IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

11/10

A. No. 974/82

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FNT

NZLR

No Special Consideration

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BETWEEN JOHN BARRY MORTON of Auckland, Builder

Plaintiff

A N D HARVEY FRANK TURNER of Auckland, Company Director, and LEXIE PATRICIA TURNER of Auckland, Married Woman

First Defendants

A N D THE BANK OF NEW SOUTH WALES being a duly incorporated trading bank having its registered office at Wellington

Second Defendant

Hearing: 17th and 18th September, 1984.

Counsel: P. J. McDonald for Plaintiff.
The First Defendants in person.
No appearance for the Second Defendant.

Judgment: 20 SEP 1984

JUDGMENT OF TOMPKINS, J.

THE ACTION:

The Plaintiff claims against the First Defendants $17,423.95, being the balance claimed to be due pursuant to a building contract. He also claims a declaration for a lien and consequential orders. A further claim for general damages for breach of the building contract was abandoned.

The Second Defendant was a party to the action as mortgagee of the land owned by the First Defendants. Mr. McDonald, for the Plaintiff, advised that the Plaintiff no longer sought any remedy that concerned the Second Defendant. An order was therefore made dismissing it from the action. In the remainder of this judgment I shall refer to the First Defendants as the Defendants.

The Defendants denied liability for the amount claimed by the Plaintiff. They also counterclaimed first for special damages resulting from the Plaintiff's failure to complete the building contract, secondly for general damages on the same ground, and thirdly for damages for defective workmanship.

These claims and counterclaims result from the terms of the agreement that undoubtedly existed between the Plaintiff and the Defendants not being stated with sufficient precision, coupled with the agreement being based on plans and specifications notably lacking in detail.

THE SEQUENCE OF EVENTS:

The Second Defendant was the owner of a town house at Takapuna. Early in 1982 the Defendants decided that they would like to alter the town house by building on a third floor. They instructed Mr. Coughlan, an architectural draughtsman, to prepare plans and specifications. This was done, the initial set of plans being dated the 9th March, 1982.

The Defendants sought prices to have the work done from three builders, one of whom was the Plaintiff. On the 20th March, 1982, discussions took place between the Plaintiff and the Defendants concerning the proposed contract. Mr. Turner noted the effect of the discussions on a memo that listed the work that was to be included in the contract and work that was not included.

On the 24th March, 1982, the Plaintiff wrote to the Defendants a letter setting out the terms on which he was prepared to undertake the work. The letter read:-

> " Please find below my estimated price to construct a new top level to your townhouse at 2B Park Avenue, Takapuna.
>
> My price includes the following items in respect to construction:

1) Raise blockwork and scaffold to suit.
2) Remove existing roof and cover ready to start.
3) Erect all framing as to drawing.
4) Supply all cladding as per plan.
5) Supply all interior linings where specified.
6) Erect and extend all decks as shown.
7) Supply all interior joinery and internal doors to a standard to match existing joinery.
8) Electrical shall be a P.C. Sum of $2,000.00
9) Supply stair and balistauding to match existing
10) Gib and stop to a paint finish.
11) Install standard plumbing installations as per plan.
12) Deck to be hardwood proofed with buytonol.
13) Erect stairwell and glaze to suit.
14) Supply all ranchsliders and windows as per plan.
15) Insulate with fibreglass batts, with gib foil, to outer walls.

At this point I must say that the quality of finish in both materials and decor will be to a standard equal to the existing interior.

My price is as follows:

Labour	$12,500.00
Materials and Subtrades. ..	$28,500.00
Total	$41,000.00

As discussed at your home on the 22/3/82, my price is based on work experience and some estimates not confirmed. Nevertheless I am more than hopeful that we can complete this operation for around $37-38,000.00, and every effort will be made to arrive at this figure.

I thank-you for involing (sic) me in your project. "

On the 30th April, 1982, an alteration was made to the plan by Mr. Coughlan. He added as a detail the information necessary to convert the western wall to incorporate fyrewall fibrous plaster - an alteration that gave the wall the necessary fire rating.

On the 12th May, 1982, the Defendants wrote to the Plaintiff a letter, the first two paragraphs of which read:-

" This memo serves to accept your price to construct a new top level to our townhouse at 2B Park Ave, Takapuna generally as per your letter of March 24th 82 and outline plans by R. F. Coughlan ref 0158

As discussed on Mon day 10-5-82 we would expect you to be ready to start on site approx 24-5-82 subject to suitable weather conditions and we list below further points which were raised during our discussions. "

The further points deal with terms of payment and access to the site.

