

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1193/82

IN THE MATTER of the Wages Protection
and Contractors Lien's
Act 1939

BETWEEN BRIAN FREDERICK DUNFOY
of Auckland, Builder

Plaintiff

AND PETER FLINDERS JOHANSEN
of Auckland, Taxi Driver

Defendant

Hearing: 7th September, 1984

Counsel: Dugdale for Defendant in Support
McDonald for Plaintiff to Oppose

Judgment: 11 SEP 1984

JUDGMENT OF SINCLAIR, J.

The Defendant in this action moves for an order for further and better discovery. The affidavit sworn by the Defendant in support discloses that the Plaintiff originally filed an affidavit of documents on the 7th November, 1983, but that on the 15th May, 1984 a counter claim was filed which it is alleged raises new issues. The affidavit goes on to say that one of the Defendant's contentions is that the Plaintiff used much of the material which is now the subject matter of the claim in the construction of the Plaintiff's own home unit at Bayswater. The Defendant therefore wished to have made available and inspect all accounts and invoices in respect of the construction of that unit. There is some correspondence between the solicitors on this particular aspect which appears to have commenced in May, 1984 and the Plaintiff's solicitors contended that

the invoices and accounts sought by the Defendant were neither relevant nor discoverable in respect of the claim or counterclaim. That is still the stance of the Plaintiff.

If one has a look at the claim it is one for \$29,063.70 allegedly due by the Defendant to the Plaintiff in respect of certain building and ancillary work carried out on the Defendant's property in Takapuna. The statement of defence denied that there was any money due to the Plaintiff in respect of the contract and in respect of a claim under the Wages Protection and Contractors Liens Act 1939 it was alleged by the Defendant that the Plaintiff had failed to give notice in writing of its intention to claim a lien and therefore was not entitled to a lien over the property.

The counterclaim which was filed in due course alleged firstly that during the course of construction the Plaintiff represented to the Defendant that he had done work and supplied materials to the value of \$104,422.48 and that the Defendant had paid that sum to the Plaintiff. The counterclaim went on to allege that that representation was false and that the value of the work and materials was in fact \$55,000. In consequence the Defendant counterclaimed for \$49,422.48. A further statement of counterclaim alleged that the work had not been done in a competent workmanlike manner and just over \$5,000 was claimed to be the cost of the alleged remedial work necessary.

A further statement of counterclaim related to an alleged express term of the contract that the building work would be completed by the end of March, 1982. Because of the Plaintiff's breaches of contract the work was not ultimately finished

until June, 1983 and as a result the Defendant, it was said, had to pay extra interest in the sum of \$30,000 and that amount was sought by the Defendant in his counterclaim.

Nowhere in the pleadings is there any reference to an allegation that the Plaintiff used material which was charged to the Defendant on the Plaintiff's own unit at Bayswater. The first time that allegation appears is in the affidavit in support of the application for further and better discovery. The ordinary rule is that the affidavit of documents is conclusive and it will do no harm to re-state that which was said in Jones v. Montevideo Gas Co. (1880) 5 Q.B.D. 556. There the Court was concerned with a rule precisely the same in effect as that contained in the N.Z. Code of Civil Procedure. On an application for further discovery the following was said:

"Either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or Judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shown by a contentious affidavit that the affidavit of documents is insufficient."

The Defendant is attempting to do precisely what was said over 100 years ago that he could not do. By the affidavit filed in support of the present application he is endeavouring by a back door method to show that there may be in existence other documents which he seeks to peruse.

As I perceive the proceedings at the moment there is no warrant at all for making the order which the Defendant

seeks. The application is accordingly dismissed with costs to the Plaintiff in any event of \$100.

P. D. King

SOLICITORS:

Williams, McDonald & Co., Auckland for Plaintiff
Kensington Haynes & White, Auckland for Defendant