IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2009-419-001467

BETWEEN	KEVIN JOHN NEWSOME Appellant
AND	RAY DENNIS CONSTRUCTION LIMITED Respondent

Hearing: 10 February 2010

Appearances: V Whitfield for the Appellant
S M Jass for the Respondent

Judgment: 9 March 2010

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on Tuesday 9 March 2010 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: .....

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The Appeal

[1] The appellant (Newsome) was sued by the respondent (Dennis Construction) in the Hamilton District Court for $17,784.94. Dennis Construction's statement of claim alleged that in December 2006 Newsome had accepted its quote to carry out building work at Newsome's property in Angelsea Street Hamilton.

[2] Thus the simple issue before the District Court was whether Dennis Construction had proved, on the balance of probabilities, that it and Newsome were parties to a contract in terms of which Newsome was obliged to pay the claimed sum.

[3] The hearing seems to have occupied three days in August and September 2009 before Judge Wolff. On 2 October 2009 the Judge, in an oral judgment, found in favour of Dennis Construction and entered judgment in its favour together with costs.

[4] This appeal challenges the District Court decision. In essence Newsome claims the Judge's reasoning process was flawed, and that the finding that Newsome had accepted Dennis Construction's quote, thus forming a contract, was not available to the Judge on the evidence.

Background

[5] The litigation between the parties would have been unnecessary, and no dispute would have arisen, but for the fact that a third party, Joyce Group, had gone into liquidation. Regardless of whether or not there was a concluded contract between Newsome and Dennis Construction, there was clearly some arrangement or understanding between the parties and Joyce Group about how the cost of the building works to be carried out at Newsome's Angelsea Street property was to be shared. The supervening inability of Joyce Group to contribute to those building costs triggered the litigation. The departure of Joyce Group from the scene left Dennis Construction in the position of having to look to Newsome for the unpaid portion of the building works.

[6] The background facts were not in dispute either in the District Court or on appeal. In 2002 Newsome purchased the Angelsea Street property. Joyce Group had inspected that property before purchase and given Newsome certain advice. Unfortunately the building leaked, leading Newsome to bring a claim in July 2005 against various people (including Joyce Group), in the Watertight Homes Tribunal.

[7] After a year Joyce Group and Newsome saw sense in resolving matters. In August 2006 there was a meeting on site involving a Mr Aitken of the Joyce Group, Mr Dennis of Dennis Construction, and Mr Newsome himself. Dennis Construction at that stage had temporary offices in a building owned or operated by Joyce Group. Newsome and Dennis Construction had never had any prior dealings.

[8] The August 2006 site meeting led to various understandings being reached so far as Joyce Group and Newsome were concerned. The cost of rectifying the various defects in the Angelsea property, which had led to it leaking, were being met by Joyce Group. Newsome for his part would pay for unrelated betterments or improvements to the property, which included repainting the exterior, copper spouting, handrails, and a contribution to the scaffolding.

[9] That was the background which led to Dennis Construction, on 15 December 2006, preparing a 2½ page quotation for the project in the sum of $25,291.11 (including GST). The quotation was headed up "Kevin Newsome, re 61A Angelsea Street, Hamilton". The quotation includes Dennis Construction's "recommendation that the Joyce Group oversee the project and advise on technical issues".

[10] Joyce Group, in what Mr Aitken described in evidence as "a gesture of goodwill", applied for the necessary building consents from the Hamilton City Council.

[11] On 31 January 2007 Mr Dennis, Mr Newsome, and Mr Aitken met at Joyce Group's offices. At that meeting Mr Aitken checked with Mr Newsome whether he was happy for work to begin. There was no specific acceptance at that meeting of Dennis Construction's 15 December quote. Mr Dennis's evidence-in-chief at trial was to the effect that this meeting took place on 15 December 2006. Mr Newsome's

evidence, however, with reference to his diary, was that he is in a different part of New Zealand on that date. Mr Dennis in cross-examination admitted that this was possible.

