38/00; [2000] VSC 212

SUPREME COURT OF VICTORIA

SMITH v LEON DUPUY DOZER HIRE PTY LTD

Balmford J

9, 25 May 2000

CIVIL PROCEEDINGS – WORK AND LABOUR DONE – WORK DONE IN ADDITION TO WORK CONTRACTED – NO AGREEMENT TO PAY FOR EXTRA WORK – WHETHER IMPLIED CONTRACT – CLAIM FOR DAMAGES FOR DEFECTIVE WORK – WHETHER SUCH WORK WOULD MAKE THE WORK DONE CONFORM TO THE CONTRACT – COSTS AWARDED TO EACH PARTY ON AMOUNT RECOVERED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999, Rule 26.04(c).

The parties agreed whereby LDDH would carry out earthmoving works at S.'s property. When LDDH completed extra work on the site, he said that he would not charge for the extra work provided his original account was paid. S. insisted that the only agreement between the parties was for an amount less than half of that claimed by LDDH. LDDH took action in the Magistrates' Court to recover the cost of the extra work. S. counterclaimed for damages for defective work, including costs associated with the construction of a retaining wall. In allowing the claim for the extra work, the magistrate found that the work done by LDDH was additional to that provided in the contract between the parties and that LDDH expected to be paid for the extra work one way or another. The magistrate applied the principle set out in *Liebe v Molloy* (1906) 4 CLR 347. In relation to the counterclaim, the magistrate upheld part of the claim but dismissed the claim for construction of the retaining wall on the ground that its construction would not make the work conform to the contract. The magistrate referred to the decision of *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613; [1954] ALR 929. On the question of costs, the magistrate, in applying the provisions of Rule 26.04(c) of the *Magistrates' Court Civil Procedure Rules* 1999 decided to award costs to each party based upon the amounts recovered. Upon appeal—

HELD: Appeal dismissed.

(1) In relation to the claim for the extra work, the magistrate was correct in the application of *Liebe v Molloy* [1906] HCA 67; (1906) 4 CLR 347; 13 ALR 106. In that case, it was held that where a person does work for another without any express contract, an implied contract arises to pay for it at its fair value.

(2) In relation to the claim for damages for defective work, the magistrate's finding that there was no breach of contract was a finding of fact which cannot be the subject of appeal.

(3) It may have been open to the magistrate to make a single award of costs in favour of the party ultimately successful on balance. However, in making the order as to costs it could not be said that the magistrate failed to exercise his discretion as to costs judicially.

BALMFORD J:

Introduction

1. This is an appeal under section 109(1) of the *Magistrates' Court Act* 1989 ("the Act") which provides that a party to a civil proceeding in the Magistrates' Court may appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding. The appeal is brought against a final order made on 26 October 1999 by the Magistrates' Court at Melbourne constituted by Mr F. Hodgens, Magistrate, whereby the Magistrate ordered, in respect of a claim by the respondent for work and labour done, that the appellant pay $1,625 with interest and costs; and in respect of a counterclaim by the appellant for breach of contract, that the respondent pay $2,640 with interest and costs. The orders as to costs were confirmed on 6 January 2000.

2. Given that each party plays three roles in the history of this litigation (plaintiff on the claim, defendant on the counterclaim, appellant in this Court; defendant on the claim, plaintiff on the counterclaim, respondent in this Court), it is convenient to refer to the appellant as "Mr Smith" and the respondent as "LDDH". It is not in issue that in June 1998, Mr Smith and LDDH entered into an agreement for LDDH to carry out earthmoving works at Mr Smith's property at Macedon.

3. On 28 January 2000, Master Wheeler ordered that the questions of law shown by Mr

Smith to be raised on the appeal were:

> (a) Whether the learned Magistrate erred in law in deciding that [Mr Smith] was entitled to the sum of $1,625.00 with interest and costs for "extra work" performed on 19 and 20 July 1998 pursuant to the principles [in] *Liebe v Molloy* [1906] HCA 67; (1906) 4 CLR 347; 13 ALR 106 or upon any other basis having found on the evidence [emphasis in the original] that;
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> (i) [LDDH] gave [Mr Smith] a firm quote to the extent of $5,000 plus $2,000 for extras;
> (ii) the original agreement was not varied in the conversation between [Mr Smith] and [LDDH] on 28 June 1998;
> (iii) there was no implied term which obliged [Mr Smith] to pay for unforseen or latent conditions found on the site which was [sic] unknown to [LDDH];
> (iv) [LDDH] said to [Mr Smith] that he would not charge extra prior to carrying out the work on 19 and 20 July 1998.
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> (b) Whether the learned Magistrate erred in law in applying the principles of *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613 and dismissing [Mr Smith's] counterclaim for the cost of constructing a retaining wall on the northern border of the site, it having been agreed between the parties that the construction of the north batter was defective?
> (c) Whether the learned Magistrate erred in law in failing to order [LDDH] to pay any sum in damages to [Mr Smith] having found that the agreement between the parties had not been fully performed by [LDDH] and it being agreed between the parties that the construction of the north batter was defective?
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> (d) Whether the learned Magistrate erred in law in failing to exercise his discretion as to costs judicially by dealing with the costs on the claim and counterclaim together and ordering that [LDDH] pay [Mr Smith's] costs, on the basis that the proceeding involved a building case where the final balance of claim and counterclaim was in favour of [Mr Smith], in accordance with the principles referred to in the decisions of: *Hanak v Green* (1958) 2 QB 9; [1958] 2 All ER 141; [1958] 2 WLR 755, *Rival Nominees Pty Ltd v Craig Davis Constructions Pty Ltd*, Supreme Court of Victoria, Full Court, 26 June 1981, unreported; and *Mackinnon & Anor v Petersen & Anor*, Supreme Court of New South Wales, Cole J, 19 April 1989, unreported.

