that there was an implied confirmation by the conduct of the respondent. It commenced the work approximately one month after the quotation had been accepted without notifying the appellant of any increase in price and, accordingly, Mr Saunders contended the commencement of the work without saying anything to the appellant as to any increase in price was plainly an implied confirmation of the quotation. I think that submission is right.

Mr Balme made two main submissions. First he submitted that in the absence of express confirmation of the quoted price there was no binding contract and that there was no onus upon the respondent to confirm the quotation but that if the appellant sought to rely upon it then there was an onus upon it to seek confirmation of the quotation prior to the commencement

of the work. I have already expressed the view that there was no such onus upon the appellant and that there could be an implied confirmation of the price as well as an express confirmation. Mr Balme also submitted that there was a matter not agreed upon in the contract, namely the price, and accordingly there was no concluded contract. He relied upon May and Butcher v The King [1934] 2 KB 17. In that case the written arrangement between the parties was that "the price or prices to be paid ... shall be agreed upon from time to time" and so clearly there was an unresolved matter; and thus there was no concluded contract. But here, as I have already held, the price was agreed but it was subject to the right of the respondent to withdraw it. There was thus a concluded contract. Mr Balme's second submission was that if there was a concluded written contract then it was open to the District Court to find that there was an implied term based on past dealings between the parties. The learned District Court judge, as I have mentioned earlier, had relied upon the course of conduct between the parties to imply a term in the contract between them that would have entitled the respondent to an increase in the cost of labour and materials without prior notification to the appellant. Much could be said for this approach had the evidence been adequate. The respondent company carries on the business of fibrous plasterers and the appellant company carries on the business of builders. One might have thought that the appellant would be well aware of the likelihood of changes in the price of labour and materials

over a period of some six months during 1981. However, rather regretfully, I come to the conclusion that though the parties had had previous dealings the evidence of Mrs Martin does not justify drawing a conclusion that there was an implied term of the kind the judge seems to have concluded.

The appeal is accordingly allowed and the judgment in favour of the respondent vacated. However, since the appellant accepts that it is liable to the respondent for the sum of $127 there will be judgment for the respondent for that sum. In the District Court the appellant indicated that were it to succeed it did not seek costs against the respondent. In the circumstances I do not propose to allow the appellant any costs on the appeal.

Solicitor for appellant: W.F. Taylor (Tauranga)

Solicitors for respondent: Cooney, Lees & Morgan (Tauranga)