EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2012-004-002009
[2016] NZDC 21776

BETWEEN	HUACHI GAO Plaintiff
AND	XIKUN (TONY) CHEN Defendant

Hearing: 26 May, 26-27 October 2016

Appearances: Mr F Deliu for the Plaintiff
Mr R Connell for the Defendant

Judgment: 4 November 2016

DECISION OF JUDGE G M HARRISON

Overview

[1] The plaintiff (Mr Gao) claims to recover from Mr Chen the cost of completing renovations at a residential property at 18 Tawera Road, Greenlane.

[2] Mr Chen defends that claim on the basis that he was not paid in a timely manner according to the contractual arrangement between the parties, and counter claims for additional work to that specified in the contracts which he says Mr Gao requested him to carry out.

The contracts

[3] The first contract was entered into on 8 February 2012. Party A was Mr Gao. Party B was described as the Meilihua Renovation Company, the person in charge being noted as Mr Chen. In evidence Mr Chen explained that the Meilihua Renovation Company was a trading name only and that it was not a registered

limited liability company, and consequently the contract is effective between Messrs Gao and Chen.

[4] The contract described as "renovation agreement," dealt with indoors – level 1 renovation items which specified 10 items to be attended to. This included, in particular, the removal of the kitchen and its replacement, the repositioning of the laundry, the replacement of two toilets and the painting of all ceilings, walls, doors, windows and cabinets "to be done where needed".

[5] There were four level 2 renovation items comprising, the replacement of carpet, the removal of a bathroom and its replacement, a further kitchen on that level to be removed and replaced with a new one, and a ceiling to be replaced.

[6] Part 2 of the contract related to 12 items to be attended to outdoors which it is unnecessary to enumerate, but substantial work was involved.

[7] The cost of the project was specified as $60,000 and payment was to be made in five instalments, the first $20,000 before the start of construction, "the rest paid according to the progress of the project at $10,000 each time; and the remaining fee of $10,000 paid upon Party A's signing off and confirmation."

[8] Mr Chen was to provide all of the paint and replacement materials, and the design of various aspects of the redevelopment.

[9] The construction period was 30 days from 10 February to 9 March 2012. The contract provided for a quality guarantee worded only as "high quality completion as needed". The last clause of the contract provided for the consequences of a breach of the contract. It provided:

> If Party A fails to pay the construction fee according to the construction schedule, Party B has the right to stop work and the construction schedule will be extended accordingly. If Party B fails to complete work according to the construction schedule, there is a fine of NZ$300 for each day of extension.

That contract was signed on 8 February 2012.

[10] I shall return later in this decision to an analysis of the contracts in this case, but for the moment move to the second contract. This was described as "renovation project supplementary agreement". It was expressed to be made between the parties to the first contract. It extended the construction schedule for two weeks, requiring that work be completed by 23 March 2012. It confirmed the original contract, or "renovation agreement", and added a requirement for a pavilion, laundry, deck and BBQ space in the garden, cultural stones to be attached to the flower bed, and a stone path to be laid in the garden.

[11] As far as price was concerned the original contract price of $60,000 was confirmed with an additional $6,000 for the further work agreed to be carried out.

[12] On 19 March 2012 either at or following a meeting between Messrs Gao and Chen, a handwritten list of work that had been completed, and work still to be completed, was compiled. It noted that $30,000 had been paid out up to 19 March 2012, that $10,000 would be paid on 20 March and that five stated work items would be completed, presumably following payment of that sum of money. Thirdly, payment of another $16,000 would be made when itemised work was completed and, lastly, the remaining fee of $10,000 would be paid according to the following notation:

> Contents
> Installation contract complete

[13] Next, on 4 April 2012, a document headed "letter of promise" was signed by Mr Chen, which provides as follows:

> Party B, Xikun Chen, hereby promises that after Party A, Huachi Gao, has paid NZ$16,000, all construction items of the project at 18 Tawera Road, shall be completed according to the contents of the two parties' then renovation agreement and supplementary renovation agreement and promises that the entire construction project shall be completed according to the standards and qualities in the contract. If, after receiving Party A's NZ$16,000, Party B cannot complete the contents of the contract, Party B will take all legal responsibilities and compensate for all financial losses.
>
> The remaining precisely $10,000 will be paid off after the completion of the project and the signing off upon compliance.