4. In his oral Reasons for Decision on the substantive issues ("the Reasons"), a transcript of which was before the Court, the Magistrate refers throughout to "Mr Dupuy" (actually, by what is no doubt an oversight of the transcriber, to "Mr Dupey") as though the Respondent, to which I have referred for convenience as "LDDH", were an individual and not a company. The original wording of sub-paragraph (iv) of question (a), using the expression "the Respondent", which I have replaced with "LDDH", would appear to have been adopted on the same basis. It does not appear to be in issue that Mr Dupuy is a director of LDDH.

5. Mr Percy, counsel for Mr Smith, was concerned to make clear that his client accepted the findings of fact of the Magistrate, and was not concerned to take any point of law which would effectively be a challenge to any of those findings. However, there is disagreement between the parties as to what those findings were. The hearing in the Magistrates' Court occupied fifteen days and the Reasons traverse a number of factual issues.

Question (a)

6. Mr Stirling, for LDDH, submitted that the Magistrate did not make the finding set out in sub-paragraph (iv) of question (a); that is, a finding that Mr Dupuy said to Mr Smith "that he would not charge extra prior to carrying out the work on 19 and 20 July 1998". The relevant passage is at pages 8-10 of the Reasons and reads as follows (typographical errors as in the original; paragraphs inserted and numbered for ease of reading and reference):

> 1. In relation to the alleged variation, that is in relation to the work done of the 19th and 20th of July, I make the following comments and findings.
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> 2. Mr Smith agreed that Mr Dupey attended the site on the 19th and 20th July and finished the levelling of the site, that is the 350mm fall from either side of the centre of the floor. But Mr Smith denies that the agreement was that if Dupey attended he would be paid $10000. Mr Smith said that the agreement was if Mr Dupey attended and finished the site that they would discuss further the $15000 claimed by Mr Dupey as owing. So Mr Smith asserts that Dupey would come back to the site, do the levelling and finish the driveway but that they would then discuss the plaintiffs bill further.
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> 3. And I note in the record of the conversation in relation to the work, to this work, that Dupey says

> at page 27.8 of the transcript and I quote, "Right, so anyway my negotiations are finished because I haven't charged you for what I did yesterday and today, other than the outstanding bill still stands. And Smith's response to the affect that $16000 is too much of an overcharge". And at page 7 of the transcript when negotiating about the bill Mr Dupey says and I quote, "Like I said to you, I'll come up and finish the floor and I'll cut the driveway. I don't know how long it will take me but I'll do that and I won't charge you for that. Now I can't do any fairer than that". And Mr Smith responded and I quote, "Well that's fair enough but what are we going to do about the bill". And Dupey responded and I paraphrase the response, "Look I'm not getting into an argument with you, you have not be diddled".
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> 4. Now that conversation indicates that Mr Dupey was prepared to return to attempt to finish the job and that he would continue to negotiate on his claim of $15000 which he regarded as owing. And when Mr Dupey said I won't charge you for it. It is reasonable to infer that he meant as an extra charge on top of his bill of $15000.
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> 5. He had submitted that in accordance with the principles of Liebe and Molloy as the defendant has the benefit of the work he is required to pay for it. There are three elements in Liebe's case that are required to addressed. Firstly a request to carry out the work and that is made out by the evidence. Secondly knowledge by the owner that the work has been carried out and that element is made out by the evidence and thirdly knowledge by the owner that the contractor was doing the work in the belief that it would be paid for as extra work.
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> 6. Now although Mr Dupey said he wouldn't charge extra for this work, what was clearly meant and intended by him was that he would not charge as an extra for the $15000 account rendered. Further Mr Smith clearly knew at this time that Dupey was insisting that the work done exceeded the value of $7000 that Mr Smith insisted was the original and only binding agreement.
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> 7. So as I see the situation at this time it could not be suggested from the evidence that Dupey agreed to return and do this work simply to be paid the all inclusive sum of $7000 which Mr Smith said was due. As I've said Mr Smith knew at the time that the work to be done was regarded by Dupey as extra work beyond the value of $7000 and that Dupey expected to be paid for it one way or another. And Smith knew that Dupey was not accepting the $7000 figure as a valid and adequate figure for the work done to that time.
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> 8. I find therefore that the agreement to do this work falls within the principles of Leeve and Malloy and that as Mr Smith has the benefit of the work, he is required to pay for it.
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> 9. The sum claimed is $1625, being thirteen hours of bulldozing at $125 per hour and that figure is fair and reasonable. And the plaintiff is entitled to that sum for that extra work and there will be an order of the plaintiff's claim for $1625.

