

BETWEEN      ERIC FLEMING LIMITED

Plaintiff

A N D      FREDERICK HOETER

Defendant

**NOT  
RECOMMENDED**

Hearing:      30 April 1987

Counsel:      C.B. Littlewood for Plaintiff  
                  P.L. Rice for Defendant

Judgment:    30 April 1987

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ORAL JUDGMENT OF HOLLAND, J.

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This is a claim for summary judgment brought by a painting contracting firm in respect of work done on behalf of the defendant in two particular areas, one in the Bank of New Zealand Queen Street, and the other in a building in Manukau City. The statement of claim seeks \$5028.10 in respect of the Manukau City contract and extras and \$2486.53 in respect of the Bank of New Zealand contract and extras. Notice of opposition to entry of summary judgment has been given. There is an allegation of bad workmanship raised by the defendant in somewhat bald form but it is apparent that the defendant disputes his liability to pay the plaintiff for the total amount claimed in respect of the Bank of New Zealand contract because of what he alleges to be faulty workmanship. It is also clear that in respect of the Manukau City claim he recognises that part of the plaintiff's claim is

justified but in some way which is difficult precisely to state he claims that the amount sought by the plaintiff should be reduced by the sum of \$1731.60 as a credit for the original cost of materials and labour involved in relation to hessian.

Counsel for the defendant has submitted that at all stages there has been nothing more in dispute between the plaintiff and the defendant over the Manukau City job than this credit of \$1731.60. He says, and it is not supported by evidence, that the only reason the plaintiff has not been paid is because the plaintiff did not recognise his right to make the reduction. If counsel's instructions are correct the payment should have been tendered. If it were tendered and refused it should have been paid into Court. It is quite apparent that neither step was taken.

Under Rule 136 of the High Court Rules summary judgment may be entered for "a particular part of any such claim". In the circumstances I am satisfied that it is just that there should be judgment entered for the plaintiff for the sum of \$3396.50 which represents the total amount claimed in respect of the Manukau City contract less the amount of \$1731.60 which the defendant disputes. The total amount claimed in respect of the Bank of New Zealand, namely \$2486.59, is in dispute and in respect of those two parts of the plaintiff's claims the application for summary judgment is refused.

It is common ground between the parties that in the event of summary judgment not being entered for the total claim the amount in dispute should be removed into the Auckland District Court. There is an application before the Court accordingly.

There will be the following orders:-

- (1) Judgment for the plaintiff against the defendant for \$3396.50 together with costs of \$500 and disbursements to be fixed by the Registrar. The balance of the plaintiff's claim comprising \$2486.59 plus \$1731.60 is transferred to the District Court at Auckland pursuant to section 46 of the District Courts Act 1947. Costs in respect of the application for the transfer and the amount left in the jurisdiction of the Auckland District Court is left for determination in that Court.

*A D Holland J*