

**IN THE DISTRICT COURT
AT AUCKLAND**

CIV-2011-004-002228

BETWEEN

B Y CONSTRUCTION LIMITED
(In Liquidation)
Plaintiff

AND

ANWAR ABDUL HAK MEHTER
Defendant

Hearing: 23 September 2013

Appearances: Mr Ho and Mr Norling for the Plaintiff
Mr Rana for the Defendant

Judgment: 2 October 2013

RESERVED JUDGMENT OF JUDGE J P GITTOS

[1] The plaintiff company B Y Construction Limited was at all times material to this action in business as a builder and was run by its principal officer and shareholder Yi Xing Yuan.

[2] In October 2011 the plaintiff company commenced this action against the defendant to recover an unpaid balance claimed to be due upon invoices rendered by the plaintiff to the defendant for design work carried out in respect to proposed alterations and additions to buildings situated at 129 Elstree Avenue, Glen Innes, and also at 123 Elstree Avenue, where a subdivision was also envisaged. At the time that the work referred to in the invoices was carried out the property at 129 Elstree Avenue was owned by the defendant outright and the property at 123 Elstree Avenue jointly owned by the defendant and his brother.

[3] The plaintiff company has since the commencement of this proceeding been placed into liquidation. The proceeding has been continued by the liquidator.

[4] It was common ground that in or about October 2009 the defendant approached Mr Yuan and asked him to appraise certain additions and alterations that the defendant contemplated undertaking to the two properties at Elstree Avenue. Three written quotations for the design, survey and planning work necessary to seek local authority consent for the projects were prepared and submitted to the defendant.

[5] These three quotations dated 12 October 2009 and 7 November 2009 (both in respect to 123 Elstree Avenue) and 29 November 2009 (in respect to 129 Elstree Avenue) are all in similar form. All have a heading "Scope of work as the plan and price" under which is set out brief details of the work to be done and the price quoted for it. Each then has a heading "The above fee does not include" under which are listed matters that are specifically not included in the quoted price. These items include "Council fee and fees charged by other parties" and "Specialist report if required". There is then a heading "Acceptance of work and guarantee of payment", under which each of the quotations has been signed by the defendant. Payment of a sum of \$5000 by way of deposit is acknowledged on each of the invoices.

[6] The scope and cost of the work contracted for are therefore clearly established.

[7] For the plaintiff Mr Yuan gave evidence (assisted by a Cantonese interpreter) and evidence was also given for the plaintiff by Mr Paranjit Bhatti, a fire engineering design consultant.

[8] For the defendant, the defendant himself Mr Mehter (assisted by a Hindi interpreter) gave evidence. There was evidence from an architectural designer and draughtsman Mr Kefali to whom the defendant had referred the plaintiff's work for comment. Evidence was also given for the defendants by two other witnesses, Mr Abdul Rehman and Mr Usut Sacha who spoke concerning the events of a meeting with the defendant's brother Mohammed, and Mr Yuan, which took place in July 2010 when the property at 123 Elstree Avenue was transferred into Mr Mohammed Mehter's sole ownership.

[9] Mr Yuan said in evidence that upon Mr Mehter's written instructions he had carried out the work referred to in the quotations promptly and that having done so he submitted invoices to Mr Mehter. These invoices covered the plaintiff's work and charges made by other professionals engaged by the plaintiff to deal with survey, engineering and fire safety aspects of the job. Mr Mehter did not pay the invoices in full; he paid a further \$10,000 in March 2010 but nothing thereafter. On 26 June 2010 the surveyor that Mr Yuan had engaged (a Mr Lim) requested from him a cheque for \$3675 payable to the Auckland Council to cover the council's fees for processing the survey work in respect to the application at 123 Elstree Avenue. Mr Yuan said he promptly referred this request to the defendant but the defendant did not make payment.

[10] In respect to 129 Elstree Avenue an obstacle to the council consent was recognised in that a small piece of land belonging to the council and adjoining the driveway to the defendant's property was in fact occupied and used by the defendant having been paved and used by him as part of his driveway. It was clear that this land would have to either be acquired from the council, its occupation by the

defendant relinquished, or some form of right-of-way established concerning its use as a condition of the council's consent to the proposed works.

[11] Mr Yuan said that the defendant was aware of that problem from the outset but took no steps to address the matter.

[12] Mr Mehter confirmed in his own evidence that he had in fact been made aware of this problem as a result of architectural advice that he had had in respect to an earlier proposed development of the property.