7. On the basis of that passage, and in particular paragraphs 6, 7 and 8 thereof, I accept the submission of Mr Stirling that the Magistrate did not make the finding set out in sub-paragraph (a)(iv) of the Master's order; but that he found that the work to be done was regarded by LDDH as extra work, additional to that provided for in the contract between the parties, and that LDDH expected to be paid for that extra work one way or another.

8. In *Liebe v Molloy* [1906] HCA 67; (1906) 4 CLR 347; 13 ALR 106 Griffith CJ, delivering the judgment of the Court, said at CLR 354:

> An implied contract may be proved in various ways. When a man does work for another without any express contract relating to the matter, an implied contract arises to pay for it at its fair value. Such an implication of course arises from an express request to do work made under such circumstances as to exclude the idea that the work was covered by a written contract. So it would arise from the owner standing by and seeing the work done by the other party, knowing that the other party, in this case the contractor, was doing the work in the belief that he would be paid for it as extra work. If the umpire was of opinion that any of this work was done under such circumstances that the owner knew or understood that the contractor was doing the work in the belief that he would be paid for it as extra work, then the umpire might, and probably would, infer that there was an implied promise to pay for it.

9. Given what I have found to be the finding of the Magistrate, and his other findings set out in paragraph 6 above, I am satisfied that he was correct in the application of *Liebe v Molloy* to the work done on 19 and 20 July 1998. The answer to question (a) is therefore No. Further, I accept the submission of Mr Stirling that if the claim of LDDH for $1625 were to be founded, not on the implication of a contract on *Liebe v Molloy* principles, but on the basis of a quantum

meruit in terms of *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221; (1987) 69 ALR 577; 61 ALJR 151, that claim should equally succeed.

Questions (b) and (c)

10. Mr Smith counterclaimed under six heads. They are as follows:

> 1. Cost of excavating trench for drain.
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> 2. Cost [of] excavating site to required width of 60 metres from constructed width of 56 metres.
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> 3. Cost of spreading topsoil on southern batter.
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> 4. Cost of constructing retaining wall on northern border of site to hold in place defective batter.
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> 5. Cost of removal and recompaction of southern batter, removal of trees and supply of additional fill.
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> 6. Cost of regrading floor surface of Greenhouse site with fine scoria or crushed rock.

Question (b)

11. Claim number 4 was dismissed by the Magistrate in the following terms at pages 10-12 of the Reasons (typographical errors as in the original; paragraphs inserted and numbered for ease of reading and reference; "batten" is agreed to be an error of the transcriber for "batter"):

> 1. As to paragraph four the cost of constructing a retaining wall on the northern border of the site I make the following findings and comments.
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> 2. The plaintiff asserts that the construction of the retaining wall is different work to that contracted for not work which was to be provided under the contract. It is further submitted that neither would the construction of the retaining wall make the work conform to the contract and Bellgrove and Eldridge is cited as authority for that proposition.
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> 3. In that case it was held that the measure of damages as the cost of making the work conform to the contract and I accept that authority as applicable and binding on the decision in this case in relation to that work. The cost of the retaining wall is therefore not allowable in this case because its construction would not make the work conform to the contract and the defendant's claim in relation to paragraph four of the counterclaim is therefore dismissed.
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> 4. As to the construction of the north batten itself I make these comments and findings.
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> 5. It is agreed that the north batten is defective...
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> 6. I am satisfied on the probabilities that what was done on the northern batten was the best that could be done in the circumstances ...
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> 7. I accept the plaintiff's submission in relation to this work of the northern batten that the ground water or springs were latent and unforeseen. That the work that was finally done in constructing the north batten was the best that could be done in the circumstances and there has therefore been no breach of the contract in relation to this work on the northern batten.