[12] In any event the work began. On 28 February 2007, Dennis Construction invoiced Joyce Group, not Newsome, for the first progress claim of $4,000 plus GST. Joyce Group did not pay.

[13] Clearly matters drifted. The work was completed. In January 2008 there was a further meeting between Mr Newsome and Mr Aitken. Newsome's evidence was that Joyce Group had changed somewhat its stance and was talking about paying a contribution rather than the entire rectification costs. In any event Newsome paid Dennis Construction $14,000 (being more than the precise cost of the betterments) which sum Dennis Construction received in late February 2008.

[14] Subsequently Joyce Group went into liquidation. Newsome throughout disputed he was contractually liable to Dennis Construction for the unpaid balance of the building work. Dennis Construction thus sued him in the District Court.

Judge Wolff's Judgment

[15] Dennis Construction's statement of claim at trial simply alleged that on 15 December 2006 it had given Newsome a quote for a building project for a specified sum which, on the same date, the defendant (Newsome) had accepted. The statement of defence for its part alleged that it had been agreed that Newsome would be liable only for the betterment work, with all other work undertaken under the quote being paid for by Joyce Group.

[16] During the course of the trial Dennis Construction sought to amend its statement of claim to include additional causes of action, including quantum meruit and unjust enrichment. This application the Judge refused.

[17] Dennis Construction (the plaintiff in the District Court) called two witnesses, Mr J D Dennis and Mr M E Aitken. Evidence from Newsome (the District Court

defendant) was given by Mr Newsome himself and by Mr P J Dempsey who was a self-employed building consultant who had accompanied Mr Newsome to the August 2006 meeting with Mr Aitken.

[18] On the central issue before the Judge, which was whether on the balance of probabilities the evidence satisfied him that Dennis Construction's 15 December 2006 offer had been accepted by Newsome, there was something of an evidential void. There was no conflict of evidence as such that the Judge had to resolve. Rather there was a tendency, understandable perhaps because of the lapse of time, on the part of all witnesses to reconstruct their understandings of past events. The Judge correctly identified this phenomenon.

[19] This is not a case where an appellate court is being asked to overthrow a trial Judge's credibility or factual findings. Because the Judge's view of the witnesses clearly influenced his reasoning process I set out relevant portions of his judgment:

> [11] Because all of the significant events took place in 2005, the evidence given by all of the witnesses contains elements of reconstruction and hindsight. With some witnesses, this is more pronounced than with others. The view that Mr Newsome advances with support from Mr Dempsey is that it was clear at all times that Mr Dennis was contracting with Joyce Group.
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> [15] Mr Newsome is a real estate agent and a former police prosecutor. A man who's plainly nobody's fool, but is also someone that you might expect to be sufficiently cautious to recognise the importance of recording contractual arrangements in writing and someone who has the wit to understand the effect and import of various writings when he should receive them. Also, as a real estate agent he would have a reasonable working knowledge of the building industry in the capacity in which building consultants are usually involved.
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> [16] Mr Newsome struck me as an honest man, genuinely trying to convey to the Court his recollection of events. I acquit him of any suggestion that he is attempting to mislead the Court. However, it is inescapable in my view that his evidence, whilst honest, is very much a reconstruction. In essence, I assess that he cannot believe he has got himself into this situation. First, by buying a building that turned out to be a leaky home. Second, when trying to get it fixed, that he did not adequately tie down the loose ends so that when Joyce Group went into liquidation he has been left in the lurch now that they have not made, and will not make, any contribution to fixing his leaky home.
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> [17] Mr Dempsey, who as an expert builder was called not as an expert, but as a witness to the events that occurred on site. However, his evidence

