

IN THE HIGH COURT OF NEW ZEALAND  
GISBORNE REGISTRY

CP 8/87

BETWEEN      ECONOTEK CONSTRUCTION  
                         LTD

Plaintiff

A N D            ARTHUR THOMAS KALE

Defendant

Hearing        21st August 1987

Counsel        J. J. Martin for plaintiff  
                         D. D. Rishworth for defendant

Judgment      21st August 1987

---

ORAL JUDGMENT OF TOMPKINS J

---

The plaintiff seeks summary judgment against the defendant for \$41,158.43 plus interest on \$32,779.43 from 1st January 1987 at the rate of 20.5 per cent, or alternatively pursuant to the Judicature Act 1908. The defendant has filed an affidavit in opposition to the plaintiff's application.

The plaintiff is in business as a builder. On 7th May 1986 it entered into an agreement with the defendant to erect for the defendant a goat rearing complex at a contract price of \$149,258. According to the plaintiff's affidavit the work commenced on 21st May 1986 and was completed by 21st October 1986. In the course of the construction there were variations to the contract involving both omissions and additions. This resulted in an amended contract price, including GST, of \$169,303.61. Including the interest claimed of \$6,831.40, this resulted in a total of

\$176,135. The affidavit filed by the plaintiff shows that after giving credit for payments made during the course of the contract, there is a balance owing, including GST and interest, of \$41,158.43. The interest claim is based on an agreement claimed to have been made with the defendant whereby he agreed to pay interest on the outstanding balance at 20.5 per cent per annum.

The affidavit filed on behalf of the plaintiff deposes that at no stage did the defendant raise any complaint regarding the account or the interest charged, nor, it is deposed, was there any subsequent contact with the defendant regarding the workmanship.

These proceedings were served on the defendant personally on 8th July 1987. On 20th August 1987, the day before the hearing, the defendant filed a notice of opposition and affidavit in support. These were not filed within the three clear days required by the rules. The notice of opposition sets out two grounds upon which the defendant opposes the plaintiff's application. First, it is alleged that the plaintiff is in breach of its contract. Secondly, it is alleged that the construction of the goat rearing complex was not carried out in a good and workmanlike manner and the workmanship involved was substandard.

The affidavit filed on behalf of the defendant contains detailed evidence in support of those two allegations. The breach

of contract alleged appears to be based on a failure by the plaintiff to complete the contract by the date stated in the contract, 10th July 1986.

The defendant's affidavit deposes that the kid rearing complex was operational from 28th July 1986. As I have already indicated, the affidavit filed on behalf of the plaintiff states that the job was completed by 21st October 1986. The evidence on behalf of the plaintiff is that the completion date specified in the contract was no longer applicable because of the variations to the contract, a claim that I understand the defendant will dispute. So one of the matters at issue between the parties is whether the contract completion date of 10th July remained a binding term of the contract, or whether it ceased to apply, in which case the contract would have been required to be completed within a reasonable time.

As to the second ground raised, the defendant, in his affidavit, sets out a number of respects in which the workmanship was substandard. Further, the defendant, in his affidavit, deposes contrary to the evidence of Mr McGarvy on behalf of the plaintiff, that he at all times made known to the plaintiff his dissatisfaction with the standard of workmanship. Apart from deposing that it is going to cost "a considerable sum" to remedy the defects, the defendant's affidavit makes no attempt to quantify the loss the defendant claims to have suffered, either as the result of the

substandard workmanship or the failure of the plaintiff to complete within time. In both these respects, what the defendant is really setting up is a counter claim.

There is no challenge by the defendant to the amount the plaintiff is claiming, either by way of the contract price plus variations, nor by way of interest, except that the defendant rather vaguely deposes that he entered into an additional agreement to pay interest as alleged by the plaintiff, but only on the basis that the plaintiff or its builders would go back and fix the faults detailed and they would complete the building with all due haste. He then deposes that the faults complained of have not been fixed.

Where a defendant seeks to resist an application for summary judgment upon the grounds that he has a counter claim that ought to be tried, then the defendant should give proper details of that counter claim in his affidavit in opposition, including the amounts claimed, either as a loss already suffered or an estimate of loss to be suffered. It would be preferable, although not required by the rules, for a draft counter claim pleading the causes of action relied on and setting out the amount of the claim, to be annexed to the defendant's affidavit. This would enable the Court to act under R 142(2) to give judgment for such amount as appears just, having regard to the amount of the defendant's counter claim. If this course is not followed the Court is unable to assess whether

the counter claim is for an amount greater or lesser than the plaintiff's claim, and whether the counter claim is such as to justify refusing the plaintiff's claim for summary judgment in whole or in part.

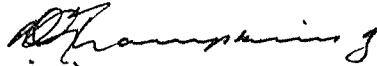
In the present case, the Court is unable to make this assessment because the defendant has failed to make any attempt to quantify the amount he wishes to claim. His affidavit refers to inconvenience caused through the failure to complete the contract within time, but there is no evidence on which the Court can judge whether that resulted in any financial loss. The allegations of substandard workmanship appear to be significant and, if established, the cost of remedying may well be substantial. But in the absence of any estimate of likely cost it is not possible to assess the effect that the substandard workmanship claimed should have on the plaintiff's claim.

The result therefore is that the plaintiff has established a claim that the defendant seeks to meet by way of counter claim, but for the reasons I have given, the defendant has not provided the details of that counter claim that he should have done. Hence I consider the proper course is for the plaintiff's application for summary judgment to be granted. This will leave the defendant free to bring such claim as he thinks fit against the plaintiff for any loss he can prove resulting from any alleged late completion and from the alleged substandard workmanship. But where those

claims are to be put forward on the vague basis they are here, I do not consider they warrant keeping the plaintiff out of the money acknowledged to be due.

There will therefore be judgment for the plaintiff against the defendant for the amount claimed, including interest as claimed.

The plaintiff is also entitled to costs which I fix at \$1,200 plus disbursements.



Solicitors

T. F. Wrigley Esq., Hastings for plaintiff  
Messrs Rishworth Wall & Mathieson, Gisborne for defendant