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NZ Reports

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A No 112/82

1332
(1)

BETWEEN CITY REALTIES (DEVELOPMENTS) LTD

Plaintiff

AND INDUSTRIAL HOLDINGS LTD

Defendant

Hearing: 10 October 1984

Counsel: D L Mathieson for plaintiff
J G Fogarty for defendant

Judgment: 19 OCT 1984

JUDGMENT OF EICHELBAUM J (NO 2)

In my judgment of 31 May 1984 (to which I will refer as judgment No 1) I held that the plaintiff was entitled to succeed in its claim. I also held that the plaintiff had itself been in breach of contract in respect of an implied term as to the obtaining of the Bank's consent. By reason of the delay so caused by the plaintiff the actual cost to the defendant of carrying out the contract, had it proceeded to do so, would have been greater than if the plaintiff had fulfilled its obligation, on account of the escalation of costs in the meantime. At p 55 of my judgment (No 1) I said :

> " Thus if the defendant had proceeded with the building, as I have found it was obliged to do, IHL would have had a good claim in damages against the plaintiff, for the difference between the cost to IHL of performing the contract on the basis on which it was entered into, on

> the one hand, and what it would have cost IHL to perform it, on the basis of ruling rates at a delayed date, on the other. "

I ordered an Inquiry as to the quantum of the loss caused to the defendant by the plaintiff's delay.

On 10 October 1984 the parties argued certain matters relevant to the Inquiry into damages and also questions of interest and costs in relation to the final judgment. On that occasion Mr Mathieson sought leave to re-argue the issue dealt with at pp 54-56 of my judgment (No 1) which led to the order for an Inquiry. I have thought it appropriate to deal with this application in a separate judgment.

In order to appreciate Mr Mathieson's argument it is necessary to elaborate on the context and background of my finding on the issue just mentioned. So far as the pleadings were concerned the issue of loss sustained by the defendant by reason of the plaintiff's delay in obtaining the Bank's consent was explicitly raised by the defendant's second counterclaim. As indicated at p 54 of my judgment (No 1) my tentative view was that there was difficulty in the concept of a counterclaim for substantial damages in respect of losses which had not in fact been incurred. However (and I am now just restating the effect of what I said at pp 54-55, although it is fair to say that I dealt with the subject somewhat elliptically) I did not regard that point as decisive because even if the defendant was unable to obtain substantial relief on this issue by way of counterclaim, it was entitled to raise it as a matter that went to reduce the plaintiff's damages. For the reasons discussed at pp 55-56 I upheld the defen-

dant's argument, and left two matters open; viz the Inquiry into the quantum of the defendant's loss, and the question whether the defendant should obtain relief through judgment on its counterclaim, or by way of reduction of the damages the plaintiff would otherwise recover.

It is now desirable that I should record the background to the way this contention of the defendant's developed as that bears on Mr Mathieson's claim to have the point re-opened. In its first counterclaim the defendant maintained that if it be held that the contract was not brought to an end as pleaded by the defendant in various of its defences, the plaintiff was in breach of its obligation to obtain the necessary consent of the Bank, and thereby prevented the defendant from earning the profit it expected to receive from the contract. That counterclaim failed because of my finding that the defendant had wrongfully repudiated. In addition the defendant did not establish any substantial damage. By way of second counterclaim the defendant repeated the allegations relevant to the first and continued :

> " 4. THAT the loss suffered by the Defendant, distinct from the loss of profits is the increased cost of the contract works being the difference between the actual assessed cost of the contract less expected profit ($40,000.00) and costs paid $18,000.00) - $614,000.00 and the actual cost of construction based on the ruling costs of labour and materials from the date the Court considers that the building permit would have been granted through the estimated period of letting sub-contracts and construction of 6 months. "

In its prayer for relief the defendant sought an Inquiry into the damages sustained pursuant to the approach pleaded in para (4), and judgment for the sum so assessed.

At the trial, the taking of evidence occupied eight days when there was an adjournment of several days before final submissions were heard. It will be apparent from my first judgment that the issue now under discussion occupied a small and subsidiary part of the totality of the matters in issue between the parties. Only a few lines of the defendant's full written arguments were devoted to the submission which was advanced on the basis that it was applicable only if the Court should hold that neither party was entitled to treat the contract as at an end. My notes indicate that the plaintiff did not have anything to say on the subject in response.