[14] Lastly, Mr Chen alleges that on 5 April 2012 there was an oral agreement between him and Mr Gao for yet further work, in that the electric sliding gates were to be replaced with wooden opening gates, there was to be additional fencing, a pergola and BBQ area, that further flower beds were to be installed, the basement was to be cleared of all rubbish and the neighbour's driveway was to be reconstructed in concrete to align it with the driveway to the subject property both in elevation and appearance. He alleges that the fair value for this further work is $12,000.

The payments

[15] Against the background of those agreements the following payments were made. On or about 8 February, when the original agreement was signed, $20,000 was paid against the original contract sum of $60,000, leaving a balance payable of $40,000. It will be recalled that cl IV of the renovation agreement provided that the project would be paid for in five instalments, the first of $20,000, meaning that there would be four further payments of $10,000, the last one being paid upon "Party A's signing off and confirmation".

[16] In fact, no further payments were made until 9 March when the supplementary agreement was signed providing for further work to be done at an additional cost of $6,000. Three further payments of $10,000 each should have been paid before 9 March leaving only $10,000 of the original contract price of $60,000 owing.

[17] On 9 March $10,000 was paid, meaning that $30,000 was unpaid.

[18] On 20 March, after the completion of the handwritten list of progress report of 19 March, a further $10,000 was paid. However, with the addition of the further sum of $6,000 from the second supplementary agreement there was at that date $26,000 still unpaid.

[19] The letter of promise of 4 April noted that after payment of a further sum of $16,000 all of the work the subject of the renovation agreement and the supplementary agreement would be completed.

[20] $16,000 was paid on 5 April, but that still left unpaid $10,000 from the original agreement.

[21] Mr Chen says that following the oral agreement of 5 April he undertook further work worth $12,000 which he did not complete because the $10,000 owing under the original agreement had not been paid, nor anything towards the additional work he says he agreed to do on 5 April. In [52] I find there was such an agreement which would have required additional payment, and whether the $10,000 due on completion of the work was to be applied to that, or a further progress payment was to be made, was never made clear.

Cancellation of the contract

[22] Mr Chen stopped work because he was not being paid, and it was impossible for him to acquire the fixtures, fittings and other building materials required to complete the job without receiving timely payments.

[23] On or about 17 May 2012 Mr Chen received a letter from lawyers acting for Mr Gao, the essential part being as follows:

> We demand that all work stipulated as terms in the renovation contract to be completed and to the satisfaction of Mr Gao or by his legal agents by 5.00 pm 25 May 2012. Failing it, we have no choice but to cancel the contract and also seeking legal remedies against you in courts.

[24] The letter went on to record the contractual history I have set out although not accurately. It will be noted there is no suggestion in the letter that the work done to that day was defective in any way.

[25] Mr Chen says he called the lawyer to discuss the matter, but no resolution was achieved. No further payment was made and Mr Chen did not return to the site to undertake any further work.

[26] On 11 July 2012 Mr Gao's lawyers wrote again to Mr Chen noting that he had not returned to the job as demanded in their letter of 17 May and that as a consequence he was to cease all activities at the property, remove all his tools and other materials and to return all keys. This was clearly notice cancelling the contract. At that time Mr Chen was still owed $10,000 plus a further amount for any work undertaken pursuant to the oral agreement of 5 April 2012.

[27] Mr Gao then arranged for Admiral Construction Limited to complete the work. He submitted in evidence a quotation for $98,727.50 which he now claims from Mr Chen although it is far from clear whether that quoted sum was just to complete Mr Chen's work, and what further additional items might have been undertaken.

