14/5

X

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.496/81

445

BETWEEN: RONALD CLIFFORD BOTT
of Auckland, Drainlayer and Concreter

Plaintiff

A N D: PERMACRETE (AUCKLAND) LIMITED
a duly incorporated company having its registered office at Auckland and carrying on business manufacturing concrete structures

First Defendant

A N D: JAMES HORACE NEWPORT
of Auckland, Company Director

Second Defendant

Hearing: 7th, 8th and 9th March 1984

Judgment: March 1984

Counsel: D E Cutting for plaintiff
A J H Witten-Hannah for defendants

JUDGMENT OF GALLEN, J.

The plaintiff possesses a number of qualifications, but for the purposes of this action may be regarded as a Drainlayer and Concreter. The defendant company constructs, amongst other things, concrete tanks and other concrete structures. It is operated substantially by the second defendant, who is effectively its managing-director.

The plaintiff has known the second defendant over a considerable period, but at some time early in 1980

or perhaps a little before that, he began to carry out certain jobs for the first defendant. While some of these involved work related to drains, he eventually became concerned with the construction of tanks on contract for the first defendant. This relationship appears to have developed to the point where the plaintiff considered it a possibility that he would commence business on his own account constructing concrete tanks. The plaintiff says that after discussing the matter with his wife, he made a decision to commence business on his own account but felt obliged to inform the second defendant of his intention because of the association which existed between them. There is some dispute over this aspect of the case, the second defendant considering that the situation which then developed occurred for quite other reasons. Be that as it may, discussions took place between the plaintiff and the second defendant with a view to the plaintiff acquiring a portion of the business of the first defendant. The discussions appear to have been fairly general in nature. They ultimately resulted in a number of decisions and the second defendant prepared a document on paper of the first defendant headed "Basis of Agreement between Permacrete (Auckland) Limited and R. Bott". This document reads as follows :

> "Below are details as agreed between Permacrete Auckland Limited and R Bott, whereby R Bott purchases the contracting portion of Permacrete Auckland Limited together with such plant as required (plant covered by Invoice No. 7156E).
>
> R. Bott to form new company and/or partnership - suggested name of Permacrete Construction Limited 1980 or like.

"New Company to purchase plant and vehicles as per Invoice No. 7156E at prices previously agreed.

New Company to pay J H Newport 2½% of turnover in return for use of plans and designs and specifications on tanks, reservoirs and such other work arranged by J H Newport.

New Company to pay J H Newport an hourly rate for work carried out by J H Newport at a figure arranged by mutual agreement between R Bott and J H Newport.

New Company to lease portion of land at Kaimahi Road together with access. The area of land to back portion of land behind present Tank shed. Share part of office and facilities such as toilets, lunch-room and workshop. Take over the telephone or have an additional phone installed. Lease $50.00 per week plus half of rates plus any subsequent increases as they occur.

Purchase petrol and diesel fuel from Permacrete Pumps at ruling rates.

Insurance to be each individual Company responsibility.

New Company to build small tanks and articles for Permacrete Auckland Limited at contract rates (rates to be by arrangement between Parties). Sizes and quantities to be by mutual arrangement between Parties.

Permacrete Auckland Limited and J H Newport give undertaking not to build or assist in any way to any company or person in the construction of tanks above 5000 gallon without written agreement between Parties.

The new Company give a reciprocal undertaking not to build or sell tanks, Dangerous Goods Sheds, Killing Sheds, troughs, septic tanks, except for Permacrete Auckland Limited or their nominee, for 5 years.

The whole basis of this Agreement, whether written or not, is for the purpose of laying down of agreement whereby each party will not interfere or hinder each other but will co-operate in every way to assist each other to their mutual advantage."