When I came to prepare my judgment I found that this was one of two topics on which I required further assistance. In a minute to counsel outlining the points on which I desired additional argument I said :

> " (B) This relates to the defendant's second counterclaim. I would like counsel to assist me with further submissions on the following :
>
> 1. The pleading is to the effect that if it be held that the defendant 'wrongfully repudiated', the defendant is entitled to maintain a claim for damages; I would like to be clearer as to the basis on which this proposition is advanced.

> 2. If I have understood the defendant's contentions correctly, damages are claimed (or rather an inquiry is sought) on the footing of the difference between the cost to IHL of performing the contract on the basis on which it was entered into, on the one hand, and what it would have cost IHL to perform it, on the basis of ruling rates at a delayed date, on the other. Again, I would like submissions elaborating the grounds on which this contention is advanced. "

Pursuant to my request counsel presented further argument on 1 and 2 March 1984. Most of their comprehensive submissions related to the first aspect raised by my minute which was not relevant to matters now under discussion. On this occasion the defendant squarely raised the issue that if the plaintiff was awarded damages for non-performance but was also found to be in breach of a term relating to the obtaining of the consent, the defendant was entitled to have brought into account the consequences of the plaintiff's own breach. The defendant's argument on the point was not only directed to the counterclaim but also maintained that the matter was one to be taken into account in the assessment of the plaintiff's own damages. In the latter respect the issue had not been raised specifically in the pleadings although the defendant contended that its denial of the allegation as to damage was sufficient to entitle it to argue the matter. In any event the second counterclaim sufficiently alerted the plaintiff to the existence of such an issue, and on the present argument Mr Mathieson very fairly said he would not take any point based on the pleadings alone. In elaborating the argument orally on 2 March 1984 Mr Fogarty concluded by giving an arithmetical example to illustrate his position which made it clear that if the

issue was dealt with by way of reduction of the plaintiff's damages rather than on the counterclaim the approach for which he contended was that which I eventually accepted at pp 55-56 of my judgment (No 1). In a brief response Mr Mathieson's main thrust was that the defendant had not suffered any loss flowing from the alleged breach of an implied term.

I do not wish counsel on either side to regard anything I have said as implying criticism. This was a major hearing involving complex factual and legal issues which both sides canvassed with thoroughness. I do not think anyone need feel any embarrassment about the way they handled what at the time was very much a subsidiary aspect.

For obvious reasons no judgment has been sealed. On the present argument Mr Mathieson's first submission was that this Court had jurisdiction to reconsider a judgment at any time before it is perfected. As was the case in Horowhenua County v Nash (No 2) 1968 NZLR 632 opposing counsel conceded that this was so. Authorities in support of that view, which I accept, are collected in In re Harrison's share under a settlement 1955 Ch 260. In New Zealand the same conclusion has been accepted in Johns v Westland District Licensing Committee 1961 NZLR 577 and Hickford v Tamaki 1962 NZLR 786. So the question is one of the proper exercise of a discretion. In Horowhenua County v Nash, Sir Richard Wild CJ said :

> " Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled - first, where since the hearing

there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled. "

(p 633)

Mr Mathieson cited a number of decisions which in his submission showed that the jurisdiction of the Court to reconsider a matter was very wide, not to say unfettered. In Hall v Meyrick 1957 2 QB 455 a question arose concerning a ruling in favour of a proposed amendment during the course of the trial which the Judge later reversed. The Judge's ruling was subject to any submissions that might be made upon the amendment when the Court and the opposite party had had the opportunity of considering it in written form. At that stage it became apparent that the proposed amendment set up a statute-barred claim. On appeal the Court regarded the earlier ruling as provisional only. However Parker LJ added the following :

" . . . . (E)ven if the judge had intended to give a final ruling, it was always open to him, until the order was drawn up, to change his mind. Though, no doubt, a judge would not take that course where the matter had been argued and submissions had been made, yet it seems to me, in a case where there is an element of surprise and counsel has not had a full opportunity of making his submission, that it would be

perfectly proper for the judge to take a different view from that which he had already expressed. "

(pp 481-82)

In Hickford v Tamaki (above) Sir Harold Barrowclough CJ, in deciding whether he should exercise the power to amend a judgment pronounced by him orally at the conclusion of a trial, considered whether there had been any prejudice to the opposite party and (no other reason for refusing to exercise the jurisdiction having been advanced) decided to make the amendment. The merits of the situation were that when the jury returned with its verdict at 10.30 p m counsel overlooked the need to request that leave be reserved to move to set aside the judgment then entered. Sir Harold Barrowclough CJ said it would have been unfortunate if through momentary forgetfulness on the part of counsel his client could lose the right to have the judgment set aside.