[28] Mr Connell, understandably, objected to the introduction of this evidence, but I did not make an order excluding it because some aspects of it have relevance to issues I will deal with.

The ownership of 18 Tawera Road

[29] Mr Gao purchased the property late in 2011, the transfer to him being registered on 9 December 2011. He paid $1.75 million for the property.

[30] He sold the property to a family trust on 2 May 2012 for $2.1 million, and therefore at a notional profit of $350,000. At that time the property was held in what is commonly known as a cross leased title.

[31] It is clear that Mr Gao set about obtaining a freehold title, a new title to the property being issued on 7 November 2012. On 12 December 2012 the transfer of the property to QCD International Limited was registered. The sale price was $2.23 million producing a further profit of $130,000, meaning that Mr Gao and his Trust made a profit of $480,000 in just over one year.

Has Mr Gao suffered any loss?

[32] Mr Connell's submission was that on the basis of the profit made on the various sale transactions described above Mr Gao has suffered no loss.

[33] Mr Deliu counters that submission as being a "straw man".

[34] I do not regard the profit made as demonstrating that no loss has been suffered. Although no evidence was called on the matter it is possible that but for the remedial work undertaken, although no allegation of defective work by Mr Chen was raised, a greater profit might have been achieved. Notably, the Trust to whom the property was transferred was not a plaintiff.

[35] It is trite law that a plaintiff must prove a causal connection between the loss that is claimed to have been suffered and the breach of contract by the defendant.

> Plaintiffs must prove that every item of loss for which they claim damages is connected to the plaintiffs' wrong in the sense that the wrong caused or materially contributed to that loss. The purpose of doing this is to assign legal responsibility, as between the plaintiff and defendant for that loss.
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> The Laws of New Zealand "Damages", para 87.
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> See also *Halsbury's Laws of England* 5th Edn Vol 29 para 364.

[36] I must therefore determine whether there is a causal connection between the loss claimed by Mr Gao and any possible breach by Mr Chen of his contractual obligations.

[37] The only allegation against Mr Chen in the amended statement of claim is that he failed to complete the project. Just for the moment, I will assume that to be the case.

[38] On 2 May 2012 Mr Gao transferred the property to a separate legal entity, presumably a family trust. This was at a time when the contract was still in existence and before receipt, by Mr Chen, of Mr Gao's solicitor's letter of 17 May 2012 which demanded completion of the project.

[39] When that did not occur the contract was cancelled on 11 July 2012. A further contractor was then engaged.

[40] The quotation of Admiral Construction Limited of 22 July 2011 is addressed to Gao's Stone Art Limited. There was no evidence whatsoever as to the involvement of this company in the renovation of the house. It is not registered on the title as having any interest in the property. Its name suggests that it is a company controlled by Mr Gao.

[41] A second quotation from Auckland Quality Builders Limited is addressed to Miss Gao, care of Lin Qiu. The reason behind that was never explained in evidence and in any event that quotation was not accepted but I mention it only to note that it was not addressed to Mr Gao personally.

[42] The further quotation from Auckland Villa Restorations Limited was addressed to Lin Qiu whom I understand to be Mr Gao's secretary at Gao's Stone Art Limited. A building report from Admiral Construction Limited of 7 August 2012 was also addressed to Gao's Stone Art Limited.

[43] Lastly, a handwritten document of 20 July 2012 signed by a Mr Jeff Brand on behalf of Admiral Construction Limited, purported to be a contract between that company and Gao's Stone Art Limited, and not the trust that owned the property. There was no evidence as to who paid Admiral Construction Limited.

[44] In *Sew Hoy & Sons Limited v Coopers & Lybrand* [1996] 1 NZLR 392, Thomas J at p 407 said:

> Questions of causation are probably particularly unsuitable for consideration on the basis of the pleading alone. As stated by Sir Anthony Mason CJ in *March v E & M H Stramare Pty Limited* [1991] 171 CLR 506, at p 515:
>
> > The common law tradition is that what was the cause of a particular occurrence is a question of fact which "must be determined by applying common sense to the facts of each particular case.

