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IN THE HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY CO 432/89

1044

BETWEEN FABER INDUSTRIES LIMITED

Plaintiff

AND MORTON ESTATE WINERY LIMITED

Defendant

LOW PRIORITY

Hearing: 4 August 1989

Counsel: Mr Randerson for plaintiff
Mr Joyce QC for defendant

Judgment: 7 August 1989

(ORAL) JUDGMENT OF HILLYER J

This is a claim for $35529.20 plus interest, and a counterclaim for $226,266. The plaintiff is a manufacturer and contractor, carrying on business in Auckland and elsewhere, and the defendant is a manufacturer of wines having its registered office at Tauranga and carrying on business in Kati Kati.

In or about January 1983 the plaintiff and defendant entered into a partly written and partly oral agreement whereby the plaintiff was to install at the defendant's winery sited at Kati Kati a number of tanks for the purpose of holding wine, together with refrigeration, walkway system and other associated componentry. The plaintiff fabricated the sections of the tanks and

transported them to the winery and assembled them there. The tanks were made in sections called strakes, which were welded together. According to the plaintiff, the installation of the equipment was completed by March 1983 and invoices were rendered to the defendant. Part of those sums so claimed were paid by the defendant, but the sum of $35529.20 was left outstanding. There has been no argument before me as to the arithmetic involved in the calculation of that sum.

Following the installation the defendant was dissatisfied with the tanks, obtained advice and as a result refused to pay the balance I have referred to. The principal allegation made by the defendant was that the tanks were subject to intergranular corrosion in the welds which would require their complete replacement. Mr Randerson described this intergranular corrosion to me as being of the nature of a cancer which would destroy the welds in due course, and which would get worse as the tanks aged.

The parties did not reach any agreement about the matter and finally on 16 May 1984 a writ was issued in the High Court at Rotorua, claiming the balance of $35529.20 together with interest. A counterclaim was filed by the defendant for $144,725, subsequently increased by a second amended statement of defence and counterclaim on 27 June 1986 to the figure I have mentioned.

The matter was set down for hearing in the Rotorua Court in February 1986 but because of pressures of work in that Court, a fixture could not be allocated.

On 30 May 1986 a letter was written by the plaintiff to the defendant advising that it had received expert reports commissioned by its client, stating that there was no structural weakness in the tanks or in the welds, and that there was no evidence of any form of corrosion attack. It is admitted that there was some minor surface corrosion and remedial work required, but denied the defendant's allegation that the tanks required replacement. It offered to do certain work, but no agreement was made between the parties for that work to be done.

It seems clear that by that stage the tanks were in use by the defendant, and that any remedial work could be done only with the consent and co-operation of the defendant. The defendant's attitude, as I have said, was that the tanks needed replacement.

Finally the action was transferred to the High Court in Auckland, and on 2 October 1986 an order was made by consent by Barker J, referring certain agreed questions to a referee under s14 of the Arbitration Act. Those questions were careful and detailed, and the parties eventually agreed that they should be referred to a Mr G.W. Butcher, an engineer of Wellington, a senior partner

in a firm of engineers, Morrison Cooper & Co. As I understand it, both parties accept that Mr Butcher is an engineer of standing and experience.

The parties came before Mr Butcher for the hearing of evidence and submissions on 2 3 and 4 March 1987 and Mr Butcher, as appears from his report, spent some time at the winery and made further inquiries on his own.

On 19 March 1987 he submitted his report to the High Court and forwarded copies to counsel. Broadly speaking, his report was to the effect that the tanks did not need replacing, that there was no intergranular corrosion but that the workmanship on the tanks was not of a good standard, and that a substantial amount of work needed to be done to put the tanks into proper condition. In particular, the tanks were of a less than desirable standard, the welds were of poor visual appearance. Incomplete passivation of the welds had been carried out by the plaintiff. Passivation, as I understand it, is a method of treating welds to prevent surface corrosion.

The Arbitrator came to the conclusion that the areas of surface corrosion he noted, could be treated by normal acid passivation methods. He found pressure testing of the tanks had not been carried out, and that the Glycol coils which were used for cooling the tanks had not been tested hydraulically, which should have been done. There

were some other matters which needed attention. He examined the hinge mechanism to the upper section lids and found the hinges were inadequate and should be replaced. In some cases stainless steel of a lower quality had been used rather than that specified.

