IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

No. M.40/84

BETWEEN JOHN ARTHUR BELL
Appellant

A N D BILLINGTON TRANSPORT LIMITED
Respondent

Hearing: 15 October 1984

Counsel: R. Radford for Appellant
G.J. Cameron for Respondent

Judgment: 15 October 1984

ORAL JUDGMENT OF HOLLAND, J.

This is an appeal from a judgment in the District Court whereby judgment was given for the plaintiff in that Court on a claim brought by it for $1,282.11, being the balance payable under a contract, and judgment was also given for the plaintiff in the Court below on the counterclaim brought by the defendant for damages for breach of contract in the sum of $3,200. The defendant has appealed against the judgment ordered against him and the dismissal of his counterclaim.

At the commencement of the hearing Mr Cameron, counsel for the respondent, applied to the Court first to dismiss the appeal on the grounds of want of prosecution because the appellant had failed to supply the points on appeal by notice of points on appeal as required by the Practice Note issued by the Judges of the Court in 1970 and reported in (1970) N.Z.L.R. 1140. This case was in the reserve list for hearing before me today. In fact the two matters set down for hearing took substantially shorter time than

required and one was only a matter of formal proof. The reserve list was accordingly called into play.

Mr Cameron tells me that he waited at his office until 5 p.m. on Friday expecting notice of points on appeal to be delivered to him. I hasten to point out that even delivering them on Friday was hardly within the spirit of the Practice Note which refers to two clear days, and I infer from that that means two ordinary working days. However, the points of appeal were not delivered to his office until after 5 p.m. when he had left.

Some three weeks ago when I was in Dunedin and a long case had settled there was very little work that could be found for me. I accordingly asked for counsel to appear before me on all matters that were set down for hearing in an endeavour to avoid that happening in the future. I indicated to counsel that some cooperation was needed to ensure that the backlog of cases was disposed of, and that because nothing had voluntarily been brought forward to fill up judicial time we would have to re-introduce reserve lists of cases, and those with cases on the reserve list could expect to be called upon if Court time was available and would be expected to be ready. Because of that, and because the issue is one of fact not involving any great problems of law, and because counsel was counsel appearing in the District Court, I was not willing either to grant the application to dismiss the appeal or his subsequent application for an adjournment on the same grounds.

I have now heard the appeal. It is solely a question of fact. It is a relatively common situation of a man employing tradesmen to do work where often the benefit of

professional advice by way of supervision and formal contracts with specifications is not appreciated until after the work has been completed and something has gone wrong. The defendant quite clearly wanted this work done on the cheap. He had consulted a professional engineer but did not engage him in relation to the contract for work which involved filling of land and excavation to enable a driveway or access into a back sloping section. He engaged the respondent to provide the machinery and to do the work. He originally contemplated that the work would be performed by his erecting a retaining wall with hardwood which he had available. The respondent agreed to do that work, but the wall was of course to be erected by the appellant. During the course of the work the appellant ran out of hardwood. He reconsulted his engineer to seek advice as to what was to be done and it was suggested that in the absence of hardwood the work could be completed by further excavation on a different basis, but which would involve benching and draining followed by batter. Undoubtedly the appellant asked the respondent to do this work and the respondent agreed.

The District Court Judge in his findings has spent a great deal of time determining what the contract between the parties was. That is not surprising because it was a very loose arrangement. He reached the conclusion in the end that the contract between the appellant and the respondent was no more than that the respondent would provide hire of equipment and labour, and implicit in that was that the equipment and labour would be used in accordance with the directions of the appellant.

The real issue before the Court was whether in the subsequent portion of the work the respondent benched.

The conclusion of the District Court Judge in this respect was:-

> "The evidence of Mr Fraser in regard to his inspection in June 1980 is not sufficiently strong to displace the sworn evidence of Mr Billington that he did the benching and filling at the site although of course there is room for error in the area to which this operation applied."

Mr Fraser was the engineer consulted briefly and from time to time by the appellant. The evidence of the respondent was not only that the respondent acknowledged that benching was required for the second part of the works, but that the benching was done. The District Court Judge in his judgment appears to have overlooked that whereas Mr Billington, the principal witness for the respondent, gave evidence from which he appears to assert that he personally did the benching; when cross-examined at a later stage, (because there was a delay in the resumption of the hearing), he specifically denied that he had personally done the benching but nevertheless maintained it had been done by one of his employees. In that respect he, however, acknowledged that he did not see the benching, and I am quite satisfied that his conclusion that the benching was done was no more than a reasoning process that because the work had been done and it involved benching, therefore the benching had been done. This was hearsay or inadmissible opinion evidence.

The contract being of the kind as found by the District Court Judge, and there being no dispute as to the number of hours claimed for reward in respect of the respondent's claim, the issue was whether the contract included benching and whether there had been a breach of that contract by the benching not having been done. It appears difficult from the evidence to make any finding other than that for the second half of the work the respondent was required

to bench. His evidence all goes to an acknowledgement that benching was required and an assertion that it was done.

It is submitted that Mr Fraser's evidence examined separately from the other evidence does not establish that benching was not done. The conclusion of Mr Fraser arose from the examination of two holes. The District Court Judge was not bound to accept Mr Fraser's conclusion, and I am satisfied that he did not accept his conclusion, but the reason that he expressed for not accepting it was "the sworn evidence of Mr Billington that he did the benching". That simply is not the state of the evidence. It has been submitted to me by Mr Cameron that on analysis of Mr Fraser's evidence I should reject it without considering any question of credibility. He says that because all Mr Fraser did was examine two holes which had been dug by the appellant, and without more precise evidence as to where the holes were or why they should satisfy the Court that benching was not carried out, one could not conclude that the benching was not carried out. This was the conclusion of Mr Fraser, the engineer, which Mr Cameron submits this Court should reject.

I have carefully read the evidence of Mr Fraser. In the absence of a specific finding of credibility by the District Court Judge I am unable to say that his evidence is to be discounted or not accepted. I am satisfied that the reason the District Court Judge decided that the benching had been done is unsupportable on the evidence. This really is an issue of credibility. The evidence is in such a state that it cannot be resolved without being reheard. There is no need in my view for the evidence to be reheard in this Court. It is unsatisfactory from the parties' point of view to have to face further litigation over this stale matter, but I am satisfied that justice requires that to be done. It may well

be that in result of the findings that I have made, and more importantly the District Court Judge has made, further evidence or examination by engineers will resolve the need for any further litigation. It may well be that even if the benching has not been done the plaintiff legally cannot support a counterclaim. That I simply do not know because again it really depends precisely on the nature of the contract and whether in fact there was a breach of contract from which the appellant is entitled to damages as against a mere failure to carry out a direction in the course of that contract for which the ultimate responsibility is really on the appellant himself who accepted responsibility for the work and the supervision. It would be clear, however, that if there was a direction to bench and the work was done without benching that the respondent had not earned his fees or his reward. The respondent has been paid in full for the first part of the work in respect of which there was no dispute. It is only in respect of the balance, and as I have already indicated that will have to be reheard.

The appeal is allowed. I direct that the matter be referred back to the District Court to be reheard in its entirety including the claim and the counterclaim. I do not propose to allow the appellant any costs in respect of this appeal and that is solely because of his failure to observe the Practice Note earlier referred to.

A D. Holland J