> appeared to me to be extremely partisan. He answered cross-examination questions as if he was advocating for Mr Newsome. His evidence was redolent of reconstruction and he referred frequently to things that "would have been so" or "must have been so" to support the view that he now holds.
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> [18] The end result is that I cannot rely on either of these two honest gentlemen's recollections as particularly assisting me in determining the contemporary existence of a contract or otherwise.
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> [19] That however, is not and cannot be the end of the matter. The defendant has to prove precisely nothing. It is for the plaintiff to prove on the balance of probabilities, that is, more probably than not that his account is correct.
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> [20] In this regard, Mr Dennis concedes that his recollection is poor. He has difficulty in remembering the actual events with any precision and he too, relies on some elements of reconstruction in the course of his evidence and drawing conclusion from known or assumed facts.
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> [21] Mr Aiken [sic] from Joyce Group, his evidence needs to be viewed with caution. It may be that he too, is rationalising his evidence and maybe there is some element of self-protection in the view that he currently takes.
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> ...
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> [26] Again, if I had to rely only on the evidence of Mr Dennis and Mr Aiken, I could not determine from their respective memories of events as opposed to their reconstruction, precisely what the arrangements were.

[20] The Judge in passing mentioned other issues, such as discrepancies between Dennis Construction's counsel's opening address and the actual evidence, and the fact that Dennis Construction had a liquidation claim (not being for the entire amount of its claim against Newsome) with Joyce Group's liquidators.

[21] The Judge also referred at [28] to the reference in the quotation to the owner retaining Joyce Group to supervise the work. He commented that the document on its face was a suggestion that the contract was between Dennis Construction and Newsome and not with Joyce Group.

[22] The Judge also referred to Newsome's professional skills and commented that it could not really be argued that he had misunderstood the meaning of the quotation document he received. He then said:

> The work was indeed approved and went ahead to completion. Issues of acceptance by silence, that the lawyers argued in this case, do not arise. This is a completed contract that indicates that there was acceptance and that the case proceeded.

The sense in which the Judge was using "case" is unclear.

[23] The Judge at the outset of his judgment correctly and succinctly analysed the central issue:

> [9] Mr Dennis says he had a contract with Mr Newsome and not with Joyce Group. The question for me in this case is whether Mr Dennis has established on the balance of probabilities that he is right and that his contract was with Mr Newsome. If he is right, he is entitled to be paid.

[24] The Judge answered the issue at the end of his judgment, (being the ratio), this way:

> [34] The end result in the present case is that when considering all the evidence, applying the standard known commercial practise (sic) and common sense, the contemporary correspondence, the nature of the repair that was involved in the present case, I am satisfied that it is more probable than not that this building contract was between the owner of the building and Mr Dennis' firm rather than, as Mr Newsome contends, between Mr Dennis and the building supervisor. That would run contrary to both common sense, commercial reality and is inconsistent with the contemporary material. Whilst there has been some casualness that in hindsight would have been better dealt with in another way, I am still satisfied to the requisite civil standard.

[25] One can see immediately a difficulty with this conclusion. Rather than asking whether the evidence from the four witnesses he had heard established, on the balance of probabilities, that Dennis Construction's 15 December 2006 quote had been accepted by Newsome, he instead decided, in the light of, inter alia, commercial practice and common sense, that it was "more probable than not" that the building contract was between Dennis Construction and Newsome rather than between Dennis Construction and Joyce Group.

Discussion

[26] It is unnecessary for me to dwell at length on counsel's comprehensive and competent submissions. There is no dispute between them on the correct legal principles. For a contract to be formed there must be an unqualified and complete

acceptance of an offer – *Reporoa Stores Ltd v Treloar*.[1] The test is objective and the whole context has some relevance – *Suda Group Ltd v Seeyway Wong & Anor*.[2]

[27] Ms Whitfield's broad submission was that the Judge had applied the incorrect legal test and reached a decision not available to him on the facts. Rather than scrutinising the evidence to ascertain whether there was a contract the Judge, with his references to common sense and commercial practice, had instead looked at what *ought* to have happened. Mr Dennis's evidence at trial, that during discussions between Mr Newsome and Mr Aitken he had "closed his ears" suggested that he was almost indifferent to whether there were contractual obligations with one party, the other, or with both. The onus throughout rested on Dennis Construction to show that, when it started work on the Anglesea Street site, the work being performed was on the basis of Newsome's unequivocal acceptance of the 15 December quote and that Newsome had accepted contractual liability for the full contract sum.