The plaintiff maintains that this document was, as it says, no more than a "Basis for Agreement", that

it did not include all the details of the arrangement between the parites, and that the actual agreement was represented partly by the written material contained in the document referred to and partly by matters agreed orally and not reduced to writing. The first defendant disagrees with this, and maintains that the document sets out the whole of the arrangement between the parties. The transaction appears to have been proceeded with the minimum of legal advice, at least in the initial stages, the document was not professionally drawn and, in my view, while it does represent a general basis of consensus between the parties, it cannot be regarded as a complete record of all respects of the transaction. It is described in its own terms as the basis of the agreement. The plaintiff gave evidence of a number of respects where the document was at least supplemented by other terms and, in any event, as an agreement it is so lacking in precision in certain areas that there would have to be some question as to whether or not it was void for uncertainty if it stood alone. For example, reference is made to an hourly rate of work and a figure to be arranged by mutual agreement; a new company is to be formed; it is to build small tanks and articles at contract rates, rates to be arranged between the parties; sizes and quantities to be by mutual arrangement between the parties.

Nevertheless, it is clear enough that all parties regarded themselves as having been involved in a binding contractual arrangement. The plaintiff, for example, considered that he was bound by the restraint-of-trade

provision. Under those circumstances, it is my view that the parties clearly did enter into a binding arrangement, some terms of which were contained in the document concerned, and others agreed orally, but nevertheless a part of the overall transaction. The point is significant, because the first and major area of dispute concerns what the plaintiff regarded as a term whereby certain contractual work totalling gross contract prices in excess of $200,000 was in some way included as a term of the agreement, whereas the first and second defendants maintain that no such term was ever included. It is therefore important at this stage to consider the evidence relating to these contentions. The plaintiff said that when the prospective purchase was under negotiation:

> "Mr. Newport had told me I could have X amount of gear and that also he had approx. $200,000 of work in hand that would go along with him if we took over his half."

The plaintiff says that some two days after this particular conversation he was in Mr. Newport's office and went through a list of contracts

> "he had supposedly already quoted on, they totalled $200,000 or just a fraction over, I think."

Subsequently, the plaintiff expressed himself under cross-examination more strongly, and indicated that in his view the $200,000 worth of work represented work which the defendant company was sure of receiving, that is, quotations which had been accepted or jobs actually awarded. The second defendant says that, at most, he indicated that he had tendered or quoted for work totalling a sum in excess of $200,000, and that all he intended to do was to indicate the extent of the advantage which the plaintiff would acquire if he purchased that portion

of the business under negotiation. There are other references in the evidence to a figure of $200,000. The plaintiff involved his accountant, Mr. Allardyce, for a consideration of the proposals to see whether it was a business that was likely to be worth while to him. Mr. Allardyce said in evidence that he was asked to investigate the business on behalf of the plaintiff. He was asked whether he went to the first defendant's office and agreed that he did. He was asked what he was given and said:

> "I was given balance sheet and general run down.
> Have you got balance sheet there? Yes, for 1979.
> Given any projections? Yes, turnover about $210,000. "

It is clear that Mr. Allardyce worked on that figure and advised the plaintiff, on the basis of it, that he should proceed with the proposal. In cross-examination he was asked whether it would be fair to say that the $200,000 figure was an estimate of projected turnover and he agreed that that would be a fair comment.

Mrs. Bott referred to a discussion with the second defendant, and she understood him to say :

> "The amount in hand would be about $200,000 of work to be handed over with the business."

Finally, a Mr. Gilbert, who was employed at the appropriate time by the first defendant, indicated that, while waiting for a ride home from work with the plaintiff, he overheard a discussion beteen the plaintiff and the second defendant which appeared to him to be about work. He was asked the question :

> "Did they say how much work was in hand?"

and the answer was:

> "Yes, between $200,000 and $300,000 of work."

The second defendant totally denies this evidence, and says that he would never have discussed business matters in the presence of an employee.

In my view, the reference to $200,000 was not a guarantee that work of that value would be provided by the first defendant, but there is clear evidence that a representation was made to this effect. In this regard, I accept what the various witnesses have said about the conversations in which they were either involved or overheard. The plaintiff acted on that representation and I find entered into the agreement in reliance upon it. Following the agreement the plaintiff began to construct large tanks in accordance with the arrangement between the parties.