[13] Mr Yuan said that he was unable to get Mr Mehter to pay the balance of his charges or to pay council's fees or otherwise progress the applications before the council. It was his impression that Mr Mehter did not pay and did not proceed with the application because he had changed his mind about going ahead with the project.

[14] From Mr Yuan's point of view the next matter of significance was when Mr Mehter asked in March 2011 that he give him the plans and reports that the plaintiff had prepared in respect to 129 Elstree Avenue. Naturally Mr Yuan was reluctant to do so without some assurance of payment. On 31 March 2009 Mr Mehter gave Mr Yuan a handwritten receipt for the documents which are listed in the receipt. It is common ground those documents were given to Mr Mehter. This receipt is somewhat difficult to decipher. It is written in somewhat broken English with a number of spelling errors. It concludes:

"This is adorything (sic) fine then I will pay Mr Burt. Bert will help for \$16000 plan drawn (illegible)."

(Bert is the English name by which Mr Yuan is known)

[15] It was Mr Yuan's evidence that the documents were never returned to him nor was he paid the promised \$16,000. Mr Mehter in his evidence claims to have returned the documents to Mr Yuan and says that he does not have them. The missing documents are of significance only insofar as one of them, a fire safety report, was criticised by a witness for the defendant Mr Kefali. Copies of the documents prepared by the plaintiff upon which the plaintiff's claim depends were retained by the plaintiff and have been put before the Court.

[16] The quantum of the plaintiff's claims was not disputed, the focus of the defence and counterclaim being upon whether the plaintiff had discharged its contractual obligations properly or at all.

[17] It was Mr Mehter's contention that the purport and intent of the receipt document was to record the parties' understanding that he would pay only if the documents were satisfactory. He said the documents supplied to him were examined by an expert of his choosing (Mr Kefali) who advised him that they were unfit for the purpose of obtaining the necessary council consents. This however was not borne out in the evidence of Mr Kefali, the draughtsman to whom the documents were shown. His only criticism of the documents generally was that they were not signed and dated or stamped. That seems hardly surprising since, not having been paid, the plaintiff was unlikely to have handed over signed copies of the documents. In other respects Mr Kefali made no criticism of the quality of the documentation produced by the plaintiff apart from the fire report. His criticism in relation to the fire report was to the effect that it was his recollection that the report which he saw was stamped as a draft only and did not contain the level of detail in the fire report exhibited amongst the plaintiff's documents before the Court. This report dated 22 December 2009 was prepared by Mr Bhatti, an engineering design consultant who was called by the plaintiff as a witness. It is plain that this comprehensive report (in respect to which Mr Kefali made no criticism in his evidence) was prepared long before Mr Kefali was asked to examine the documents uplifted by Mr Mehter in March 2011. The documents actually shown to Mr Kefali appear to have been lost in the circumstances mentioned above. It is evident therefore that whatever Mr Kefali may have thought about the fire report that he in fact saw, the fire report upon which the plaintiff relies and in respect to which it rendered its invoice is the report before the Court which had been prepared by Mr Bhatti many months earlier.

[18] Even if the receipt was intended to record a qualified promise of payment, which Mr Yuan denied was the case, and which is not clear on the face of the document itself, the defence rather faintly raised, that the documents were not proper or adequate for the purpose of obtaining the necessary Council consents is not established as a matter of fact upon the evidence.

[19] Apart from that the defendant raised two further defences. The first of these, which goes to the nature of the contract between the parties, was raised by way of defence and also in support of the defendants counterclaim for refund of the monies paid to the plaintiff in part-payment of its fees.

[20] Mr Mehter asserted that his understanding of the contract was that the plaintiff would not only prepare the necessary documents but would actually obtain the necessary council consents for the building work. He says that the plaintiff has failed to do so and there has therefore effectively been a total failure of consideration.

[21] It is clear that no consents were in fact obtained. The council wrote to Mr Mehter on 19 August 2010 in respect to 129 Elstree Avenue advising:

“Further to us not receiving the information required for the building consent, I confirm that the above building consent has now been refused and council’s records amended accordingly. “

[22] The letter goes on to remind Mr Mehter of the need to pay an outstanding fee owing to the council in respect of the matter, for which an invoice was enclosed.

[23] It was Mr Yuan’s position that he did not guarantee the consents would issue and could not have done so. He was prepared to facilitate the issue of consents but they could not issue unless Mr Mehter attended to certain matters; namely that he sign the necessary applications, that he pay the council fees and that he resolve with the council the issue of his adverse occupation of the council land, either by agreeing to purchase the land from the council or by removing his paving and ceasing to occupy it. These things Mr Mehter did not do despite promptings to him by Mr Yuan.