In Johns v Westland District Licensing Committee (above) Richmond J was faced with the situation that an amendment to the Licensing Act enacted after the pronouncement of his original judgment brought about the result that the issue of a writ of certiorari as earlier ordered would no longer serve any useful purpose. The judgment not having been perfected, Richmond J thought it proper to withdraw the order made previously. He relied inter alia on In re Harrison's share (above) where after a Judge had pronounced orders approving schemes affecting family trusts there had been a decision of the House of Lords which made it clear that the Judge had no jurisdiction to make such orders. The Judge having varied the orders originally pronounced, the propriety of his action was upheld by the Court of Appeal. In referring to the exercise of the discretion the Court simply said :

" When a Judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously. "

(pp 283-4)

A survey of the cases cited shows that except for Horowhenua County v Nash there has been no attempt to categorise the situations in which the jurisdiction may properly be exercised. Clearly it is a power to be invoked only in special circumstances, of which In re Harrison and Johns v Westland District Licensing Committee are striking examples; and the very fact that the circumstances will need to be special means that it is undesirable if not impossible to attempt to refine the categories any further. Mr Mathieson submitted that the present case fell within category (2) in Horowhenua County v Nash - that counsel had failed to direct the Court's attention to authorities of plain relevance. He also submitted that it was within exception (3), namely that there was some other very special reason why justice required that the judgment should be reconsidered. As to thathe submitted first that the meaning of counterclaim No 2 was difficult to understand on the pleadings and made even more obscure by the way it was developed during the original hearing. There is some substance in that, but with respect it seemed to me that after my minute had been issued and further argument had been submitted on behalf of the defendant, the point the defendant was seeking to raise had emerged reasonably plainly. Nevertheless, it could fairly be said that elucidation was obtained only in the course of the hearing on 1-2 March, and if at that point counsel had intimated that because

of the state of the pleadings and the course the matter had followed so far he was now taken by surprise, and had sought an adjournment to enable him to meet the argument, I think it unlikely that such a request would have been refused. Indeed if within a reasonably short time of the conclusion of the argument, while judgment was still reserved, the present application had been made I think that too might have been received sympathetically. However, the first occasion when it was intimated that the plaintiff wished to address further argument was on 11 July 1984 when the point was mentioned in the course of a Chambers hearing on the directions relating to the Inquiry. By then four months had elapsed since the final submissions and it was six weeks after the delivery of my judgment. Mr Mathieson also argued that the application was stronger than where as in Horowhenua County v Nash the Judge had finally parted with the case. It is strictly true that here I have not done so; the Inquiry as to damages remains as well as the form of the judgment and the questions of interest and costs. Nevertheless, for better or worse the point which Mr Mathieson wishes to have the Court reconsider had been dealt with in my reasons for judgment, and decided, so I think this argument is of marginal weight.

I should now refer to the course the matter took on 10 October 1984. When both sides had presented argument on the question of leave I permitted Mr Mathieson to develop his submissions on the merits. I did so partly because I think the nature of the new argument that a party wishes to submit is of relevance in deciding whether he should be permitted to advance it. Secondly, there is the aspect that should this case go further the Court dealing with the matter on appeal will have before it such assistance as may be derived from the views of the Judge at first instance. Mr Fogarty did not object to this

course and was ready to meet Mr Mathieson's argument on the merits.

Mr Mathieson's first submission was that on the counterclaim, only nominal damages should be awarded, on the basis that no substantial damage had been proved. Although I left the point open in my judgment (No 1) I think the plaintiff's submission is unanswerable. The contrary can be tested simply by enquiring what the position would be if my judgment in favour of the plaintiff on the primary issues between the parties should be reversed on appeal. A judgment given for the defendant on the counterclaim for substantial damages representing losses which in the event the defendant did not incur could not possibly survive, yet a counterclaim is supposed to represent a distinct cause of action which could stand on its own feet regardless of the existence of any cause of action of the opposite party's.