12. In *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613; [1954] ALR 929 the foundations of a building were defective as a result of the builder's substantially departing from the specifications. The High Court found that the measure of damage was not the difference between the value of the building as erected and the value it would have borne if erected in accordance with the contract, but the cost of reasonable and necessary work to make it conform to the contract. In that case, it was held that the demolition and rebuilding of the building was reasonable and necessary to that end; the question of what was reasonable and necessary being a question of fact.

13. Mr Percy submitted that the construction of the retaining wall was the only reasonable way to cure the defect in the northern batter. The work was defective and his client should be compensated for the defective work. He submitted that the Magistrate should have found an appropriate measure of damages, such as the diminution in value produced by the defective work.

14. However, the Magistrate found no breach of the contract in this regard, and no other finding on which to found a claim for damages, and his findings on this issue are findings of fact,

which cannot be the subject of appeal under section 109(1). Accordingly, the answer to question (b) is No.

Question (c)

15. The Magistrate awarded damages on the first two heads of the counterclaim and on the fifth head. The third claim was either withdrawn or deleted by amendment. The fourth claim has already been dealt with. The claim under the sixth head was dismissed on the basis that Mr Smith had not proved that LDDH caused the relevant defect. Question (c) is misconceived.

Question (d)

16. Section 131(1) of the Act provides:

> The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.

Also relevant is Rule 26.04(c) of the *Magistrates' Court Civil Procedure Rules* 1999 which reads:

> 26.04 If a counterclaim is made, the scale upon which the costs of the parties are to be fixed must, unless the Court otherwise orders, be determined—
> …
> (c) if both parties are successful, by the amounts which they recover on their respective claims;

17. The Magistrate's oral reasons for decision on the costs order, a transcript of which was before this Court, conclude:

> As I've found to some extent both parties wanting in evidence in respect of their claims, in respect to each of their claims, to apportion the costs on a percentage basis, assumes that the claim in each case was at the outset justified. Now in regard to the ultimate findings I have made, I have obviously some doubts about that. The fairest and most appropriate method therefore is to award the costs to each party based upon the amounts recovered. That is to the extent to which each party has been successful on their respective claims, as Order 26 suggests. For those reasons, I say that I see no reason, no good reason to depart from the rule of Order 26.04 and full scale costs will be awarded on that basis. That is on the amounts recovered by each party on the respective claims.

18. Mr Percy relied on a number of authorities which may be summed up in a passage from *Hudson's Building and Engineering Contracts*, tenth edition, at 870-71, which was approved by Crockett J in *Rival Nominees Pty Ltd v Craig Davis Constructions Pty Ltd*, an unreported judgment of the Full Court delivered on 26 June 1981. The learned author writes:

> Only in the case of wildly exaggerated claims, or separate and costly issues on which the successful party has failed and which it was wholly unreasonable for him to raise, can there be, it is submitted, any justification for departing from the rule that the party ultimately successful on a final balance of claim and counterclaim should be paid his costs. There are cases in other situations where separate orders for costs on claim and counterclaim are appropriate, but counter- claims on building and engineering contracts arise out of the same transaction and are equitable set-offs, and the basic commercial realities, in the vast majority of the cases argue very strongly, it is submitted, for a single award of costs in favour of the party ultimately successful on balance, unless the balance is so small as to justify the view that the party responsible for initiating the litigation and obtaining such a balance can be regarded as having been effectively unsuccessful.

19. That passage was cited to the Magistrate, who distinguished *Rival Nominees* on the basis that it was an appeal from the decision of an arbitrator, and that there was no suggestion that any rule similar to Rule 26.04(c) was applicable in that situation. It is clear from his reasons for decision on the costs order that the issues were extensively argued before him, and he gave careful attention to the arguments.

20. In *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513; [1950] ALR 94, Kitto J considered the function of an appellate tribunal in reviewing a judgment given in the exercise of a discretion. At CLR 532 he said:

> … the court of appeal must guard against reversing a discretionary decision merely because it would itself have decided the matter differently; it is not justified in substituting its own judgment for that of the primary judge unless it is clearly satisfied that his judgment was erroneous.

And at CLR 533:

> ... even if [the appeal court] considers that insufficient weight has been given to some relevant consideration, it will still not substitute its judgment for that of the primary judge unless it comes clearly to the conclusion for that reason that the discretion has been exercised wrongfully.

21. Bearing those principles in mind, I find no reason to interfere with the discretion as to the award of costs conferred on the Magistrate by section 131(1) and Rule 26.04(c). The question is predicated on the statement that "the Magistrate failed to exercise his discretion as to costs judicially". It will be apparent from what I have said in paragraph 20 above that that is not the case. The answer to question (d) is No. 22. For the reasons given, the appeal will be dismissed. Counsel may wish to make submissions as to costs.

APPEARANCES: For the appellant Smith: Mr I Percy, counsel. John Morrow, solicitors. For the respondent: Mr M Stirling, counsel. Williams Winter & Higgs, solicitors.