[24] One has only to look at the written quotations which are the basis of the parties contract to conclude that Mr Mehter’s view of the plaintiff’s contractual obligations is misconceived. All of the quotes clearly detail the scope of the work involved which does not include obtaining council consent or building permits. Moreover, all of the invoices specifically record that the quoted fee does not include

Council fees, and in the case of the quote dated 12 October does not include building consent.

[25] Apart from that it is plain that both parties were aware from the outset that so far as 129 Elstree Avenue was concerned the council would not give approval unless Mr Mehter's adverse occupation of council land was dealt with. The resolution of this precondition was not something that the plaintiff itself could deal with. That required action by Mr Mehter. Commonsense would suggest that the plaintiff would not have contracted with the defendant on the sort of basis that he contends for in these circumstances.

[26] I find therefore as a fact that the plaintiff's contractual obligations did not require it to do more than properly carry out the design and planning work necessary to obtain the Council consent as specified in the written quotations.

[27] The final defence raised has to do with 123 Elstree Avenue only.

[28] It was common ground that when Mr Mehter engaged the plaintiff this property was co-owned by the defendant Mr Mehter and his brother. It was nevertheless the defendant only who engaged the plaintiff's services, and who signed the quotation for the work at that address and also a subsequent written instruction to the plaintiff to proceed with the work at both addresses dated 22 December 2009. The work was all completed and an invoice rendered in June 2010.

[29] In July 2010 the defendants' interest in 123 Elstree Avenue was transferred to his brother Mohammed who became the sole owner of the property. Mr Mehter said in evidence that at that time there was a meeting involving his brother and Mr Yuan, which was also attended by Mr Abdul Rehman and Mr Yusuf Sacha. He contends that at that meeting there was a variation of the contract between himself and the plaintiff whereby it was agreed that the contract was to be taken over by his brother who would assume responsibility for the defendants' obligations. Evidence was given by Messrs Rehman and Sacha as to their recollection of what took place at that meeting. What they were able to contribute was quite vague. No notes were kept and plainly these men had not been asked to turn their minds to the matter until

relatively recently. I note that both these witnesses in their prepared and signed briefs asserted that Mr Mehter himself, the defendant, was also present at the meeting as well as his brother, but both in their evidence before the Court said that their briefs were incorrect in this respect and confirmed that Mr Mehter had not been present. Mr Mehter himself acknowledged that he was not present at the meeting.

[30] The plaintiff acknowledged that he had been at the meeting but says that he made no contractual arrangements with Mr Mehter's brother and no changes were made to his contract with the defendant. Indeed it is difficult to see how any such changes could have been made, even had the plaintiff been agreeable to this happening, since Mr Mehter himself was not present. There is no suggestion that any of the other parties present was authorised to act as his agent in the matter. Furthermore this meeting took place after the work had been completed and charged for, and there seems no reason why the plaintiff should have been prepared to release the defendant from his obligation to make payment. No consideration for doing so appears to have been offered.

[31] The defendant has failed to establish that there has been any waiver of the plaintiff's claim or variation of the contract between the parties arising from this meeting or otherwise.

[32] Mr Mehter in his evidence says generally that he repeatedly asked the plaintiff for the plans and documents and that the plaintiff did not produce them. He contends that the application before the council for consent was refused for that reason.


[33] It may well be that he did ask repeatedly for the plans. It appears clear upon the evidence that the necessary work had been done by the plaintiff in a proper and timely way and that the release of the plans and progress of the building consent application have been delayed solely by Mr Mehter's failure to pay the sums due to the plaintiff, to pay the fees required to be paid to the council, and to resolve the outstanding issue of his adverse occupation of part of the council's land.

[34] I find the plaintiff's claim to be proved. There will be judgment for the plaintiff in the sum of \$54,211.46 together with interest thereon at five percent per annum pursuant to the District Courts Act assessed from the date of filing these proceedings (19.10.11) down to the date of judgment.

[35] The defendants counterclaim is dismissed.

[36] The plaintiff is entitled to costs on the claim and counterclaim together with witnesses expenses and disbursements as fixed by the Registrar on a schedule 2B basis.

Signed at Auckland this *2nd* day of *October* ^{*h*} ~~September~~ 2013 at *3* ~~am~~ pm


J P Gittos
District Court Judge