No. 6 of 1941

14

IN THE HIGH COURT OF AUSTRALIA.

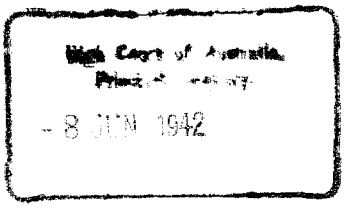
F I N N

v.

L E M C K E.

Original

REASONS FOR JUDGMENT.



Judgment delivered at Melbourne

on Monday, 8th June, 1942

H. J. Green, Govt. Print., Melb.

C.2774

M06/1941 (15

IN THE HIGH COURT

OF AUSTRALIA

1941 No. 6.

F I N N)
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) JUDGMENT.
V.)
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)
LEMCKE)

WALTER D. SYKES, LL.B.,
118 Queen Street,
MELBOURNE.

Solicitor for the Plaintiff.

IN THE HIGH COURT)
OF AUSTRALIA)

1941 No. 6.

B e t w e e n

ROBERT PEARCE FINN Plaintiff

and

FREDERICK WILLIAM IE MCKE Defendant.

Before His Honour Mr. Justice Starke

Monday the Eighth day of June 1942

THIS ACTION coming on for trial before this Court on the 26th 27th and 28th days of May 1942 UPON READING the Pleadings herein AND UPON HEARING the viva voce evidence of the abovemamed Plaintiff and of Arthur Allen and Percy George Begbie on behalf of the said Plaintiff and of the abovenamed Defendant and of John Francis Deighton Scarborough and John McNab on behalf of the said Defendant AND UPON READING the several exhibits put in evidence on behalf of the respective parties AND UPON HEARING Dr. Coppel of Counsel for the said Plaintiff and Mr. Moore and Mr. Dethridge of Counsel for the said Defendant THIS COURT DID ORDER that this Action should stand for judgment and the same standing for judgment this day accordingly THIS COURT DOTH ORDER that judgment be entered in this Action for the said Plaintiff for the sum of £272:17: 2d AND that judgment be entered for the said Defendant on the Counterclaim herein for £262:6:8 AND THIS COURT DOTH FURTHER ORDER that the parties do abide their own costs of the day's hearing of this Action before the Chief Justice of this Court on the 26th day of May 1942 AND THIS COURT DOTH DIRECT that the said parties do bear equally between them the costs of the Shorthand Notes taken on the trial of this Action AND THIS COURT DOTH FURTHER ORDER that subject as aforesaid the said Defendant do pay to the said Plaintiff his costs of this Action (including costs of Discovery) AND that the said Plaintiff do pay to the said Defendant his costs of the said Counterclaim (including costs of Discovery) AND THIS COURT DOTH FURTHER ORDER that the respective costs aforesaid shall be taxed by the proper officer of this Court and that the amount of the Judgments hereinbefore pronounced and the costs of the Claim and Counterclaim hereinbefore mentioned and any other unpaid costs payable under any other Order in this Action be set off and that such balance as then remains due to either party shall be paid by the party from whom to the party to whom the same shall be due.

BY THE COURT

DEPUTY REGISTRAR

FINN V LEMCKE

JUDGMENT STARKE J.

This action is between residents of different states. The defendant had obtained a contract for the erection of certain premises at Albury for the A.M.P. Society. By sub-contract made about September 1940 the plaintiff agreed with the defendant to execute "the plumbing, drainage, and storm water to the A.M.P. premises Albury",(with certain exceptions immaterial to this case), "according to the plans and specifications and to the satisfaction of the Architect" for the sum of £1185. 10. 0. "No extra work to be carried out without a written order". The plaintiff's claim was for £754. 1. 8. the balance due for work and labour done and materials supplied under the agreement and for certain extras.

By his defence the defendant alleged that certain items claimed by the plaintiff amounting to £53. 5. 0. were covered by the contract price and that the plaintiff and the defendant agreed expressly or impliedly that a galvanised iron hip roof provided for in the building contract should not be put in, and that the cost (£7. 14. 0.) of putting in the roof should be deducted from the contract price. And the defendant counter-claimed £265. 3. 2. Between the issue of the Writ and the hearing before me the defendant had paid to the plaintiff on account of his claim the sum of £427. 19. 6. leaving a balance of £326. 2. 2.

The plaintiff, however, admitted or did not contest the counter-claim in respect of the following items:-

£33. 5. 9. Counter-claim par. 11: admitted in Defence to Claim.