One of the specific questions asked of Mr Butcher was as to what repairs should be carried out at present and what would be the probable cost of such repairs, and another asked, if there was a risk of future repairs, what the likely future cost would be.

Mr Joyce for the defendant said that little or no evidence had been put before the engineer on the question of the cost of repairing any defects that might be discovered. He said that at the arbitration the emphasis had been on the one hand by the defendant that the tanks needed complete replacement because of the intergranular corrosion in particular, and on the other by the plaintiff that the tanks did not need replacing. Some evidence however was given by the plaintiff as to the cost of repairing defects, and obviously in response to the specific question asked of him, the Arbitrator made his own calculations of what he thought would be the likely cost of repairing the defects he had found. In my view this he was well entitled to do, and should have done, in the light of the specific question asked of him. He did say in his report that the costs presented in evidence

were only order of magnitude costs, which could not be confined to more definitive levels, and that when the work to be done was defined and scheduled, the parties would be in a position to determine the costs precisely.

He further arrived at his figures, on the basis that the work would need to be done by the plaintiff, at a mutually agreed time when the tanks were empty and with co-operation between the parties. He said the remedial repair work could be completed expeditiously without undue burdens and pressure being placed upon Mr Hancock, the wine maker.

On that basis Mr Joyce has submitted that there is inadequate evidence as to what the cost of the repairs should be, and that the matter should be referred for a further report pursuant to Rules 324-326 by another independent expert. Not unnaturally Mr Randerson for the plaintiff opposed this suggestion.

More than 5 years after the proceedings were issued, I have come to the conclusion it would be wrong for me to delay the determination of the matter any longer. A specific question was asked of the Arbitrator as an engineer of long experience. As best he can, he has given his estimate of the costs of carrying out the repairs and maintenance that he considers necessary. The parties had adequate opportunity before him to put forward

such evidence as they chose of the cost of any repair work necessary. They had adequate notice that this would be one of the questions the arbitrator would be considering, because they framed the question put to him as to the cost. In my view, there is sufficient evidence upon which at this stage I can determine the cost of the repairs.

When the report was received by the solicitors for the plaintiff, they wrote to the solicitors for the defendant saying that they had calculated the repair costs to be a total of $10,000 and that in the interests of clearing the matter up as quickly as possible, their client proposed that the repair costs be deducted from the amount of their client's claim, including interest. On that basis they said the defendant would be at liberty to carry out the repair work engaging independent contractors.

They had however, calculated those repair costs not on the basis of what it would cost for an independent contractor, but on the basis put forward by Mr Butcher, which was that work would be done by the plaintiff. It has been accepted by both parties that that would be a lower amount that it would be necessary to pay any independent contractor to do the work. The best figure I have been given is one given by Mr Randerson for the difference between the cost of the work being done by his client company and an independent contractor. He said that the

independent contractor would charge approximately 40% more for overheads and profit. I have no other figure suggested by the defendant contrary to that figure of 40%, and I propose to accept that as being the proper allowance that should be made if the work is to be done by an independent contractor, as opposed to it being done by the plaintiff.

It is clear therefore that the offer made on behalf of the plaintiff to settle the matter, by the defendant having the work done at the cost estimated by Mr Butcher, but by an independent contractor, is inadequate. Even if $10,000 is all it would cost the plaintiff to do the work, that presumably would be because it had allowed for its profit and overheads in the quotation it gave to the defendant. Furthermore, in that same letter the plaintiff made it conditional on the acceptance of its suggestion, that interest for four years on the full amount of the claim should be paid at the rate specified in the contract, 24%, and that the defendant should pay the total costs incurred by the plaintiff in the arbitration, of approximately $50,000, plus Mr Butcher's fee and another fee that was not specified.

I cannot accept that as a clear offer to do the work which by that stage the Arbitrator had determined was necessary.

In reply to that letter the defendant wrote back what I can only describe as a clear rejection. It rejected not only the offer made in the letter, but it said it rejected the arbitrator's decision and was going to apply to have it set aside. It seems therefore, as though no real consideration was given by the parties to any further agreement or negotiation regarding the repair of the work by the plaintiff.

At the present time the situation is that the plaintiff is no longer able to do the work because it appears its manufacturing division has been transferred to another party.

