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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

N242

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M. 867/83

IN THE MATTER of Section 71 of the District Courts Act 1947

BETWEEN DELWYN HERBERT NORMAN of Auckland, Graphics Manager

Appellant

AND GRAEME WHITE of Thames, trading as Valley Industries

Respondent

Hearing: 29th February, 1984

Counsel: Carden for Appellant
Grice for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This is an appeal from the District Court at Thames which had its origins in a building contract which had been entered into between the Appellant, who was the owner of the land, and the Respondent, who was the Contractor.

The Respondent sued for a balance of money due on the contract and was met with a counter claim on the basis that the contractor had agreed to build a 60' x 60' garage/workshop with a concrete base, and the counter claim refers to the fact that the contract was entered into on the terms and conditions set out in the agreement, that is a written agreement which was entered into between the parties. In relation to the carrying out of the work it was alleged that there would be compliance with the requirements of the by-laws of the Thames-Coromonandel District Council which, in accordance with the pleadings, meant that any

excavation would not exceed 1.2 metres in depth. The counter claim went on to allege that the contractor breached that agreement and that there was a failure to comply with the by-laws or, alternatively, that there was an excavation in excess of 1.2 metres in depth. In consequence it is said that a retaining wall had to be built and a counter claim was filed seeking $2,500 for breach of contract.

In the District Court in a judgment which is not entirely satisfactory, the District Court Judge found that the contract between the parties did not include the excavation. That is in essence what he found. In this appeal the grounds for appeal filed by the Appellant referred to a decision of Watson v. Laidlaw (1922) N.Z.L.R. 1172 and it was cited for the authority that this Court, on appeal, must decide the case according to its own judgment on the facts and evidence and not merely to enquire whether the judgment of the District Court has been shown to be right or wrong. However, the decision in Watson v. Laidlaw had its basis founded in an appeal where there was actual evidence heard in the then Supreme Court as that was then the method of dealing with appeals from the Magistrate's Court in the Domestic Proceedings jurisdiction and in the civil jurisdiction of that Court. Since 1943 there has been a change in that now, unless this Court orders evidence to be re-heard for any good reason, the matter is to be dealt with on the notes of evidence and the principles to be applied can be shortly stated from two cases, the first is Benmax v. Austin Motor Co. Ltd (1955) A.C. 370. The headnote of that case, which is in the House of Lords, serves to highlight one of

the submissions made by Mr Carden; the headnote reads:

> "There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing."

To the same effect is the decision in this Court in Maffey v. Maffey (1971) N.Z.L.R. 690 where the then Chief Justice referred to the principles on which this Court would act on appeals and he referred to the case of Watt v. Thomas (1947) A.C. 484, another decision of the House of Lords. In that case he quoted a passage of a speech of Viscount Simon at page 486 where he said this:

> "An appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given."

In this particular appeal there was, on certain aspects, conflicting evidence not only as between the witnesses, but in relation to the actual evidence

given by an individual witness. By making certain findings of fact the District Court Judge has accepted certain passages of the evidence in preference to others; that is precisely what he is there for. Having not had the advantage of seeing the witnesses, nor having had the ability to assess the manner in which they gave their evidence, I am constrained to a certain degree by the findings of fact made in the District Court.

But really, when one has a look at the whole matter I wonder just whether, in the circumstances of this case, those aspects of the case really have much part to play in arriving at a decision. The parties in this matter reduced their contract to writing; the contract was produced and it provided for the construction of the garage/workshop at a basic price of $2548. Then it provided for a concrete base at $900 and cartage of $120, giving a total price of $3568. There is a drawing in the top left corner which indicates the type of building which was to be constructed. It was a contract for a fixed price for a fixed construction. In it there is the notation "excavation extra". It is to be noted that condition 7 of the contract provides for the quoted prices to be in respect of level building sites free from rock and free from any unforeseen obstacles. As the District Court Judge found, I would also find that that has no reference to the notation which was made on the contract of excavation extra.

It is now said, of course, that the excavation which was to be carried out was to be carried out in accordance with the local by-laws or to a depth of not more than 1.2 metres, but nowhere does that appear in the contract

and in my view the reason why it does not appear is because, as the District Court Judge found as a matter of law, excavation was not a part of this particular contract. It was outside it. The words may be a little indelicate to describe the situation, but certainly there is nothing in this contract which defines where the excavations were to take place, to what depth, approximate cost and whose responsibility the cost was to be. This is an attempt to alter a written contract by extrinsic evidence. I refer to Chitty on Contracts, 25th Edition, at paragraph 802:

> "Where the parties have embodied the terms of their contract in a written document, the general rule is that 'verbal evidence is not allowed to be given... so as to add to or subtract from, or in any manner to vary or qualify the written contract.' "

That is precisely what the Appellant is attempting to do in this case and that course is not available to him. If there was an ancillary contract it ought to have been pleaded. It has not been pleaded as an ancillary contract, but has been pleaded as part of this contract to build the garage.

In all the circumstances I have no hesitation in finding that on the plain words of the contract the excavation was not included. But if more is required, one only has to have a look at the conduct of the parties to see precisely whether the finding I have just made has any basis or not. The original discussion with the person who was to do the excavation was conducted by the owner, namely the Appellant in this case. The excavator was paid by the Appellant. If the contract was not between

the Appellant and the excavator why did he pay him? The very fact that he paid him to my mind is ample evidence of the existence of an independent contract between the owner and the excavator. There can be no basis for saying that this contract was the liability of the builder.

The appeal is accordingly dismissed with costs of $150 plus disbursements to the Respondent

P.D. Ieq J.

SOLICITORS:

Gaze Bond Carden & Munn, Auckland for Appellant
Harkness Henry & Co., Hamilton for Respondent