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FJ 7(3)

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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR.102/84

1705

BETWEEN FRANK BERRY

Appellant

A N D BARRY JOHN KIRWAN

Respondent

Hearing: 27 November 1984

Counsel: Appellant in person
A.J. McPhail for Respondent

Judgment: 18 December 1984

JUDGMENT OF HARDIE BOYS J

This is an appeal from a reserved judgment of the District Court at Ashburton which held the respondent Mr Kirwan entitled to recover from the appellant Mr Berry the sum of $12,000, as the balance due under a contract for the construction of a house by Mr Kirwan for Mr Berry. Mr Berry has throughout represented himself, and that has been a pity because without legal training he has not been able to appreciate the legal procedures and principles that apply and that bind the Courts. He feels very strongly about the way Mr Kirwan has behaved, and has a considerable sense of injustice at Mr Kirwan's success in the District Court, but no matter how justified his feelings may be, a Court of law must act in accordance with the law, not a particular view of business

propriety. Further, it must be noted, this Court may deal with an appeal only on the evidence given before the Court below, and it cannot admit additional material, such as Mr Berry sought to introduce during the course of his submissions.

As I understand it, trouble first arose over the positioning of the hot water cylinder. The Judge held that Mr Kirwan was in the wrong about that, but as Mr Kirwan had already dealt with it in accordance with Mr Berry's requirement, no adjustment to the contract price was called for. But this incident put Mr Berry on his guard, and caused him to inquire into assurances that Mr Kirwan had given when the terms of the contract were being negotiated, concerning the exterior cladding. He had selected concrete blocks rather than Summerhill stone, believing from what he said Mr Kirwan told him, that the former, though cheaper, were of equivalent quality. In the final contract price, however he did not he said receive any credit for the cost differential, but he nonetheless accepted the price, believing that the difference was not worth arguing about if as he assumed he was to have the benefit of good workmanship. He does not now consider he received that benefit, and he also alleges that the block that was used is not of equivalent quality to the Summerhill stone. But there was no evidence before the Court to support that allegation; on the contrary, there was uncontradicted evidence from a building consultant and assessor of great experience, Mr O'Regan, that the two kinds of block were essentially of the same material and made by the same process. There was certainly no structural difference, only one of appearance. In these circumstances, the Judge was

quite right to hold, on the evidence presented to him, that Mr Berry was not entitled to any deduction on account of the use of the concrete blocks.

Next, Mr Berry complained of deficiencies in respect of roofing nails and roofing iron. Most of the nails used were different from those specified. Mr Kirwan contended that Mr Berry had agreed to the change. Mr Berry denied that. The Judge did not attempt to resolve that conflict, and he did not need to do so, because it was Mr O'Regan's opinion that one kind of nail was just as good as the other. Had there been a lessening of quality, then it would have been necessary to decide whether the change had been authorised, for an adjustment of price would have been called for. But as it is, even if the change was not authorised, Mr Berry has not been shown to have suffered any loss as a result.

Much the same can be said about the roof itself. Although Mr Berry is critical of it, the evidence does not establish that it is defective. Mr Berry is now suspicious that the nailing is not secure, but there was no evidence about that before the District Court Judge.

A practical problem has arisen over the garage door. This is a tilting door, and its tracks are so placed that on one side they block the light from a window between the kitchen and the garage. This is a design, not a construction fault. The design, including the use of a tilting door, was put together by the two parties in collaboration. The plan incorporating it clearly shows the conjunction of kitchen window and garage door. Mr Berry knew that this kind of door has tracks. It was inevitable that the tracks should be in

the way of the window; and no other type of door could have been used. Although there is some substance in Mr Berry's allegation that Mr Kirwan, as the professional, ought to have alerted him to the fact that the tracks would be in the way of the window, Mr Berry must in my view accept some of the responsibility himself. Thus the cost of rectification would have to be shared. But the difficulty is that there is no evidence of what that cost might be, even if rectification were possible, and because the onus of proof in this respect lies on the appellant, I am obliged to hold that this item has not been sufficiently proved.

The house remains uninhabitable because there is no water supply. At the time the contract was negotiated, Mr Berry was unsure whether he would use rainwater from appropriate tank storage, or an artesian bore. Accordingly the contract provided only for internal plumbing from the intake point on the house. Supply to that point was Mr Berry's responsibility. Mr Berry then decided that there should be an underground storage tank, and Mr Kirwan undertook to provide one. It would have been an extra. But before either its siting or its final price were agreed, the parties fell out. Mr Berry now maintains that Mr Kirwan should not receive any further payment until the tank has been installed (and his other complaints made good) and that Mr Kirwan should bear any additional cost caused through having to have the remaining work done by another contractor.

This contention so far as it relates to the tank is to a large extent based on a letter which Mr Kirwan's solicitors wrote to Mr Berry on 9 May 1983, when the job had come to a

halt and something over $22,000 was claimed by Mr Kirwan to be owing to him. This letter stated that if the moneys claimed were paid, the remaining work would be completed. Although the water tank was not listed as part of that remaining work, a price for its installation was shown, as an extra. Mr Berry claims that Mr Kirwan thereby became committed to instal it. It is however clear that this was a quotation for a certain type of tank, which did not prove acceptable to Mr Berry. He wanted something different. Therefore there was no contract to supply the tank, only an offer that was not accepted. It follows that Mr Kirwan is under no legal obligation to supply the tank, and that Mr Berry is not on its account entitled in law to withhold payment of what is due for the other work.

Several other matters of complaint were referred to in the course of Mr Berry's submissions, but I do not deal with them, either because they were not raised in the Court below and so cannot be considered on appeal, or because they were put forward as examples of the poor treatment Mr Berry considers he has had, and not as items in respect of which compensation is or can be sought.

The balance payable to Mr Kirwan in accordance with the contract was $12,194.19, but the excess over $12,000 was abandoned so as to bring the claim within the jurisdiction of the District Court. The Judge entered judgment for the plaintiff for $12,000 and the result of this appeal is that that judgment must be upheld. Mr Kirwan also claimed interest, which would ordinarily be payable at 11% and which to date would amount to some $1700, but the District Court Judge declined to award it, and took the view that the amount

foregone by Mr Kirwan in these respects would more than compensate Mr Berry for one small item for which credit had to be given, as well as for his disappointment over the blocks. Mr Berry should regard in the same light those other items which he raised before me, including the kitchen fan, the exact position about which I did not understand, but which is a relatively small item.

Mr Berry having put his case as fully as he could, will now I hope accept that it has been carefully considered, and realize that whatever the ethics of it may be, he is in law obliged to pay. And of course he is free to have the house completed by another contractor.

The appeal is dismissed. The respondent is entitled to costs, which are fixed at $100.

Solicitors:

Appellant in person
Urquhart, Reed & Co, ASHBURTON, for Respondent.