

IOFI (FAAFOUINA), REV v KEIL (BOLKO)

Supreme Court Apia

Bremner J

7, 8 and 11 November, 12 November 1985

CONTRACT - Termination - Grounds for termination of contract (a) by Defendant abandoning the contract and (b) sub-standard of work on the house - counter-claim for exemplary, general and loss of profit damages dismissed.

HELD: Defendant terminated the contract and was required to repay the Plaintiff the difference between the money he could account for (\$13,702) and the money he was given (\$22,456). The building to date was of a substandard quality and the defendant was required to pay for the reinstatement.

L S Kamu for Plaintiff

R M Barlow for Defendant

Cur adv vult

In this action, the plaintiff claims from the defendant a sum of \$16,201.82 being made up of two sums. Firstly the return to the Plaintiff of monies paid to the defendant and not accounted for together with the sum of \$6,120 being the cost to the plaintiff of building work on which the Plaintiff had expended monies, which work had to be redone. The counter-claim, something in the vicinity of \$30,000 is made up of various sums, difference in an amount claimed by the Plaintiff, \$4,816.70 the sum of \$13,191.75 being loss of profits, \$5,000 general damages and \$10,000 exemplary damages. At the commencement of the hearing the Plaintiff sought leave to amend the statement of claim by deleting the claim for general damages of \$15,000 and by amending the figure, paragraph 11 of the statement of claim from \$17,702 to \$13,702. This later amendment was objected to by counsel for the Defendant on the basis a substantive defence in respect of the difference of \$4,754 had been raised. Coming to the figure of \$9,081.82 difference it would have been or should have been clear that on the figures cited \$22,456, if \$17,000 was expended could not have been \$9,000. Whether \$17,000 is an error or whoever prepared the statement of claim, did not check it, the fact remains that from the evidence that the defendant would have been given the figure referred to as \$13,702. Accordingly paragraph 11 of the statement of claim will be amended as sought.

The claim arises from a contract between the parties to build a house. The Plaintiff being the owner of the land and the Defendant being the builder and as is usual in cases where there are no specifications and no written contract, trouble arose. The plaintiff says that he met the defendant in March of 1984 and they discussed building a house. The Defendant took the Plaintiff around some of the houses that he had built. The Plaintiff liked one in particular, then he asked if the house could be built for US\$50,000. The Defendant said it could be and the Plaintiff said he was quite happy with that.

The Plaintiff said that the agreement was to build a house with 3 bedrooms, a two car garage, drive-way and water tank. It was to be completed except for the carpets. At some point in time, the Plaintiff said he wanted a bigger master bedroom than the house he had seen, and he the Defendant agreed to that. No question of any additional cost was raised or considered. In evidence the Plaintiff maintains that payment was to be in 4 phases as the various stages of building were completed. It appears that the Plaintiff believed that the builder would bear the cost of the first phase and when that was completed, the Plaintiff would pay the value of the work done up to that date. This was in March.

In May the Plaintiff says that he came back to Western Samoa from where he resides in San Diego and was told by the defendant that he, the Defendant did not have any money, and that any moneys he had were tied up in the house that he the Defendant had built for himself. He wanted according to the Plaintiff US\$13,000 to buy the materials for the house in New Zealand and to get started. The Plaintiff says that he was surprised by that. He only had US\$1,000 with him in travellers cheques which he gave to the Defendant and later on, after he returned to San Diego he sent a cheque for US\$12,000.

In August of 1984, the Plaintiff received a phone call from the Defendant at his home in San Diego and was advised that the materials had arrived on the wharf in Apia, and he the Defendant, needed monies to pay the customs to get the materials from the wharf. The Plaintiff says that he was most concerned and unhappy about the state of events but he came to Samoa and in the event, he had US\$30,000 available to him. He said he spoke to the Defendant who told him that the US\$13,000 had been spent. The Plaintiff went to the house and inspected it, his recollection is that there was a bulge in the foundation and he was concerned about that. He was concerned he said that the amount of US\$13,000 had been spent with nothing to show for it. He had a meeting, where the profit on salary of the defendant was discussed and the Plaintiff says the Defendant told him that he

got paid out of leftover materials. This of course the Defendant denies. But there is the sum of \$12,000 worth of materials left after the completion of the house, although Peni Asi who is looking after the Plaintiff's finances, does not think that they will realise more than \$6,000.

The Plaintiff was unhappy about the situation, unhappy about the shape of the walls and the way things were going so he gave a Power of Attorney to one Rudolf Keil and one Peni Asi. Rudolf Keil relative of the Defendant said he supervised the construction of many houses, he said that he had looked at the house and he was not impressed with the standard of the construction, so he obtained a report on the condition of the foundation. Much was made in evidence in cross examination of the fact that two reports were obtained, one dated 2 October and one dated 4 October, whereas on the 24 September Mr Keil had written to the Plaintiff indicating that [the] Pacific Constructions had tendered to build the house, with two car ports in accordance with the plan, some drastic replacement to the foundation, as to finances and what he Rudolf Keil thought of the Defendants behaviour. I propose to ignore completely the first part of the letter of Rudolf Keil to the Plaintiff, in fact why it was (n)ever introduced in evidence I do not know.

