

**IN THE DISTRICT COURT
AT BLENHEIM**

**CIV-2016-006-000250
[2017] NZDC 13723**

BETWEEN

ANTHONY BRIAN FITZPATRICK,
DOROTHY MARGARET FITZPATRICK
AND ANDREW BRETT HOLDAWAY
AS TRUSTEES OF THE BRIAN AND
DOROTHY FITZPATRICK FAMILY
TRUST
Plaintiff

AND

STEPHEN JAMES HORRELL AND DRL
TRUSTEES LIMITED AS TRUSTEES
OF THE WESTBURN TRUST
First Defendant

AND

TASMAN PACIFIC HOLDINGS
LIMITED
Second Defendant

Hearing: 25 May 2017

Appearances: Clark for the Plaintiff
Q Davies for the Defendant

Judgment: 27 June 2017

RESERVED JUDGMENT OF JUDGE A A ZOHRAB

Introduction

[1] Mr Fitzpatrick is a builder trading under his family trust, the Brian and Dorothy Fitzpatrick Family Trust (“the BDFFT”). Mr Fitzpatrick was asked by Mr Stephen Horrell to price the construction of a family home for the property at [confidential address deleted] (“the property”). The estimated price given by Mr Fitzpatrick was [deleted].

[2] The price was accepted and a labour and materials contract (“the labour and materials contract”) was entered into and it is attached as Exhibit B to Mr Fitzpatrick’s affidavit. The labour and materials contract was signed by Mr Horrell, and describes the owner as Mr Horrell. Mr Fitzpatrick signed the labour and materials contract as the builder, but with no mention of the BDFFT.

[3] The labour and materials contract later became a labour only contract. It is arguable that this was either a variation of the original labour and materials contract, or a new labour only contract.

[4] Mr Fitzpatrick carried out building work on the property and sent invoices totalling \$251,089.77, to a company associated with Mr Horrell, Tasman Pacific Holdings Limited (“TPHL”). Invoices totalling \$67,375.82 have remained outstanding since October 2015.

[5] The plaintiff issued summary judgment proceedings in the name of the BDFFT against Stephen Horrell and DRL Trustees Limited, as trustees of the Stephen Horrell Family Trust as the first defendant, and TPHL as the second defendant, seeking payment of the outstanding invoices.

[6] The defendants oppose the grant of summary judgment on the following grounds:

- (a) The identity of the parties to the contract is uncertain.
- (b) The labour and materials contract was replaced by an oral agreement to do building work to a tradesman like standard for a reasonable fee. Further, there was a new estimate agreed upon of \$99,600, and the work done exceeded the estimate and was unreasonable.
- (c) There are also issues with the standard of work.

Principles on summary judgment applications

[7] In order to succeed at the summary judgment stage, BDFFT must demonstrate that the defendants have no arguable defence to the cause of action. The Court must be left without any real doubt or uncertainty on the matter.¹ However, the Court will not hesitate to decide questions of law where appropriate. The Court is entitled to scrutinise affidavits to ensure they pass the threshold of credibility. Where there is a conflict of evidence, the Court is nevertheless entitled to adopt a “robust and realistic approach” to the conflict.²

Discussion and decision

[8] The labour and materials contract is, on the face of it, a document between Mr Fitzpatrick and Mr Horrell. There is no mention of BDFFT or Mr Horrell’s family trust, or that they are signatories for any other entity, save for the fact that the signing page of the labour and materials contract records that the owner of the property where the work is to be done should sign where Mr Horrell in fact signed.

[9] The Certificate of Title confirms that Mr Horrell and DRL Trustees Limited (now in liquidation), which are the Trustees of the Westburn Trust and which is Mr Horrell’s family trust, are the owners of the property. It is submitted by the plaintiff that Mr Horrell was therefore signing the labour and materials contract on the behalf of the Trustees of the Westburn Trust.

