

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP NO 936/91

BETWEEN TURF INDUSTRIES
(1979) LIMITED a duly
incorporated company
having its registered
office at Auckland
carrying on business
as an engineer trading
as MANUFACTURING
& ENGINEERING

Plaintiff

AND BONDOR (NZ) LIMITED
a duly incorporated
company having its
registered office at
Auckland carrying on
business as a
manufacturer

Defendant

Hearing: 26 September 1991

Counsel: Raymond Parmenter for Plaintiff
Stephen Jagusch for Defendant

Judgment: 26 September 1991

ORAL JUDGMENT OF TOMPKINS J

The defendant has applied to review an order of Master Gambrill made on 23 August 1991 refusing the defendant's application for an order for security for costs against the plaintiff.

The plaintiff claims \$60,400.55, being the amount claimed to be due to it by the defendant for work done by the plaintiff for the defendant between 17

December 1990 and 15 February 1991. It is, therefore, a simple, straightforward claim for an amount for work performed.

The statement of defence admits that there was an agreement between the plaintiff and the defendant for the plaintiff to design, manufacture, install and commission at the defendant's premises certain plant and equipment. It goes on to make a number of allegations that amount, in effect, to a claim that the plaintiff failed to carry out the work in a proper and workmanlike manner. By reason of those allegations it claims that it is under no obligation to pay any amount to the plaintiff.

There follows four affirmative defences that I need not relate in detail, but are all, again, based on an allegation that the plaintiff failed to carry out the work in a manner in which it should. There is then a counterclaim in which on the same or similar grounds the defendant claims against the plaintiff losses it claims to have suffered of "not less than \$150,000." Again, there are a large number of causes of action pleaded (far more than, at least on a reading of the pleadings, would seem to be necessary) pleading causes of action such as deceit, breach of warranty, mistake, failure to exercise reasonable care in both contract and tort. What would appear on the face of it to be a relatively simple issue seems to have been made far more complicated than it need be by reasons of the defendant's pleading.

The basis of the defendant's claim to be entitled to security is that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful. There is evidence to indicate that the plaintiff's financial position is insecure. That is based on statements made by persons on behalf of the plaintiff concerning its financial position.

The affidavit filed by Mr Jarvie, a director of the plaintiff, is sparse. It makes no real attempt to answer the contention that the plaintiff is in a precarious financial position and may be unable to pay any costs awarded against it - indeed, to the extent that the affidavit contains any reference to the plaintiff's financial position, it would tend to support that conclusion. Mr Jarvie accepts, for example, that the company cannot make full payment to its creditors, although he claims it continues to trade profitably. It is asserted by Mr Jarvie that the plaintiff's inability to pay its creditors is due to the action of the defendant in withholding payment of the amount the plaintiff claims is due. The affidavit of Mr Jarvie falls far short of providing the sort of detail that is required to justify that claim.

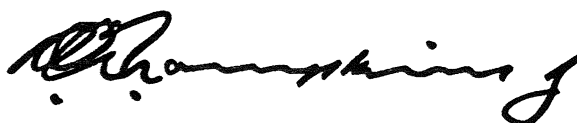
I am advised by counsel for the defendant that the defendant not only resists the plaintiff's claim on the basis set out in the statement of defence, but also claims that quite apart from the quality of the plaintiff's work, the plaintiff was only entitled to \$18,500 and not the \$60,400.55 claimed. Surprisingly, in view of the unduly lengthy nature of the statement of defence, nowhere is that assertion pleaded. In the absence of any pleading, I do not consider that it should be taken into account.

I have reached the conclusion that the Master was correct in declining this application, although on a different ground to that referred to in her minute. The real issue as disclosed by the pleadings is not the plaintiff's claim for the amount due for carrying out the work specified in the agreement, it is rather the numerous affirmative defences and the substantial counterclaim pleaded by the defendant in response. It is because of all the issues the defendant now seeks to raise concerning the manner in which the work was carried out that counsel for the defendant submits that the hearing is likely to occupy five sitting days.

Mr Jagusch is correct when he points out that the defendant did not need to bring its counterclaim in these proceedings and could have done so by issuing separate proceedings. But in that case, of course, it would have no grounds upon which to apply for security for costs against Turf Industries, who would then be the defendant. This in my view illustrates that it would be unjust and unfair to the plaintiff to have to supply security for costs because the defendant brings its claim as a counterclaim when it would not be liable to provide security for costs if the defendant brought its claim as a separate claim.

It is therefore for those reasons that I affirm the order of the Master and dismiss the application to review the order that she has made.

The plaintiff is entitled to costs on this application which I fix at \$250.00.

A handwritten signature in black ink, appearing to read "R. Thompson". The signature is written in a cursive style with a large, prominent initial "R" and a long, sweeping tail that extends to the right.

Solicitors for the Plaintiff: Brookfields (Auckland)

Solicitors for the Defendant: Simpson Grierson Butler White