[45] In the words of Lord Reid in, *Stapely v Gypsum Mines Limited* [1953] (AC 663 at p 681):

> A full grasp of the facts is imperative. Experience has demonstrated time and again that the answer to the question of whether there is a nexus between the breach of the defendant and the loss suffered by the plaintiff and, if so, what it is, then tends to fall into place. Indeed, if the question whether there is a causal connection between the wrongdoing and the damages is to be resolved by the application of common sense, it is difficult to see how that question properly can be approached in advance of the evidence. Common sense thrives on hard facts, not abstractions.

[46] Applying that reasoning to the present case it is clear that Mr Gao disposed of his ownership of the property in favour of a family trust. That is a separate legal entity. The remedial costs claimed were all addressed to yet different entities; in particular Gao's Stone Art Limited, in respect of which no evidence whatsoever has been called as to how a remedial contract with that company can amount to a loss suffered personally by Mr Gao. Applying what common sense I am able to, for whatever reason it seems that Mr Gao determined that a company which he appears to be associated with should bear the primary responsibility for payment of the remedial costs, at a time when a trust owned the property.

[47] That being the case the transfer of the property to the trust, but in particular the engagement of the remedial contractor by Gao's Stone Art Limited amount to a novus actus interveniens which, in my view, has broken any causal nexus which may have existed between the parties up to the date of the cancellation of the contract on 11 July 2012. Any actual loss was not incurred until payment for the remedial work was made, which I presume occurred, and there is no evidence that was paid by Mr Gao personally.

[48] For those reasons his claim is dismissed.

[49] As to the further causes of action raised, as far as the claim for loss of rental is concerned, at the time of any alleged breach of the contract by Mr Chen, Mr Gao had divested himself of ownership of the property and would not have been entitled personally to receive rent, assuming that to be a valid claim. As to the claim to recover the penalty of $300 per day, that must also be dismissed because; (i) as at the date of cancellation of the contract, assuming that to be valid, Mr Gao had still failed to pay amounts outstanding, (ii) the time for completion of the additional work was never agreed, (iii) the penalty clause may in any event, be invalid.

Counter claim

[50] Mr Chen claims that on 5 April, the day he received payment of $16,000, it was agreed with Mr Gao that further work would be done, despite the non payment of all monies due under the prior agreements. The work involved was:

(a) Removal of rubbish from the basement of the house;

(b) Replacement of electric gates with wooden opening gates;

(c) The relevelling and sealing of the neighbouring driveway; and

(d) The provision of six flower beds.

[51] Mr Gao denies that any such agreement was made.

[52] I am inclined to the view that there was such an agreement because there was evidence of the wooden gates being ordered, and of work done on the driveway at least.

[53] The claim is however very confused.

[54] In paragraph 100 of his brief of evidence Mr Chen specified the work he had not completed pursuant to the original agreement, as later varied.

[55] When he received payment of the $16,000 on 5 April I would have expected him to attend to the completion of that work, but instead it seems that he undertook some anyway of the newly agreed work, and he confirmed in evidence that he applied $6,000 of the $16,000 payment to that new work.

[56] In the end, the evidence was not sufficiently precise to identify what work had not been done, and what new work had been done.

[57] Accurate evidence might have established whether the unfinished work equated to the $10,000 which had not been paid. In that case, it would have been

relatively simple to calculate the cost of the new work. But that is not the case. Mr Connell accepted that a claim based on quantum meruit could not be advanced, and I am left in the position of having to guess at what, if any, further payment should be made to Mr Chen bearing in mind that neither the original work nor the new work had been completed.

[58] This I am not prepared to do and Mr Chen is non-suited on his counter claim.

Conclusion

[59] Neither party has succeeded. In those circumstances it is not appropriate to make any award of costs, which shall lie where they fall.

G M Harrison
District Court Judge