On the same day there was also delivered to the Plaintiff a memorandum headed "Alterations to outline plans". This memorandum listed fourteen items, some of which were alterations to the plans and some were requests to obtain prices and consider other alterations.

On the 17th May, 1982, the Takapuna City Council granted a building permit. Work commenced on the 21st May, 1982.

Early in June the Plaintiff learned that the alterations to the plans did not comply with the Takapuna City Council's light and height requirements. The precise manner of non-compliance did not emerge in evidence. Indeed the First Defendant when giving evidence expressed some doubt whether there was non-compliance. However, the Plaintiff stopped work on the project and the Defendants immediately instructed Mr. Coughlan to produce an amended plan. This he did dated the 1st June, 1982. The most significant amendment was that the northern wall of the floor was set back at an angle. There were some other alterations to the internal partitions. These apparently met the Council's requirements and work was resumed. It is not entirely clear how long work was stopped, but it seems to have been only a matter of days rather than weeks. Upon resumption that part of the north wall that had already been constructed had to be demolished and intersecting frames altered. It was common ground that there would be some increased costs as a result of this, the First Defendant claiming that it was agreed that these increased costs would be shared equally between the Plaintiff and the Defendants - a contention that the Plaintiff did not accept.

The work then continued. There were a number of

variations and extras. Some of these are recorded in the form of pencil notations on the plans, others are recorded in a series of memos from the Defendants to the Plaintiff.

Three progress payments were made as follows:-

3.6.82	$10,000
17.6.82	15,000
30.6.82	8,000
	$33,000

On each occasion the Plaintiff requested the amount of the progress payment from the Defendants, who paid it. No particulars of the costs incurred to date were provided.

On the 21st July, 1982, a meeting took place between the Plaintiff and Mr. Turner. The Plaintiff advised him that in view of the alterations and extras the cost of the project was likely to be about $50,000. Mr. Turner would not accept this. He claimed that the Plaintiff was bound to undertake the work for $41,000 except for extras that had been authorised in writing. There was a conflict of evidence on the detail of the discussion, but it is apparent that at that meeting the difference in the approach to the contract became obvious. The Plaintiff then said that he was not prepared to carry on with the contract if the Defendants were not prepared to meet the reasonable cost. So the Plaintiff ceased work. There was apparently some correspondence between the Plaintiff's solicitors and the Defendants, but this correspondence was not in evidence. Finally, the Defendants had the balance of the work undertaken by another contractor and sub-contractors.

On the 10th August, 1982, the Plaintiff gave to the Defendants notice of his intention to claim a lien in the sum of $17,494.91, being the amount claimed to be due for the work the

Plaintiff had done. The writ of summons and statement of claim was issued out of this Court on the 17th September, 1982.

THE NATURE OF THE CONTRACT:

Crucial to the issues arising from the claim and the counterclaims is the nature of the contract between the Plaintiff and the Defendants.

It was the Plaintiff's contention that there was a contract to do the work shown on the plans and specifications together with any variations or additions for a reasonable price. The estimated price contained in the letter of the 24th July, 1982, was not a fixed price. In common parlance it was a charge-up job.

The Defendants contended that what resulted was a contract to do the work according to the plans and specifications for a fixed price of $41,000, plus amounts agreed for authorised variations and extras. However, if the reasonable cost of the work (excluding variations and extras) were less than $41,000, the Defendants expected to be charged the lesser amount.

There was no formal written contract. The contract was evidenced by the plans and specifications, the Plaintiff's letter of the 24th March, 1982, and the Defendants' memo of the 12th May, 1982.

It is therefore necessary to determine the nature of the contract by ascertaining the intention of the parties as revealed by the documents that made up the contract. To the extent that there is ambiguity, the Court can have regard to the circumstances surrounding the making of the contract. I therefore propose to examine the documents and the surrounding circumstances in some further detail.

The plans are, as I have already indicated, notable for their lack of detail. They consist of only two sheets. There is a floor plan, a plan showing the existing first floor, four exterior elevations, a site plan, and an interior elevation showing part of the existing structure, and (but in elevation only) existing and additional stairs. There is no detail of joinery, plumbing and drainage or electrical. They are, in my view, rightly described by the Defendants in their memo of the 12th May, 1982, as outline plans. Indeed Mr. Turner, when giving evidence, said that the plans and specifications as drawn were not the Defendants' final ideas. Part of the reason why they chose the Plaintiff to complete the additions was his undertaking that he could be flexible and give ideas which were helpful and not costly.