[10] Notwithstanding that Mr Horrell signed the labour and materials contract, and that the Certificate of Title confirms the property is owned by the Trustees of the Westburn Trust, invoices for the building work were issued on behalf of the BDFFT to TPHL.

[11] Mr Horrell says there was a second labour only contract, and that was between BDFFT and TPHL.

¹ *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4

² *Krukziener v Hanover Finance Limited* (2008) 19 PRNZ 162 at para [26].

[12] Mr Fitzpatrick says that there was only ever one contract and that was varied to what was essentially a labour only contract, and that the parties remained the same, and that the agreement was between the BDFFT and Mr Horrell's family trust, which was mistakenly named in the pleadings as the Stephen Horrell Family Trust, when it should have been the Westburn Trust.

[13] Mr Fitzpatrick says that the only reason the invoices were issued in the name of TPHL was because Mr Horrell requested it, and presumably that was because there was some tax advantage to him, given that Mr Horrell was the sole director of TPHL.

[14] Further, Mr Horrell says that whilst the trustees of the Westburn Trust own the property, not only was the labour only contract entered into by TPHL and not the Westburn Trust, he was not authorised by his fellow trustees from the Westburn Trust to enter into the labour only contract.

[15] The temptation is to take a robust commonsense approach and determine that given the property is part of the Westburn Trust, which is Mr Horrell's family Trust, it would not make sense, even allowing for the fact that Mr Fitzpatrick and Mr Horrell are lay people, for the BDFFT to agree to do work for TPHL on a property which TPHL did not even own. Furthermore, on a common sense basis, one can see why Mr. Fitzpatrick would have agreed to render the invoices in the name of TPHL so as to assist in Mr. Horrell achieving some tax benefits through the use of his company. Accordingly, commonsense would suggest that what must have happened is that the labour and materials contract was varied to a labour only contract, as between BDFFT and the Westburn Family Trust.

[16] However, Mr Horrell denies that was the case. Furthermore, DRL Trustees Limited's involvement is unexplained on the face of the labour and materials contract. An issue arises potentially as to trustee unanimity. Case law indicates that contracts need to be signed by all trustees³ and, whilst such a flaw could be remedied by the court upon application, that would have to occur by way of rectification and could not occur as part of summary judgment. Alternatively, an agreement may be binding if

³ *Dong v Sun* [2014] NZHC 208, (2014) 15 NZCPR 452).

there is prior written authority authorising a trustee to bind the trust, but there is no information regarding trustee arrangements.

[17] As I said earlier in my decision, the temptation is to take a robust commercial approach, and work on the basis that this was a contract as between the two trustees of family trusts. However, in my view there are sufficient ambiguities as to who are the correct parties to the contract, and also as to the terms and nature of the actual contract itself that I am left with having to conclude that the plaintiff has failed to persuade me that the defendants have no arguable defence to the plaintiff's claim.

[18] Finally, I note that it seems clear that, whether it was a completely new contract or a variation of the original labour and materials contract, there came into existence a labour only contract on a reasonable fee basis. In my view the defence suggestion that the plaintiff gave an estimate of \$99,600 for the work cannot realistically survive the fact that some \$180,000 was paid to the plaintiff without issue. Furthermore, the suggestions by the defendants in Mr Horrell's affidavit as to unreasonable fees and poor workmanship fall within the category of "bald assertions". Whilst the legal onus is on the plaintiff to prove its case, there is an evidential onus on the defendants to provide some evidence to support their assertions and, given that the monies have been owed since October 2015, they have had ample opportunity to obtain some independent evidence to substantiate their bald assertions and their failure to do so is telling.

Conclusion

[19] The plaintiff has not satisfied the Court that the defendants have no defence to the cause of action in the statement of claim. Accordingly, I decline to grant summary judgment on the statement of claim.

[20] Costs are reserved in accordance with the Court of Appeal's decision in *NZI Bank Limited v Philpott* [1990] 2 NZLR 403 (CA).

[21] The proceedings are to be allocated an initial case management conference.

A A Zohrab
District Court Judge