In any event, Rudolf Keil gave evidence as to first of all, the Defendant ceasing to continue with his contract. He says that there had been a number of reasons and that one of them was when the method of workmanship of the Defendant was challenged by Rudolf Keil. He said the Defendant refused to change his style of work, to reinstate what had been done and he got very angry about it. He the Defendant "told us to get someone else to finish it" and walked out. Rudolf Keil said at that stage he wrote to the Plaintiff recommending termination of the contract. There was a meeting when the Defendant was called to account as to how US\$13,000 or the Western Samoa equivalent of \$22,456 had been spent. This was of particular concern to Rudolf Keil because by one of these coincidences that happen, the Defendant was returning from New Zealand as Rudolf Keil was leaving the country and they met somewhere at the airport. Rudolf Keil stated that the Defendant told him that he had been to New Zealand to get the materials for the pastors house and he had paid for them in New Zealand in cash. He further said that a few days later, he had a similar chance meeting with the Defendant, and he was again told that the materials had been paid for in New Zealand in cash. He said he was very surprised when the bank got in touch with him and told him that the building materials had arrived and there was a bank draft ready for payment.

In the evidence as to the meeting, it was held and the Defendant confirms that it was so held and it went on for some considerable time, some of the figures were calculated, some were allowances made and some were from receipts in all a total of \$13,702.48.

Both Rudolf Keil and Peni Asi say that the figures were explained to the Defendant, the Defendant got angry and he walked out. Peni Asi said the Defendant slammed the table, said, "it was finished he was through". Rudolf Keil said he was told to find another person to finish the house and he the Defendant walked out and did not return. To this day, he has not returned. Peni Asi said a notice for termination was sent to the Defendant by post. A copy of this letter cannot be located and the Defendant says that he never received it.

The Defendant says that the meeting was an argument over his pay or wages. He said, he was angry, but denies telling Rudolf Keil and Peni Asi to get another person to finish it (the work). He said that in respect of wages the last time he worked for wages was during his apprenticeship he was not going to start again now. In any event, he walked out and he hasn't been back. Probably Rudolf Keil and Peni Asi were relieved he said what he did, it stopped them making the decision to terminate.

I now turn to the second reason which is given for termination and that was that the standard of the work done was such that in itself would give grounds for terminating the contract. A Mr Krone, Managing Director of Pacific Construction Limited a person who has had considerable building experience said that in Western Samoa, either the New Zealand or Australian building codes are used, but in any event, the defects that he found were such that the work would have to be redone. Bearing in mind that we have a foundation wall 6' at its highest point, Mr Krone says the mortar joints were too wide, in some places the gap was 2" wide and it should be at the most 3/4". Secondly that on the structure a floor was to be laid but when he inspected it, it was not level showing a drop of 4 inches. Further up to 60% of the filling was logs and tree branches improperly compacted. Further the reinforcing in the block wall was 3/8" but it should have been 1/2". Also if 1/2 inch reinforcing was used vertically it should be at intervals with a 2 feet centre in this case the centres were in excess of 2 feet. In addition, he said there was no bond beams. In a 6' wall a bond beam is a different type of brick which is to be laid every third layer and it contains horizontal reinforcing which is tied to the vertical reinforcing thus making a wall which will not move. The Block layer says that there was a beam bond. Mr Lee Lo an Architect of considerable experience said that there was no corner or beam bond. Mr Krone said that the inspection of the foundation showed that in some places the concrete footing was insufficient. He recommended that the wall be broken and rebuilt. Mr Lee Lo gave evidence that there was no reinforcing in the footing. Finally, the blocks being used were too small at 6" x 8" x 16". The block layer said, yes, they are too small, they should have been 8" x 8" x 16" but these were the blocks supplied by the defendant so they were the ones used.

In the construction of a block foundation wall, the cavities in the blocks are filled with cement. There was no cement in the cavities in these blocks. Mr Lee Lo describes the accepted practice which is to fill each course as it is laid with cement. The Defendant describes a system whereby the whole wall is built, and when the builder is ready to pour the concrete floor, the floor is poured and the cavities are filled at the same time. The Defendant emphasises that this gives greater strength to the floor and prevents cracking at the joints. Mr Krone and Mr Lee Lo said this cannot be done. It is not possible, by this method to ensure that the cavities are in fact filled. I wonder how the concrete could get to the base of the wall and past the beam bond more so if there are more than one beam bonds. Mr Lee Lo saw the wall, and as far as he was concerned, it was sub standard the filling on the one end had forced the wall out of alignment by almost 6 inches. Although his description in the first paragraph of his report relates to the standard size of concrete blocks it also refers to the poor layout and the wall which "zig zag on almost every sides and ends of the foundation". He recommended the whole lot be removed and be redone.