[28] Newsome had indeed agreed to pay Dennis Construction for the betterments but that was a very different obligation from assuming contractual responsibility for the remedial works which Joyce Group had agreed to shoulder.

[29] Mr Jass for Dennis Construction accepted that, at the 31 January 2007 meeting, there was no formal acceptance of the 15 December quote. Nonetheless by agreeing at that meeting that the work would take place on his property, Newsome was unequivocally accepting the quote. It was implicit in the evidence that Newsome allowed work to commence on his property. Mr Dennis, in evidence, was adamant that he had not been engaged by Joyce Group, their name not being on the quote.

[30] Counsel's written submissions made certain adverse comments on Mr Newsome's evidence at trial but, as is apparent in the judgment, there was no adverse credibility finding.

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1 *Reporoa Stores Ltd v Treloar* [1958] NZLR 117 at 187.

2 *Suda Group Ltd v Seeyway Wong & Anor* HC Auckland CIV-2004-404-3904, 10 November 2005, Frater J.

[31] The Judge, as trier of fact, submitted Mr Jass, was perfectly entitled to take into consideration factors of common sense and commercial practice.

Decision

[32] Although the Judge correctly identified the contractual issue before him and asked the right question (supra [23]), I consider that he erred in answering it.

[33] The answer he gave in [34] of his judgment (supra [24]) was subtly but qualitatively different from the question. The issue to be determined was whether, on the balance of probabilities, Dennis Construction could prove an unqualified acceptance by Newsome of the 15 December quotation. The issue was not whether it was "more probable than not" that the building contract was between Newsome and Dennis Construction, rather than between Dennis Construction and Joyce Group.

[34] The Judge's assessment of the evidence he heard from the four witnesses clearly did not carry him to a conclusive answer (on the balance of probabilities) on the acceptance issue. Instead the Judge has relied on common sense and commercial practice.

[35] But the background to the parties' discussions lay somewhat outside the normal dealings between a builder and a home owner. Before Dennis Construction even entered the picture there had been a dispute between Newsome and Joyce Group which had led to Newsome, on advice from a Hamilton Queen's Counsel, embarking on discussions with Joyce Group. In the expectation that Joyce Group would assume responsibility for the rectification work, Newsome withdrew his Watertight Homes Tribunal claim.

[36] That background suggests, perhaps, that standard commercial practice (on which there had in any event been no evidence) might not necessarily apply to the tripartite discussions which were taking place between August 2006 and January 2007.

[37] Dennis Construction was introduced to Newsome, and indeed to the Anglesea Street situation, by Joyce Group. Newsome's position throughout, on the evidence before the Judge, was consistent with his legal stance that he never accepted contractual responsibility for both the rectification work and the betterment work. Dennis Construction, on its pleadings, relied solely on acceptance of its 15 December quote and a concluded contract.

[38] Against that factual matrix, I do not consider it safe, as Mr Jass urges me to do, to hold that by letting Dennis Construction commence the building work, Newsome had unequivocally accepted the offer contained in the 15 December quote.

[39] In short, on the central issue of whether Dennis Construction's 15 December offer had been accepted by Newsome, the evidence before the Judge was silent. Resort to common sense and standard commercial practice cannot, in my judgment, construct an acceptance and thereby form a contract which Dennis Construction had otherwise failed to prove.

[40] Thus, because I am satisfied, unlike the Judge, that there is no concluded contract, the appeal must be allowed.

Result

[41] The appeal is allowed.

[42] The judgment entered against the appellant in the Hamilton District Court on 2 October 2009 and the order for costs are set aside.

Costs

[43] Counsel were agreed that the successful party was entitled to costs on the 2B scale in terms of the High Court Rules. Costs are thus awarded to the appellant accordingly with leave reserved if there are any difficulties in quantifying the appellant's cost entitlement.

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Priestley J