The specifications too are sparse. The general clauses section is poorly drafted, using inconsistent terms. In many respects it is not appropriate for a contract of this kind. The other sections are also notable for their brevity. The section for the roofer consists of two lines. In the carpenter and joiner appears the following relating to hardware:-

> " All locksets, latchsets, cupboard catches, drawer pulls, toilet roller, soap recesses, shaving cabinet, mirrors, and all hardware necessary to complete all joinery to be supplied and fixed by the contractor. "

None of these items were specified with any more precision. There was no P.C. sum proposed for hardware - or for any of the other items other than the reference in the Plaintiff's letter of the 24th March to a P.C. sum for electrical.

The Defendants met these inadequacies in the plans and specifications by referring to the understanding between the Plaintiff and the Defendants evidenced in the Plaintiff's letter of the 24th March, 1982, that the quality of finish in both

materials and decor will be to a standard equal to the existing interior. Therefore, they submitted that the joinery did not need to be detailed because it was to be of a standard equal to the joinery in the existing building.

Mr. Jefferson, an experienced quantity surveyor, who gave evidence on behalf of the Plaintiff, expressed the opinion, that I accept, that it would be risky for a builder to endeavour to give a fixed price on these plans and specifications.

The letter of the 24th March commences by referring to "my estimated price". It then lists items, some of which are dealt with in the plans and specifications, and some not. For example, the first item refers to block work. There is no block work shown on the plans or specifications. In the end the need for block work was eliminated by the amendment to the plan to which I have already referred, providing for a fyrewall where the brick work would otherwise have gone.

Then the second to last paragraph of that letter must be of some significance. Mr. Morton said - and his evidence was not contested - that the reference to "some estimates not confirmed" related to the fact that prices for some of the sub-trades had not, at that stage, been received. Then the reference to completing the operation for around $37,000 to $38,000 can only mean - and was accepted by the Defendants to mean - that if the reasonable cost of the alterations (excluding any further variations or extras) came out at less than $41,000 then the Defendants would be charged that lesser amount.

The memo of the 12th May, 1982, purports "to accept your price" to carry out the work. However, as I have indicated, the second memo of that date lists a number of alterations to what the memo fairly describes as "outline plans", but nowhere is it suggested that these alterations were to result in any change to

the price. Indeed, the memo does not refer expressly to the price accepted except where it states:-

> " The Bank of N.S.W., Penrose, has accepted financing the additions to approx. $40,000 - your price was not the cheapest. "

As part of the surrounding circumstances, at the meeting of the 20th March, 1982, the Plaintiff indicated to the Defendant that labour would be charged at $15 an hour. This is recorded in Mr. Turner's memo of that discussion. This would, of course, be irrelevant if it were intended to be a fixed price contract.

As I have indicated, as the work progressed there were a number of alterations authorised by the Defendants. For example, a memo dated the 14th June, 1982, instructs the Plaintiff to accept a quotation from a roofing contractor for the roofing to be done in Butynol (this is a variation from the plan) and records that "extra costs (approx. $300) to be added to contract price as discussed by phone 11.6.82".

Then a further memo dated the next day, the 15th June, 1982, records an arrangement for a bay window to be installed in the west wall of the lounge and states:-

> " Extra cost for bay window approx. $800 to HFT/LPT account. "

A memo of the 13th May, 1982, refers to the supply of a waterbed. This had been discussed at the meeting of the 20th March, 1982, when it was shown amongst the items not included. In a Defendants' memo of the 13th May, 1982, there appears:-

> " We understand price of $41,000 includes approx. $1,000 for waterbed - details to be finalised. "

These variations - and there were others - are expressed in approximate terms. This imprecision is consistent with a charge-up job. It is not appropriate for a fixed price contract with expressly agreed variations.

The Plaintiff described the job as an evolving contract. Mr. Turner in evidence acknowledged that it was true that the project was to be one of continuing change or alteration. That, he said, was the understanding at the time the Plaintiff priced the job.