The point just discussed was of course taken on behalf of the plaintiff in answer to the counterclaim at the 1-2 March 1984 argument. At this stage its main relevance is to the question of the form of judgment to be entered in relation to the second counterclaim. The new aspect which Mr Mathieson wished to put before the Court was that the defendant had not proved any recognised head of loss. Basing himself on my finding that the defendant had failed to show it would have made any profit out of the contract (judgment No 1, p 56) and adopting the classification in Ogus, The Law of Damages (1973) Cap 8 Mr Mathieson said that accordingly the defendant had not lost any "expectation" interest. In situations where there is no "expectation" interest or the claimant is uncertain whether he can establish any (see e g Anglia Television Ltd v Reed 1972 1 QB 60) he may elect to seek recovery of his "reliance" interest, broadly speaking expenses which have been thrown away as a result of the opposite party's

breach. Mr Mathieson maintained that in general, leaving aside cases of restitution or invasion of an indemnity interest, those were the only forms of remedy open to a claimant. Mr Fogarty submitted contra that on ordinary principles there was no reason why the consequences of the plaintiff's delay should not be taken into account in the calculation of the plaintiff's own damages.

If the problem is approached from the point of view of the measure of damages properly payable to the plaintiff the search is for the amount that will put the plaintiff in the same position it would have been in had it not sustained the wrong for which it is now to be compensated. The basis on which the plaintiff has mounted its claim is for loss of bargain arising under the contract it had with the defendant : the additional cost which it has had to pay to another party to achieve the same result. It is obvious that for purposes of that calculation the plaintiff has to establish what it would have had to pay to the defendant. If, on performance of the contract, apart from the lump sum price the defendant would have been entitled to any items by way of extras or other payments due under the contract, clearly those would have to be taken into account in the calculation. I do not see any difference in principle if the sum in issue relates to a counterclaim by the defendant for breach of the contract.

On this approach the only remaining question is whether the principle for which Mr Mathieson contends would have prevented such a counterclaim by the defendant, that is, still on the hypothesis that the contract had been performed. The special feature on which Mr Mathieson relies is that the defendant had made a "bad bargain" : that there was no prospect of a profit. I do not accept that in such a situation there is any rule of law that prevents the defendant from recovery.

I need to deal with the two decisions particularly relied on by the plaintiff. In C & P Haulage v Middleton 1983 3 All ER 94 the appellant was granted a contractual licence to occupy premises on a renewable six monthly basis. He expended money in making the premises suitable for purposes of his work as an engineer, although the licence provided that fixtures installed by him were not to be removed upon expiry of the licence. Ten weeks prior to the end of a six month term he was unlawfully ejected. He was able to obtain permission from the local authority to work from his own home, which he did until after the six months term would have expired. The appellant claimed against the licensor for the cost of the improvements effected by him in the premises. He recovered nominal damages only, the Judge holding that he had not suffered any loss since he had been able to move his activities to his home rent free, and the expenditure on improvements would still have been lost had the licence been validly terminated. The appeal failed. The Court of Appeal re-stated that in assessing damages for breach of contract the Court endeavoured to put a plaintiff in the position he would have been in had the contract been performed. In the circumstances the appellant was no worse off than if the contract had been fully performed. He was not entitled to claim the expenses incurred, so as to restore him to the position he would have been in before he had entered into the contract, since that would compensate him for the bad bargain he had made and would leave him better off than he would have been had the contract been wholly performed. Ackner LJ in delivering the principal judgment said :

> " It is not the function of the courts where there is a breach of contract knowingly, as this would be the case,

> to put the plaintiff in a better financial position than if the contract had been properly performed. "
>
> (p 99)

In reaching his conclusion Ackner LJ placed reliance on the second authority, Bowlay Logging Ltd v Domtar Ltd 1978 87 DLR (3d) 325 a decision of the Supreme Court of British Columbia. There the parties entered into a contract under which the plaintiff was to cut timber sold by the defendant, the latter to be responsible for hauling the timber away from the site. The plaintiff claimed the defendant was in breach of contract as the defendant did not supply sufficient trucks to make viable the plaintiff's operation which was losing money. The plaintiff claimed not loss of profits but compensation for expenditure. The defendant argued that even if it was in breach the plaintiff should not be awarded damages because its operation would have lost money in any case. Berger J in the course of reviewing English and American authorities and texts quoted from an article by Professor L L Fuller and William R Perdue Jnr, "The reliance interest in contract damages", as follows :

> " We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed. "
>
> (1936, 46 Yale LJ 52, 79)

A little later in his judgment Berger J said :

" The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract - or in other words, he is saved from incurring further losses.

If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. Moreover, the amount of the damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract. The greater his expenses owing to inefficiency, the greater the damages.