43.12. 6 Duct in Cellar. Counter-claim par. 10 and not contested.

37. 6. 7. Screen to gutter. Counter-claim par. 10 and not contested.

2.13. 1. Fire clay sink supplied. Counter-claim par. 10 and not contested.

£116.17.11

So the contest between the parties reduced itself to the following items:-

Items		
1.	£24. 15. 0	Extra cost of 6 inch instead of 4 inch cast iron soil pipe. See par. 5 of Defence.
2.	6. 0. 0.	Agricultural drains. See par. 5 of Defence.
3.	22. 10. 0.	Extra damp course. See par. 5 of Defence.
4.	7. 14. 0	Omitting galvanised iron roof. See par. 7 A.B.C. of Defence.
5	139. 8. 9	Lead flashings. See par. 10 of Counter-claim.
6.	2. 16. 6	Basin. See par. 10,10 A.B.C. of Counter-claim.
7.	6. 0. 0	Hiring Tarpaulin. See par. 12, 13, & 14 of Counter-claim.
	£209. 4. 3	

Item 1. This depends upon the meaning of the word drainage in the September agreement. It refers to drainage in connection with the A.M.P. premises - the discharge of water or other fluid from those premises. The six inch pipe was part of the house drainage and the pipe led into the main sewer. The Municipal authority controlled the house drainage and required that a pipe of the dimension mentioned should be connected with the main

sewer. In my opinion, this was drainage of the premises which the plaintiff had agreed to do under his agreement. Clauses 125, and 133 of the Specification of the main contract lend aid to this view. The defendant succeeds on this item £24. 15. 0.

Item 2. Drains under the basement. This also was part of the drainage system of the premises which the plaintiff was bound to provide under his agreement. Clause 139 of the Specification of the main contract lends aid to this view. The defendant succeeds on this item.

Item 3. This item is more conveniently dealt with under Item 5 £139. 8. 9. Flashings.

Item 4. The allegation that the plaintiff agreed not to put on the galvanised iron roof and that it was an implied term of the agreement that the cost of putting it on should be deducted from the contract price is not proved. The defendant put in a concrete roof for his own purposes. The plaintiff had a lump sum contract and there was no provision in it for any such deduction as is claimed. He never agreed that the iron roof should not be put in and neither he nor his foreman was consulted about the matter.

"Prima facie" said MacKinnon L.J. in Shirlaw v Southern Foundries (1926) Ltd. 1939 2 K.B. 206 at 227, "that which in any contract "is left to be implied and need not be expressed "is something so obvious that it goes without "saying; so that, if, while the parties were "making their bargain, an officious bystander "were to suggest some express provision for it "in their agreement, they would testily suppress "him with a common 'Oh, of course!'" The Moor-

cock (1889) 14 P.D. 64 at p. 68.

It appears in the evidence that the plaintiff himself thought that it would be right and proper to make an allowance if he did not do the work. But what he might do ex gratia or as a matter of business expediency is one thing, and what might be his contractual obligation is another. The parties are now at arms length and the plaintiff's counsel stands on his rights according to law. The plaintiff succeeds on this item.

Items 3 & 5. Damp course and Flashings. These items relate to lead damp courses and lead flashings and the rights of the parties depend upon the meaning of the word "plumbing" in the September agreement. It refers of course to plumbing in connection with the construction of the building on the A.M.P. premises.

Plumbing is an ordinary English word and means the art of working in lead, and he who so works is called a plumber. But it is said that plumbing according to the usage or the understanding of the building trade does not include the putting in of damp courses over windows or doors or anywhere else, though it does include lead flashings. A lead damp course, I gather, is something which protects brickwork and other porous materials from the seepage or flow of water, whilst a lead flashing is something which protects a joining, as when a roof comes in contact with a wall, or a chimney projects through a roof. But where a damp course ends and a flashing begins, is obscure. At all events no such usage or understanding as was suggested, exists in the building trade. The witnesses

do not agree and I feel satisfied that the work of putting in lead damp courses is just as much part of the work of a plumber as putting in lead flashings. Other tradesmen have no doubt put in lead damp courses but that is because in some cases, as over windows and doors, the work does not require much skill, or a plumber is not available. In the present instance the plaintiff's foreman, who was a plumber, put in damp courses over windows and doors as a matter of ordinary routine. Indeed it is for this very work that the plaintiff claims extra for damp courses above doors and windows. The foreman would have gone on putting in such damp courses, I should think, but for the fact that the plaintiff intervened and said that he was not bound to do that work. The flashings, however, for which the defendant counter-claims cover not only lead protection over windows and doors but lead protection right round the roofs on all floors of the building, including the working of the lead round external and internal corners, which strikes me as a rather skilled job and essentially the work of a plumber, and is properly described as plumbing.