Because the work available was represented by contracts to which the first defendant was a party rather than the plaintiff, the plaintiff effectively acted as a subcontractor in respect of various jobs which he carried out. He was unable to form the new company which was contemplated because the name suggested was apparently unacceptable to the Registrar of Companies, registration of a company with a name similar to "Permacrete" being opposed, according to the plaintiff, by a previous business associate of the second defendant, and it seems clear that the plaintiff, with the at least tacit agreement of the first and second defendants, traded on his own account.

The plaintiff then proceeded to construct a number of substantial tanks, all or most in areas outside Auckland. Reference was made to one in Tirau, one at Kapuni and elsewhere.

It appears that a degree of resentment built up between the parties over this period. The second defendant says

that the plaintiff, for domestic reasons, was unhappy about working outside Auckland. The plaintiff and his wife would have preferred that the plaintiff worked closer to home but the plaintiff denies that he had strong feelings about working outside Auckland.

It also appears that the plaintiff became resentful of the use by the first defendant of a motor truck purchased by the plaintiff from the first or second defendant, the rates agreed upon being low. The plaintiff considered that the second defendant had taken advantage of him by selling him the vehicle and then requiring him to make it available at unremunerative rates.

Towards the end of 1980 the first defendant had obtained a contract with Griffin & Sons. Ltd. to construct two substantial tanks for use in fire prevention. The first defendant apparently carried out the necessary preliminary earthworks and when the plaintiff returned from the completion of a job at Tirau he found waiting for him the plans to construct the first of the tanks concerned. This was a tank to contain initially 30,000 gallons of water, together with a site plan showing where both tanks were to be sited; the second tank being one contemplated to hold 10,000 gallons. The second defendant had left the plans for the larger tank for the plaintiff, the second defendant being required to be in Australia at that time. The custom of the first and second defendants was to arrange for engineering plans of the tanks concerned to be prepared. These were submitted to the local authority and construction proceeded after the issue of a permit. The larger tank for Griffins had been quoted to that firm as a 30,000 gallon tank and the plans prepared for such a tank. The

second defendant had decided, however, without reference to the principal or to the plaintiff, that the purpose of the tank being to hold 30,000 gallons, because of certain practical requirements relating to the mains and the ballcock arrangement in the tank, it would be necessary for the actual tank to be larger, and he had altered the plan to provide for a tank of 35,000 gallons. This the plaintiff proceeded to construct. At some subsequent time the plan for the second tank for 10,000 gallons was made available to the plaintiff, who prepared the base. Having done so, he realised that the two tanks were of different heights. Since they were to be interconnected, this would have effectively prevented the higher tank containing water above the level of the top of the lower tank. and it was necessary for some arrangement to be made to correct this situation. The most appropriate method would have been to alter the diameter of the 10,000 gallon tank but this would have meant a complete redesign. The base had already been constructed, and presumably the permit obtained. The plaintiff decided, after consultation with the second defendant, to correct the position by extending the 10,000 gallon tank to the requisite height. To do this he strengthened the tank to allow for the additional stresses arising from the increased height and weight of water and effectively built it up so that it became a 16,000 gallon tank, not a 10,000 gallon tank.

At about this time a serious deterioration in the relationship between the plaintiff and the second defendant occurred. There are differing accounts as to the reasons and as to what actually took place. The plaintiff says he was angry over what he regarded as constant attempts to take advantage of him by the first and second defendants, and it is clear that he was particularly angry over the situation which

had developed with the Griffin's tanks. The plaintiff had to construct a 35,000 gallon tank and a 16,000 gallon tank. The second defendant took the view that he had quoted on the basis of 30,000 and 10,000 gallon tanks and the price for such tanks was all that the plaintiff could recover and all that he would pay. It was presumably all he would get out of Griffins.

