IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CIV-2016-087-000272
[2018] NZDC 22341

BETWEEN	GREGORY HARE Plaintiff
AND	ROBERT HARE AND AWHIMATE POUWHARE as Trustees of the Ngati Haka Patuheuheu Māori Reservtion Trust Defendants

Hearing: 29 October 2018

Appearances: P Chambers for the Plaintiff
T Wara for the Defendants

Judgment: 30 October 2018

RESERVED JUDGMENT OF JUDGE T R INGRAM

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[1] Mr Greg Hare sues the trustees of his family marae for breach of contract. The sum claimed is $71,000.

[2] The defendant marae trustees, of whom the defendant's brother, Mr Robert Hare, is Chairman, needed to construct a new wharekai for the marae. Over a period of many years they raised funds to undertake that task. Their efforts to raise funds included obtaining a grant from a Government agency, but a considerable set-back was encountered when it was discovered that a large amount of money had been stolen from the marae's accounts after the building contract had been let, just as the work was about to commence.

[3] Eventually, financial matters were sufficiently reorganised for work to begin on the job. The first thing to do was remove the old building, which was found to have asbestos materials in it, causing a further setback. Many people gave freely of their time and expertise to accomplish that task, including the plaintiff.

[4] The next thing to be done was to prepare the site to the required standard before handing it over to the contracted builder. Because of his expertise in handling earthmoving machinery, the plaintiff was asked to provide a quote for his services to excavate the site, including removing top-soil, fill the site to the engineer's specified levels with clean base course material, and compact that material to the engineering specification. It was later discovered that the engineer required a shallow covering of top-soil over the compacted base course, work which was extra to the original task.

[5] The marae committee chairman was tasked with arranging quotes for the work, and he asked the plaintiff to provide a written quote. The plaintiff sought the assistance of a marae committee member, Ms Awhimate Pouwhare, to type up and print off a quote. It was her evidence that she did not clearly understand what the document was when she prepared it, and she used some figures provided by the builder in another document to prepare the quote at the plaintiff's direction. Ms Pouwhare's evidence was that the only document she typed was one produced in evidence, which is reproduced below.

Material Supply			
528 tons hardfill		$15,000.00	
Machine Hire	Delivery and Pickup	$640.00	
	600 pd Roller	$8,400.00	
	600 pd Bobcat	$8,400.00	
	1500 pd Excavator	$21,000.00	
			$53,440.00
Foundation Preparation			
	Footings x 2 trucks concrete		$1,926.00
	Steel Fixings x 5days and materials		$4,500.00
	Boxing x 5days and materials		$6,000.00
Labour	2 weeks @$40.00 per hour		$5,600.00
Floor slab from Daff's quote			
			Total: $71,466.00

NB: all figures are GST exclusive, Rob, if that helps.

[6] It was the defendant's evidence that the document Ms Pouwhare prepared for him was not in exactly the same terms as that which was produced in evidence, but it was for the same amount. He kept no copy, and left it to Ms Pouwhare to hand the quote to the trustees.

[7] Ms Pouwhare's evidence was that she handed the document set out above to the trustees, and that there was no other document typed by her. I accept her evidence on that point, and I accept that the only document seen and discussed by the trustees was the one reproduced above.

[8] The minutes of the trustees meeting record the following.

Hardfill for Wharekai Foundations	Costs and quotes will include machinery cartage, machinery hire, Greg's fee (as machine/s operator), incidentals $20,000 targeted as progressive budget

[9] Those minutes show that the trustees discussed the defendant's quote and agreed to meet the plaintiff's fee as machine operator. It is clear on the minutes that the trustees did not discuss nor accept a quote for $71,446.00, because they allowed a "progressive budget" of $20,000. They did agree to meet the plaintiff's fee as a machine operator, which can only mean the sum of $5600, specified as the "labour" in the document.

[10] Mr Robert Hare, the chairman of the trustees, sent the plaintiff a text on Thursday, 31 March which said:

> Builder not doing hard fill 'cos it's our cost. He will credit us on foundation work once it's complete to specs. The trust did decide to pay for your services, machinery and material to do hard fill.

[11] It was the plaintiff's evidence, which I accept, that on the strength of the quote he had provided and the text message he received, he believed that he had quoted $71,446.00, and that quote had been accepted by the trustees.