But next it was contended that the September agreement, taken in conjunction with the Specification of the main contract, makes it clear that plumbing for the purposes of the September agreement excludes damp courses wherever found. Clause (61) of the Specification Damp Courses and Clause 123 Flashings coupled with the headings Brickwork and Plumber were relied upon. The specification is not concerned with defining what is or what is not plumbing. It is specifying work

to be done and how it is to be done and requiring that certain lead shall be built into the wall for the purpose of a damp course as the brick work proceeds. For instance in Clause 61 "Damp Courses" there is a direction, "over the heads of all openings in external walls flash the frames", and also a reference to the headings "Plumber" and "Bituminous Roof" and in Clause 54 under "Brickwork" "Build into brickwork" there is a provision "Build into brickwork all frames and iron work, flashings, damp courses, pipes, electric light and power conduits, and all other works mentioned in the various trades", Other and somewhat analogus instances were cited but I shall not go through them. It is clear, I think, that the specification is not defining or delimiting the work of the trades for the purposes of the main agreement. So we must fall back on the ordinary English meaning of the word plumbing in relation to the September agreement, and that covers lead work over doors and windows, round roofs and external and internal corners. The defendant succeeds as to both items 3 and 5.

Item 6. The plaintiff supplied the basin but the defendant alleges that it was negligently fixed, in consequence whereof the basin was cracked. It is not proved that the plaintiff was guilty of any negligence. The crack might have arisen from some defect in the basin itself or by the dropping of something into the basin, or on to the metal ring at the bottom of the basin, or negligence in fixing the basin. In the circumstances, I am not prepared to find negligence on the part of the plaintiff, or his workmen, in fixing the basin. The plaintiff succeeds on this item.

Item 7. Cost of hiring tarpaulin. It was an obligation of

the plaintiff under the September agreement to cover with iron certain roofs. The back roof of the building was ready for the iron in March 1941 but the plaintiff had not his iron on the ground and the defendant hired a tarpaulin to cover the roof and protect the building from rain until the plaintiff was ready to put the iron on the back roof. The September agreement did not make time the essence of the contract but the plaintiff was no doubt under a duty to carry out his agreement with reasonable diligence and skill. The question in respect of this item is whether the plaintiff was reasonably diligent in the performance of his agreement. The plaintiff had some difficulty in obtaining iron in 1940. He was advised on 26th February that the roof would be ready for iron by 15th March. Apparently the back roof was ready for iron on 12th March. On 22nd March he was advised that the iron for the back roof was not on the job and that if it was not on the job by 25th March then the defendant would have to protect the building from rain which was falling intermittently. But the iron was not on the job by the 25th March and the defendant hired a tarpaulin from 30th March 1941 till 4th April 1941 to cover the roof and protect the building from rain. The cost of hiring the tarpaulin was £6. 0. 0. In my opinion the plaintiff was not reasonably diligent in covering the back roof with iron before 30th March. He could, I think, have procured and brought the iron on the job by the 25th March and have completed the back roof by the 30th March if he had been active and diligent in the performance of his contract. He committed a breach of his contract and the damages may be reasonably measured by the cost of hiring the tarpaulin to cover the roof and protect the

building from rain until the plaintiff put on the back roof. The defendant succeeds on this item.

The result is:-

Judgment for the Plaintiff on the claim for £272. 17. 2.

Judgment for the defendant on the Counter-claim for £262. 6. 8.

Order that the parties do abide their own costs of the days hearing before the Chief Justice of this Court on 26th May 1942.

Direct that the parties do ~~then~~ bear equally the costs of the Shorthand Notes.

Subject as aforesaid:

(a) Order that the defendant do pay the plaintiff his costs of the action (including costs of discovery) to be taxed.

(b) Order that the plaintiff do pay to the defendant his costs of the Counter-claim (including costs of discovery) to be taxed.

Order that the amount of Judgments hereinbefore pronounced, and the costs of Claim and Counter-claim hereinbefore mentioned, and any other costs unpaid payable under any other order in this matter, be set off, and that the balance be paid by the party from whom, to the party to whom the same shall be due.