The plaintiff says that, as a result of the argument which then developed with the second defendant, the second defendant informed him he would get no further work from the first or second defendants. The plaintiff regarded the second defendant as terminating the agreement between them. He says that, because he had no more work in prospect, he dismissed the majority of his staff and went to Australia for a holiday . The second defendant, on the other hand, says that the plaintiff told him he was tired of working outside Auckland, that he intended to give up work, and was going to set up a similar business in Australia. His purpose in going to Australia was to spy out the lie of the land. There is a clear conflict of evidence between the plaintiff and the second defendant on this issue, and it is in effect the crux of the case, because resolution of the matters in dispute depend upon what actually occurred at that time. I do not believe that either party is deliberately misrepresenting the position. It seems to me, having heard them both, they they both genuinely adhere to the views which they express. But it is also clear that they are both strong minded people. It is now four years since the events occurred and it is likely that both have convinced themselves that the matters occurred as they now believe them to have occurred. In my view, it is more likely that the second defendant terminated the arrangement than that the plaintiff

did so. The second defendant denies that he made any comment at that time about the plaintiff not getting any more work but does consider that such a comment was made in connection with the use of the plaintiff's truck. The evidence indicates that the plaintiff had made arrangements to sell the truck, the subject of the argument, before any such comment could have been made. In all the circumstances, it seems more likely, and I find as a fact, that the comment was made, as the plaintiff says, by the second defendant as a result of an angry confrontation between the parties and that it related to the contract as a whole.

The plaintiff says that on his return from Australia he approached the second defendant, the plaintiff having cooled down in the interim, and asked whether any work would be made available. The second defendant agrees that there was some discussion on the plaintiff's return from Australia but says that that was confined to a situation which had developed over the Christmas period when one of the plaintiff's trucks had been stolen (and effectively destroyed by being driven into the sea) as well as a dispute over a cheque. The plaintiff maintains that the defendant did have work which could have been made available to him, in particular, a contract for the construction of sewerage tanks and works at Rotoroa Island. There is no doubt that such a contract was available. There is equally no doubt that it was not made available to the plaintiff. The second defendant says that the plaintiff's refusal to honour his arrangement placed him in a difficult position with regard to

commitments the first defendant had assumed. In effect, however, he does not appear to have offered the plaintiff any such work, in particular the Rotoroa Island job.

In all the circumstances, I find that the second defendant terminated the agreement between the first and second defendants and the plaintiff.

Whether this termination amounted to a breach of contract allowing the plaintiff to claim damages in respect of it depends upon what the parties contemplated would be the term of the contract or the mode of termination of the arrangement. The document makes no provision for termination or term. The evidence relating to the amount of work available at the time of negotiation appears to have contemplated that work to the value of $200,000 would have been available during a year's operation. However, I do not think the parties ever formally decided how long the contract was to last, and never consciously turned their minds to that question. Having regard to all the circumstances, I consider that a term must be imported to the effect that the contract could be terminated by either party on reasonable notice. What amounts to "reasonable notice" is a question of fact to be determined in relationto all the circumstances. One thing is clear, an immediate termination without notice cannot, in the circumstances of this case, be regarded as reasonable.

I accordingly find that the defendant was in breach of his contractual obligations by the termination of the contract which he gave when he informed the plaintiff that he would receive no more work.

The plaintiff is entitled to recover damages for such breach, but arriving at a sum which properly represents