In respect of the fill in the foundation, the Defendant called Mr Brunt to give evidence that there was no tree material in the foundation. Mr Brunt gave evidence which I accept completely. He came along, he filled inside the wall with stones, which he had obtained from a stone wall. That does not mean that there was not 60% wood and tree branches in the fill as found by Mr Krone because Mr Brunt also said that when he got there, the deepest part of the foundation was already half filled with rocks and as he couldn't see under that, he does not know what was there. The comment of the block layer is interesting, although he says cross ties were there, Mr Lee Lo is adamant that there was no steel in the footing. It is interesting when he (the block layer) describes filling up the wall which method is different from every other company in Western Samoa.

The Defendant has been building houses since 1976 and he builds two ways, as far as payments are concerned. He purchases the materials with an advance from the owner and builds or he builds on a labour only basis. He said that he wanted the US\$13,000 to buy materials and to get the foundations done and work under-way. He differs from the Plaintiff in what was to be provided. There was no drive way and a small car port. He agrees that the price was US\$50,000. He says he could complete it, for that amount and his profit would be in the vicinity of 15%. It is said there was no agreement as to any payment in phases or by way of progress payments. He concedes that he was confronted about the WS\$12/13,000 and that he did not pay for the materials in New Zealand. The Defendant disagrees with Mr Krone regarding the

filling of the foundation and the evidence given that the foundation was not up to the required standards. His evidence was that he should have been using 1/2 inch rod but that was not available so 3/8 inches was used instead. Instead of putting a steel rod each on every second block, he put it in every block to give it extra strength. He maintains that the reason the wall buckled was that he was stopped from working on the site, at this point in time when he would have poured the concrete.

At the final meeting with Rudolf Keil and Peni Asi, the expenditure of moneys to date was discussed. He said he was angry when he was asked to pay the sum of \$9,000 back and was angry about the whole thing and walked out. It is clear that there was a fixed price contract. It is clear that the Defendant went to New Zealand and ordered the materials. It is equally clear he did not pay for them. As credibility is clearly in issue, I saw and heard the witnesses over three days and I am in no doubt at all that the Defendant told Rudolf Keil that he had paid in cash for the materials in New Zealand. It is clear that he told the Plaintiff that he needed the US\$13,000 to pay for the materials. He said he did buy the materials for the foundation and they were not purchased in New Zealand. He was asked to account for the moneys given to him and he could only account for \$13,702.48, as I have said some of that figure is calculated and allows credit for the airfares to New Zealand and expenses in New Zealand. It allows for a return to him for the work that he had done to the date of that meeting. I find and find as a fact on the evidence that he did walk out from the meeting. I find as a fact that he did tell Rudolf Keil and Peni Asi to get somebody else to finish the work and they did. I find therefore and find as a fact that the contract was terminated by the Defendant.

Clearly the Plaintiff was going to terminate the contract but the Defendant got in first. In any event, however, I believe that once the Plaintiff knew that the materials had arrived from New Zealand and were on the wharf and that a sight draft was held by the bank for payment for the materials the Plaintiff had every right to cancel the contract then. I find as a fact that the Defendant was going to pay for the materials. However, I find as a fact and I find, to use the criminal standard beyond reasonable doubt, that the standard of the work is such that the Plaintiff had every right to terminate the contract. I accept the evidence, as to the quality of this work, of Mr Krone, and I do so, bearing in mind that he did subsequent work [and] as also Mr Lee Lo. Their evidence that there was no way of remedying the work short of demolition and rebuilding. It is interesting to note that when the new block layers commenced work on the building, the removal of the first row of bricks caused the 6' wall to fall down and it hardly indicates that there was horizontal reinforcing in that wall.

For these reasons, therefore having found that the Defendant terminated the contract, having found that he was given \$22,456, having found that he could account for \$13,702 which includes a profit margin plus expenses, plus labour, that he is required to repay to the Plaintiff the difference as calculated. Having found as a fact the substandard quality of the wall of course he has to pay for the reinstatement. the only question I ask myself is why did the Plaintiff sue for this amount? One would have expected on a fixed price contract the Plaintiff would have sued for all expenses incurred in building the house over and above the US\$50,000. I need not go into the counter claim which must fail. Dealing with the exemplary damages claimed counsel indicated they were for whole of the attitude of the Plaintiff and his agents over the period and also in respect of the Plaintiffs application for a writ of arrest. I find on the evidence that the actions of the Plaintiff and his agents were fully justified but that as far as the writ of arrest is concerned, I again point out that the counter-claim is based on breach of contract. If the Defendant wishes to sue for false arrest or imprisonment he must commence separate proceedings, counsel for the Defendant accepts this proposition.

As to the loss of profit in the counter-claim, simply, the Defendant is not entitled to any, he is only entitled (and I have some doubt about this) to claim on the work done prior to termination. As I have pointed out the Plaintiff has allowed this to the Defendant. Briefly turning to the credibility question where there is a conflict between the Plaintiffs evidence and the Defendants evidence, I accept the evidence adduced by the Plaintiff and reject that of the Defendant.

For the reasons given therefore there will be judgment for the Plaintiff on the claim, in the sum of \$15,207.22 with costs, disbursements, witnesses expenses and solicitors fees as on a claim for the total figure claimed in the counter-claim namely \$33,052.45. The Plaintiff having been successful in defending that counter-claim, the counter-claim will be dismissed.