It is my conclusion that the contract between the Plaintiff and the Defendant was for the Plaintiff to carry out the work according to the plans and specifications, together with any variations and extras for a reasonable price. I do not consider that the parties ever reached an agreement on a fixed price for the carrying out of the work shown on the plans and specifications. The price of $41,000 stated in the letter of the 24th March, 1982, was, as the letter states, no more than an estimated price.

The consequence of a contract of this nature is thus described in Smellie, Building Contracts and Practice, at p.163:-

> " Where a price for the work to be done has not been fixed by agreement between the parties, the builder or contractor is entitled to recover a fair and reasonable value for the work done and the materials supplied by him, or, in other words, upon quantum meruit. This right rests on an implied contract by the employer that he will pay for services rendered at his request. "

In K. M. Young Ltd. v. Cosgrove (1963) N.Z.L.R. 967, the Court was concerned with a charge for bulldozing work. Hutchison, J., at p.696, after referring to some other authorities, expressed his findings thus:-

> " That is quite different from the present case in which the estimate was no more than an estimate and the respondent knew that the actual cost was to be based on an hourly rate. The principle that a contractor is entitled to recover the fair and reasonable value of the work done is one applicable where the price of the work to be done has not been fixed by agreement. In this case it was fixed by agreement; it was to be the hourly rate; and it seems to me that, once that hourly rate is found to be a reasonable one, that fixes the contract price. "

These passages in my view have relevance to the facts in the present case. As I have already found the price of the work to be done was not fixed by agreement. What was expressly referred to in the discussions preceding the documents that constitute the contract was an hourly rate of $15 per hour. That, plus the cost of materials and sub-contractors, together with the normal builder's mark-up, then becomes the price payable under the contract.

THE CANCELLATION OF THE CONTRACT:

I return to the meeting of the 21st July, 1982. According to the Plaintiff he told Mr. Turner that he was going to have to face the fact that the final cost was going to be around $50,000. He said that Mr. Turner replied "No way", and wrote on a piece of paper either $40,000 or $41,000 and told the Plaintiff that that is all they had got and that was it. Mr. Turner suggested to the Plaintiff that he should read clause 6 of the specification. After some brief further discussion the Plaintiff said that if he were not paid for the additional work then the matter would have to go to court and the job would have to stop. He withdrew from the contract. No further work was undertaken by the Plaintiff or his men.

Mr. Turner in cross-examination acknowledged that the attitude he took at the meeting of the 21st July was that the Defendants had a fixed price contract of $41,000 and that they

would only pay for work which was the subject of written orders in terms of clause 6 of the specifications. He also said that he asked the Plaintiff to provide details of the $50,000 claim, but these details were never available.

Clause 6 of the specifications reads:-

> " ALTERATIONS AND DEVIATIONS: The owners reserve the right to alter or amend the plans and omit any of the work under this Contract; such deviation shall not invalidate this Contract. No allowance shall be made to Sub-Contractors for any alteration, deviations of (sic) additions unless he can produce written order from the owners, and such order shall distinctly state the matter thereof and is to be subject to an extra or varied charge. The Sub-Contractor shall notify the owners of the nature and cost of each item ordered and obtain his consent before proceeding. "

Although others of the general clauses refer to the position between the owners and the contractor, clause 6 relates only to the position between the owners and sub-contractors. It is not apparent why this should be so - I suspect it is another example of careless drafting. However, as it reads it cannot apply between the Defendants and the Plaintiff. But even if it did, I do not consider that the clause can have any application to a contract other than a fixed price contract - and as I have already found this was not a fixed price contract. In the context of this contract, therefore, the clause is meaningless and can be ignored (Nicolene Ltd. v. Simmonds (1953) 1 Q.B. 543).

I consider that Mr. Turner, when he made clear to the Plaintiff that he was only going to pay $41,000 plus any variations or extras that had been authorised in the manner specified in clause 6 of the specifications, indicated his intention not to perform his obligations under the contract. He thereby repudiated it. I have no doubt that he did so because he misunderstood the nature of the contract and his obligations under it. But his attitude at the meeting, in my

opinion, comes squarely within s.7(2) of the Contractual Remedies Act, 1979:

> " (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance. "

In these circumstances the Plaintiff was entitled to cancel the contract. He was then entitled to be paid a fair and reasonable amount for the work he had undertaken. He was relieved of any further liability to carry out the work.