the amount payable is, in the circumstances of this case, difficult. I have already said that no particular term was contemplated by the parties for the agreement. I accept that the plaintiff entered into the arrangement in reliance on the representation that work, at least to the extent of $200,000 would be available to him. The plaintiff claims that during the course of the arrangement he received work of only $76,000. Under those circumstances, I think his loss may appropriately be measured by reference to the profit he could have expected to make on the difference between that sum and $200,000, that is, $127,000, rather than by reference to any term or specific period of notice. But there is very little evidence which indicates what that profit could reasonably have been expected to be. The plaintiff called his accountant, Mr. Allardyce, who gave evidence relating to the advice he gave the plaintiff at the time the plaintiff was contemplating entering into the contract. Mr. Allardyce was clearly influenced by the reference to $200,000 and he stated in evidence that he thought the deal "showed a net profit of $21,000." He also indicated that the plaintiff's profit percentage in respect of his previous operations was in the vicinity of 26%. I do not think it is possible to say that a profit margin achieved by the plaintiff in different circumstances, with different work and different overheads, could be regarded as an appropriate basis for calculating his loss in respect of this contract. I am equally unable to use the figure of $21,000 referred to by Mr. Allardyce because I cannot tell, on the information available to me, what proportion of the profit so contemplated related to the $76,000 of work which the plaintiff undoubtedly completed. A comparison of the profit margins achieved by the defendant

company is also invalid as a basis for calculation because the operations, management and overheads are entirely different. I note, however, that on a much higher turnover the profit which the second defendant claimed to have made, taking into account his management payment and his share of directors' fees, was considerably less than $20,000. In cross-examination Mr. Witten-Hannah suggested to the plaintiff that it was generally accepted that a profit margin of 10% on contracting was reasonable. The plaintiff strongly disagreed with this suggestion and said that a contractor who did work on a 10% profit margin would be unable to continue in business. Having regard to all the circumstances, I consider the best I can do is to apply such a percentage, and in my view it is appropriate that the plaintiff should recover 10% in respect of the work not made available, that is, $12,700. This produces a sum which is not markedly out of line with the original profit assessment made by the plaintiff's accountant and is not totally incompatible with the results achieved by the first defendant in its operations. I therefore hold that in respect of the principal breach of the contract the plaintiff is entitled to recover from the defendant the sum of $12,700.

That finding means that it is unnecessary for me to consider the plaintiff's claim in respect of the Rotoroa Island contract, which was subsequent and is included in any event in the overall claim for the loss of work subsequent to termination .

The plaintiff also claimed sums from the first and second defendants in respect of the work he carried out for Griffin & Sons Ltd. He says, in effect, that he should be paid for what he constructed, that he built a 35,000 gallon tank and should not be paid as though it were a 30,000 gallon tank. The plaintiff's only claim can be against the first and second defendants, since he had no direct contractual relationship with the principal and all contractual arrangements with the principal were entered into by the first and second defendants without reference to the plaintiff. The second defendant says that it is reasonable that the plaintiff should be paid on the basis of a 30,000 gallon tank because there are economic advantages in building two tanks rather than one, and that this would normally reflect in a lower price being quoted. The price list which was produced shows that there is a price differential between a 30,000 gallon tank and a 35,000 gallon tank, which is hardly surprising. I consider that, if the plaintiff was being expected to accept a lower price, then he should have been involved in some negotiation. It cannot be that the first and second defendants can simply involve the plaintiff in any pricing that seemed convenient to the second defendant without some involvement of the plaintiff. In this case the plaintiff had no knowledge of any special arrangement. He had no discussion with the second defendant, who was in Australia at the time the plaintiff received his instructions. The plaintiff merely received an instruction to build a 35,000 gallon tank. I think, in the absence of any special arrangement for a reduction to which he was a party, he is entitled to be paid on the basis that he built a 35,000 gallon tank. I am reinforced in this view by the fact that the arrangement between

the first and second defendants and the principal was not wholly based on the provision of two tanks rather than one, but had some element of advantage to the first and second defendants built into it because of the arrangement that one or other of them should take certain other tanks from the site, no longer needed by the principal. The second defendant suggested that the appropriate amount to be paid to the plaintiff, if he were entitled to recover anything in respect of the larger tank should be based on the difference in construction costs, which he calculated at $312, being the cost of labour and materials. The price schedule produced to me shows that the difference charged under normal circumstances between at 35,000 gallon tank and a 30,000 gallon tank is $1,936. Presumably the purpose in having a price schedule is to allow the parties, including the plaintiff, to have in mind what, in the ordinary run of contracts, they could expect to recover and to base their business arrangements accordingly. The plaintiff in fact claimed the sum of $1381.18. Having regard to the circumstances this does not seem to me to be an unreasonable figure.