The substantial question before me therefore, is what should be the allowance made to the defendant for the cost of carrying out the work that the arbitrator has determined was necessary? I say that is the substantial question before me because Mr Joyce has not sought to argue that the arbitrator's decision should be set aside. When the application by the plaintiff for an order adopting the arbitrator's report and for entry of judgment was filed, there was a notice of opposition of which particulars were subsequently given, in which that submission was made. It was only when Mr Joyce finally filed his amended notice of opposition that the papers disclosed that he would not be seeking to have the arbitrator's award set aside, and that the defendant

accepted that the tanks did not need replacement because of intergranular corrosion.

A more exact calculation by Mr Randerson of the cost of repairing the tanks and doing the other necessary work, was the sum of $10,150. Adding approximately 40% to that would give a figure of $14,000.

I should say I have considered the evidence put forward of quotations obtained by the plaintiff from a firm, Paramount Sheet Metal (1985) Ltd, which was said to be of the order of $16,000. There has been however an increase in costs between the time when the arbitrator's report was published and the quotation obtained by the plaintiff. Another quotation obtained by the defendant was $58,100 in January 1988, recently updated to $63,800. Those estimates were obtained from a firm called Niro Atomizer Ltd, and in my view are not realistic because they cover work that was not referred to by Mr Butcher. It is said, for example, that a much more expensive method of testing to that envisaged by Mr Butcher was contemplated.

I have come to the conclusion that the proper time at which the cost of the work should be estimated, is shortly after the time Mr Butcher gave his decision. Until that time neither party, in my view, was prepared to say with any accuracy what work was necessary. Both parties now accept it appears, that the work that Mr Butcher has

specified is necessary and they should have had that knowledge in March 1987 when the report was presented. I think it would be proper to allow a period of two months for the report to be considered and the work to be done. I have come to the conclusion therefore, that as at 19 May 1987 the amount owing by the defendant to the plaintiff should be determined.

Mr Randerson has submitted that the interest specified in the contract at the rate of 24% pa or 2% per month, should be allowed as from 1 April 1983, but in my view that is not correct. The matter was conducted more on the basis of a counterclaim than of a defence to the claim, but that no doubt was because of the defendant's opinion that the tanks needed replacing.

The amount the plaintiff claims is the cost of doing the work specified in the contract, and the arbitrator has found that that work was not done properly or adequately. It seems to me therefore, that the proper approach to the matter is that the cost of repairing the work and putting it into proper condition, should be deducted from the amount claimed by the plaintiff. On that basis interest would be payable from 19 May 1987 down to the present time at the rate specified in the contract on the sum of $35,529.20 less $14,000, ie $21,529.20.

Accordingly, there will be judgment for the plaintiff for that sum plus interest at 24% from 19 May 1987 down to the date of judgment.

That then leaves only the question of costs. It is clear in my view, that the matter was one of substantial difficulty from a technical point of view, as was evidenced by the fact that the parties agreed to the appointment of an expert to conduct the arbitration. It was further necessary for proper and full evidence to be called from expert witnesses, and I think it right that the plaintiff should be allowed the full cost of the expert witnesses who gave evidence on its behalf. Those costs together with the 50% of the arbitrator's costs, which in my view also should be paid by the defendant, amount to $16,756.04.

There will be judgment for the plaintiff for those further amounts, and I hold that it is proper to allow those amounts in lieu of the amounts specified in the regulations normally allowed to expert witnesses in view of the complexity of the matter.

That leaves the question of party and party costs. Having regard to the way in which the litigation has been conducted, I am prepared to allow costs to the plaintiff on the claim for the amount of the claim and interest, in respect of which it has succeeded, and on the counterclaim

as on a sum of $226,266 which was the amount claimed in the last counterclaim put before this Court. During the course of the arbitration, some higher sum was submitted, but no such claim has been made here, and in my view it would be proper to allow costs only on the counterclaim as filed in this Court.

On each of those costs there will be a certification for three extra days, counting the time before the arbitrator and the day that has been spent before me. I certify for discovery and inspection in the sum of $350, and on the application for an order changing the venue in the sum of $100. In addition in this Court there will be disbursements to be settled if necessary by the Registrar.

The Orders I have made as to costs sufficiently cover in my view, any other incidental attendances that may have been necessary, having regard to the fact that the proceedings were filed in Rotorua and that the defendant's winery is located in Kati Kati.

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P.G. Hillyer J

Solicitors
East Brewster Urquhart & Partners, Rotorua, agents for Kayes Landers & Jorgensen Auckland for plaintiff
Cooney Less & Morgan of Tauranga for defendant