The fundamental principle upon which damages are measured under the law of contract is restitutio in integrum. The principle contended for here by the plaintiff would entail the

award of damages not to compensate the plaintiff but to punish the defendant. So it has been argued that a defendant ought to be able to insist that the plaintiff's damages should not include any losses that would have been incurred if the contract had been fully performed. According to Treitel, Law of Contract, 3rd ed.(1970), at p. 798:

> ' It is uncertain whether the plaintiff can recover his entire expenses if those exceed the benefit which he would have derived from the contract, had there been no breach. '

Ogus, in The Law of Damages (1973), has said at p. 347 that, 'it is not yet clear whether English law imposes this limitation'.

The tendency in American law is to impose such a limitation. And I think Canadian law ought to impose it too. "

As to English law, since that was written there has of course been the decision in C & P Haulage v Middleton.

I have said sufficient about these cases to show that both were concerned with a different situation, namely where an award of damages based on expenses incurred by the plaintiff would have put him in a better position than had the contract been performed. Indeed Mr Mathieson recognised that an extension of that principle was required if it were to be applicable here. I do not see any sound or logical basis for such an extension. Had the contract been profitable and IHL was able to prove that because of the delay in obtaining the Bank's consent such profit had been diminished there is no dispute that it would have

had a proper basis for damages. If the position had been that but for the delay the contract would have resulted in a modest profit to IHL but the breach had converted this into a loss there is no reason in principle why the difference between the hypothetical and the real result should not be recovered. That would be the sum required to put IHL in the position it would have been in but for CRL's breach. Similarly if the contract would have made a modest loss and as a result of CRL's breach there was a greater loss, again the principle affirmed in the Bowlay case does not prevent recovery. To revert to the language of Ackner LJ in C & P Haulage v Middleton (above) no question arises of putting the claimant in a better financial position than if the contract had been properly performed.

Mr Mathieson further submitted that IHL rightly mitigated its losses by ceasing to incur any further liabilities. Had it run up further expenses when it had the option of giving notice making time of the essence, it would not have been able to recover them, because of failure to mitigate. A fortiori with hypothetical losses. I am unable to accept this argument either. As pointed out in my judgment (No 1) at p 55, although the defendant elected not to give notice, and affirmed the contract, it does not follow that it waived its right to damages for delay.

No other objection of principle was raised to the recovery of damages in respect of the plaintiff's delay. The relevant dealings between the parties occurred at a time when it was recognised on all sides that building costs were escalating. There was no argument concerning the applicability of Hadley v Baxendale, the situation clearly falling within either limb.

I conclude therefore that had the defendant completed its work pursuant to the contract it would have had a good claim against the plaintiff for damages for

delay. Or putting it from the plaintiff's point of view, the best bargain it could obtain from the contract was subject to diminution by the amount of the defendant's claim. The defendant having failed to perform, in measuring the plaintiff's loss of bargain it seems to me to be entirely in accord with principle to deduct the amount of the defendant's claim, in order to arrive at the position the plaintiff would have been in had the contract been performed. And although no case directly in point has been cited, to deal with the situation by way of deduction from the plaintiff's damages is consistent with what is stated in McGregor (above) at p 152, and with the decision of Macarthur J in Samson & Samson Ltd v Proctor 1975 1 NZLR 655. See also Corbin on Contracts, Vol 5 pp 236-7. Accordingly, notwithstanding the more elaborate argument now presented, I remain of the view that the defendant is entitled to have taken into account the loss it would have suffered as a result of the plaintiff's delay.

The question whether the plaintiff should have leave to re-argue the point is therefore academic. However, since I have given full consideration to that aspect, I should state my conclusion on it. I do not think that the type of additional submission advanced here is within the second category of Horowhenua County v Nash. The type of oversight referred to there was in relation to an "authoritative" decision of "plain relevance" which I take to mean something that was or might well be decisive. I do not think the learned Chief Justice had in mind the case where in essence what counsel seeks is an opportunity to submit a fuller argument. That is really the present situation even though the argument involves pursuit of a line of attack not advanced at all at the earlier hearing. As to the third category, this encompasses all other special situations that might arise. And although the general principle, subject only to rare exceptions, has to be that there is only one bite at the cherry I do not exclude the possibility that in particular circumstances, the fact that

counsel was taken by surprise may qualify for a second. There may be instances where the nature of the problem is not appreciated in time to seek an adjournment. It is however taking that situation a significant step further to allow an application for reconsideration after a reserved judgment has been delivered. In my opinion the facts of the present case are not such that the Court's discretion should be exercised in the applicant's favour.

Accordingly my formal decision is that the plaintiff's application for leave is declined.

Solicitors :
Hogg Gillespie Carter & Oakley (Wellington) for plaintiff
Weston Ward & Lascelles (Christchurch) for defendant