28/12

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP 98/88

BETWEEN DAVID JOHNSTON,
DONALD GEORGE HATFIELD,
DONALD RAY ANDERSON,
CHARLES HUGHES

Plaintiffs

AND TERENCE T EVANS

Defendant

Counsel: Miss T R Mann for the Plaintiffs
Miss C C M Owen for the Defendant

Date: 2 November 1988

ORAL JUDGMENT OF MASTER HANSEN

The plaintiffs are a firm of planning and surveying consultants and architects and the defendant is a property developer.

In the statement of claim are two causes of action, the first seeking judgment in the sum of $6,508.85 and the second seeking judgment in the sum of $11,569.30. Given the affidavits filed in opposition Miss Mann on behalf of the plaintiff has very properly conceded that the first cause of action involves disputed issues of fact which must be tried in the normal manner. The second cause of action is founded on four invoices and again counsel for the plaintiff very properly concedes that the first of these, invoice number 3609 is disputed by the defendant in such a manner that it is inappropriate for the entry of summary judgment. That leaves a balance of $8,569.30 relating to three invoices.

The plaintiffs' submission is that they have discharged the onus on it and shown that there is no defence to that claim. The defence to this claim that remains of the total of two causes of action is a claim of equitable set-off. I think Miss Owen was somewhat taken by surprise by the concession made by the plaintiff. I do not think it would be unfair to say that she did not argue this defence of set-off with particular conviction. It is quite clear that set-off does give rise to a defence that may be used as a shield but not as a sword. The leading authority in New Zealand in the summary judgment arena is Pemberton v Chappell [1987] 1 NZLR 1, but there are a number of other cases dealing with the same point. For there to be a set-off there must be a sufficient factual nexus or connection between the plaintiff's claim and the set-off alleged by the defendant. It is said in another case Westpac Finance v Christie Dunedin CP 124/87, decision of Master Hansen 23 May 1988, that the defendant is obliged to establish matters which go to the heart of the plaintiff's claim so as in a sense to impeach the validity of that claim - and I acknowledge a debt for that quotation to Mr Justice Tipping in McNicol v McNicol Christchurch CP 43/87, unreported decision of Tipping J, 15 December 1987.

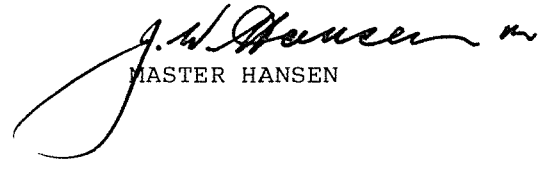
It seems to me in this particular case impossible to say that there is any factual nexus at all between the claim the plaintiff is proceeding on today and the set-off that the defendant seeks to advance. The first cause of action relates to work that can be described as the Pembrook work. The second cause of action involves work that has been described as the Brooklands site. The defendant in relation to the Pembrook work advances various defences in relation to advice he received relating to the district scheme and town planning matters. The other site, which is not adjacent, is completely separate. The work, except for the first invoice, which has been conceded by the plaintiffs, was carried out apparently satisfactorily; there is no suggestion in the affidavits in opposition that it was not.

I think in those circumstances it is clear beyond peradventure that the matters raised in relation to the planning matters and the Pembrook work have no factual nexus to the second cause of action, the Brooklands work. I am quite satisfied that the plaintiff has discharged the onus on it and is entitled to judgment for the $8,569.30 it seeks.

There is no formal application for a stay of execution but I am confronted with an informal application from the bar. The Court of Appeal has recently stressed the importance of counsel including in their notice of opposition to summary judgment an application for a stay of execution if it is likely to be needed and I would urge the bar in Dunedin to take note of that decision. The defendant's counsel argues that the parties are the same; that the counterclaim is a very significant one (indeed it is considerably larger than the plaintiff's claim), that there are complex disputes in relation to that counterclaim and the claim relating to Pembrook; and for that reason there should be a stay of execution. On the other hand Miss Mann opposes the application for a stay of execution and says the second cause of action is an entirely separate proceeding and is in no way sufficiently connected to the first cause of action to warrant a stay. It is admitted that the plaintiffs should be entitled to the fruits of their judgment especially in circumstances where the monies have been outstanding since 1986. I am satisfied that this is not an appropriate case to grant a stay pending the trial of the counterclaim and the disputed first cause of action. There is no real connection between the two causes of action whatsoever apart from the fact of a commonality of plaintiff and defendant. The amount has been outstanding for some considerable time and I am satisfied that the plaintiffs are entitled to judgment and are entitled to the fruits of that judgment without stay pending the outcome of a claim and counterclaim for completely unrelated work.

Accordingly there will be judgment for the plaintiff as mentioned earlier in the sum of $8,569.30. There will also be interest to the date of judgment awarded to the plaintiffs in the sum of $2,015.77.

There will be costs on the successful part of this claim to the plaintiff in the sum of $550 plus disbursements as fixed by the Registrar. I have as I say discounted that to some extent to take into account that the concessions made by the plaintiff were not communicated to the defendant until today.



MASTER HANSEN

Solicitors for the Plaintiff: Messrs Webb Farry

Solicitors for the Defendant: R J Somerville & Co