<u>A FAIR AND REASONABLE PRICE:</u>

The Plaintiff in his amended Statement of Claim valued the labour and materials he had spent on the job at $57,060.79. Particulars were supplied consisting of listing the materials and sub-contractors showing the invoice amount and the amount charged for each, and also showing the labour, the great majority of which was charged at $16 an hour.

Mr. Jefferson had been asked to check these claims. He considered that some adjustments needed to be made. He reduced the adult labour charge-out rate from $16 to $15. He reduced the labour costs for joinery fittings made but not supplied. He also eliminated material charges for these joinery fittings and reduced the mark-up from the 20% the Plaintiff had claimed to 10%. There were other sub-contractor adjustments. This reduced the value of the material and labour to $50,423.95. But Mr. Jefferson still had some doubt about the labour component. He felt that the time that had been spent on the job was more than could be justified by $1,897.50. He said that he made checks on the labour, he made allowance for complexity of the work, the difficulty of doing the job on the third storey, and the weather in winter time. But he

still thought the labour charge was too high. However, he also referred to the very large number of variations. He said he identified 56 variations over a period of five weeks, that is, some ten variations a week, a situation that he described as highly disruptive. However, I think there is some merit in the Defendants' contention that Mr. Jefferson was somewhat overstating the variations because a very large number of those noted in the memos are either duplications or explanations rather than variations. Therefore I consider that this labour component of $1,897.50 should be deducted, leaving a value of the work and labour of $48,526.45.

Mr. Turner in his evidence did not challenge Mr. Jefferson's assessments. Indeed he did not really challenge the Plaintiff's figures at all except that he thought that the total for the plumbing was excessive, and he also thought that the amount claimed for scaffolding was more than the Plaintiff had estimated. But I do not consider that his evidence, either in these or other respects, disproved the Plaintiff's figures as amended by Mr. Jefferson.

As a result, and after taking into account the $33,000 already paid, the balance due to the Plaintiff under the contract is $15,526.45.

THE COUNTERCLAIM:

The first and second causes of action in the counterclaim are based on an allegation that the Plaintiff, in declining to continue to do the work following the meeting of the 21st July, 1982, was in breach of his contract. The Defendants claim the cost of completing the contract and general damages for inconvenience, loss of income, stress and anxiety, loss through escalation of costs, etc.

Quite apart from the failure of the Defendants to prove the items claimed, either as special damages or general damages, these two causes of action cannot succeed. I have already held that the Plaintiff was entitled to cancel the contract when Mr. Turner indicated to the Plaintiff the Defendants' refusal to carry out their obligations under the contract. This finding disposes of the two causes of action in the counterclaim.

The third cause of action alleges that the Defendants suffered injury as the result of the Plaintiff's alleged mismanagement, lack of drive and enthusiasm. The particulars supplied relate to damage to the driveway, loss of profit from the second Defendant's hairdressing business, failure to complete the contract on time, the need for the second Defendant's clients to negotiate scaffolding etc., and lists a number of respects in which it was claimed the Plaintiff's work was poorly done.

But the Defendants called no evidence at all to substantiate any one of the allegations listed under the third cause of action in the amended counterclaim. Nor was any attempt made to prove the special damages claimed of $4;307.

CONCLUSION:

The Plaintiff is entitled to judgment against the Defendants in the sum of $15,526.45. He is also entitled to interest on that sum calculated in accordance with the Judicature Act, 1908, from the 21st July, 1982, until the date of judgment.

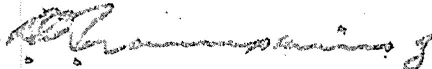
The Plaintiff gave his notice and commenced his action under the Wages Protection and Contractors Liens Act, 1939, within the times prescribed. There will therefore be a declaration that he is entitled to a lien under the Act on the estate and

interests of the Defendants, or either of them, in the land referred to in para. 2 of the Statement of Claim in the sum of $15,526.45.

The Plaintiff also sought an order directing the sale of the land pursuant to s.43(1) of the Act. But I consider it more appropriate to give the Defendants an opportunity of meeting this judgment before the making of an order directing a sale. Leave is reserved to the Plaintiff to apply for such an order if that becomes necessary.

The Plaintiff is entitled to costs on the amount recovered according to scale, together with disbursements and witnesses expenses to be fixed by the Registrar.

The Plaintiff is entitled to judgment on the counterclaim, together with costs according to scale, calculated on the amount claimed.



Solicitors:

P. J. McDonald, Auckland, for Plaintiff.