The 16,000 gallon tank is in a different category. It will be recalled that the plans provided for, and the parties contemplated, the construction of a 10,000 gallon tank. The plaintiff, when he received the plan, constructed the base for a normal 10,000 gallon tank, but then realised that, if he built the tank according to the plan provided for him, it would be at a height which prevented the two tanks operating adequately as one unit. The second defendant says that the fault was the plaintiff's, that he should have seen when he looked at the plans that to construct a tank in accordance with them would produce one which was, in the circumstances, at the wrong height and he should have

corrected this situation. It was suggested that the larger tank could have been lowered, or the smaller tank built on a raised foundation. To have done this would, according to the evidence, have created some problems because of the differing level of the base bearing in mind the kind of operation contemplated. It would have been possible to redesign the tank, but this would have involved a loss in respect of the base already constructed, additional design costs and delay. The plaintiff in fact chose to correct the situation by increasing the height of the tank he had commenced to build. This involved, effectively, substantially strengthening the tank so that it was able to support the increased height and weight of water. In this he was assisted by the second defendant.

In my view, the basic fault lay with the production of a plan which was unsuitable. This was the responsibility not of the plaintiff but of the first and second defendants, and I bear in mind that in respect of these jobs, as well as others, the second defendant, in terms of the agreement, required and was paid a consultancy fee and a commission. Under those circumstances, I do not think it is reasonable that the plaintiff should be expected to put right a situation by noticing when he saw the plans that the tank had been wrongly designed. He did, in fact, ascertain this at an early stage of construction. I do not believe he should bear the additional cost of correcting what was clearly a design fault, and in my view the responsibility for this rests on the first and second defendants.

Once again there is a dispute over the cost involved in correcting the situation which developed. The

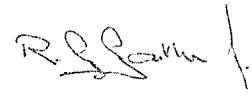
plaintiff has claimed the sum of $3,931.02 and provided the basis for his calculation. The second defendant says that the additional cost should have been no more than $305.50. The difference on the schedule between a tank of 10,000 gallons and a tank of 15,000 gallons is $1,850. I accept that the special situation which developed in this case probably meant that it would have cost more to construct the tank which was constructed than the ordinary standard tank. This was a one-off construction, required to meet a particular height requirement, and also correcting a situation which had already developed. This would cost more, I think, than the normal difference. I think the figure put forward by the second defendant is quite unrealistic having regard to the circumstances, but I consider that the calculation made by the plaintiff, at what seems to have been a comparatively late stage, is based on theoretical facts rather than on the actual costs and in the circumstances I believe that an appropriate figure is somewhere between that claimed by him and the difference between the cost of the two standard tanks already referred to. Having regard to all the circumstances, I consider that an appropriate figure is $2,500.

In my opinion, therefore, the plaintiff is entitled to judgment in respect of the three sums referred to, that is, $12,700 for the general breach of contract, $1,175 in respect of the 35,000 gallon tank for Griffins. and $2,500 for the 16,000 gallon tank for Griffins.

Some dispute arose as to the party against whom the plaintiff is entitled to judgment if I were to find in his favour. The plaintiff has claimed against both first and

second defendants. The second defendant contends that the plaintiff's claim, if any, is against the first defendant only. I cannot accept that. The agreement contemplates the involvement of both and, in addition, the second defendant received substantial payments by way of consultancy fees and sums paid to him direct under the terms of the agreement.

There will therefore be judgment for the plaintiff against both defendants in the sum of $16,375, together with costs according to scale and disbursements and witnesses' expenses to be fixed by the Registrar. There will be an allowance for two extra days.



Solicitors: D.E.Cutting & Co. Auckland, for Plaintiff

Witten-Hannah, Patterson & Jones, Auckland, for Defendants