[12] The trustees on the other hand, considered that they had accepted a quote of $5600, being the labour component set out in the document, which they saw as a fee to operate the machinery only, and nothing else.

[13] The trustees expected the defendant to go ahead and excavate the site, using the machinery they had arranged and paid for, and then spread and compact the hard fill, which they had arranged and paid for. He did. That work took place between 11 April and 9 May. The excavation had to go deeper than originally expected because of softer ground conditions, and soil had to be spread on the compacted fill as an extra to the job, as the engineer required a softer material for a plastic covering to sit on, a step not covered in the original specification.

[14] The completed platform was accepted by the engineer, and building construction was taken over from that point by the contract builder.

[15] As the evidence in the case clearly demonstrated, the plaintiff thought that he was not merely quoting for labour, but was effectively quoting a "wet hire" on dry hired machines, and materials. It was his evidence that he thought that there would be

a margin on the machine hire to go with the labour component expressed in the quote, and that he would be paid $71,446.00, out of which he would meet the cost of the hardfill, the machine hire, and the foundation preparation. The trustees meanwhile thought that they had hired a machine operator for $5,600, and they expected to and did pay the expenses of the hardfill, the machine hire, and the foundation preparation.

[16] The plaintiff sent the marae committee an invoice for 1008 hours of labour on the job. As became clear in the course of cross-examination of the plaintiff, he could not conceivably have carried out 1000 hours of work between 11 April and 9 May, as less than 700 hours elapsed between those dates. The marae committee did not accept that invoice as being accurate, and sent the plaintiff a cheque for $6000 as koha.

[17] Additional quotes from reputable operators were obtained by the marae committee, which indicated that there should be something in the order of 200 hours of skilled labour required for the earthworks and compaction. In the course of cross-examination, the plaintiff was disposed to accept that he had made a mistake in his calculation of the hours charged for excavation, fill placement and compaction.

[18] On the evidence available to me, it is clear that the plaintiff and defendant were never in agreement as to exactly what was being quoted for, and what was being done for the money quoted. There was however agreement that the plaintiff was to be paid for his labour in operating the machinery at the rate of $40 per hour.

[19] The marae committee thought that they were accepting a labour only quote to operate machinery at $40 per hour for two weeks. The plaintiff thought he was getting a contract to supply hardfill, machine hire, and foundation preparation, on which he could legitimately expect a margin for himself in addition to the labour cost quoted.

[20] This circumstance is covered by the provisions of the Contract and Commercial Law Act 2017. Section 24 of the Act provides as follows:

> **24 Relief may be granted if mistake by one party is known to another party or is common or mutual**
>
> (1) A court may grant relief under section 28 to a party to a contract if,—
>
> (a) in entering into the contract,—

(i) the party was influenced in the party's decision to enter into the contract by a mistake that was material to that party, and the existence of the mistake was known to the other party or to 1 or more of the other parties to the contract; or

(ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) the party and at least 1 other party were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and

(b) the mistake or mistakes resulted, at the time of the contract,—

(i) in a substantially unequal exchange of values; or

(ii) in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation substantially disproportionate to the consideration for the benefit or obligation; and

(c) in a case where the contract expressly or by implication provides for the risk of mistakes, the party seeking relief (or the party through or under whom relief is sought) is not obliged by a term of the contract to assume the risk that that party's belief about the matter in question might be mistaken.

(2) The relief may be granted in the course of any proceeding or on application made for the purpose.

(3) For the purposes of subsection (1)(a)(i) and (iii), the other party or other parties must not be a party or parties who have substantially the same interest under the contract as the party seeking relief.

[21] In the circumstances outlined above, I am satisfied that the parties were intending to contract with each other and for the plaintiff to provide skilled labour to operate the necessary earthmoving machinery to undertake the site excavation, backfilling and compaction tasks. The plaintiff believed he was providing a wet hire and materials for the quoted sum of $71,446.00, which included a margin for him, while the marae committee believed they were agreeing to pay $40 per hour for skilled labour in the sum of $5600, and nothing more.

[22] Accordingly, I am satisfied the provisions of s 24(1)(a)(iii) apply, because both parties were influenced in their respective decisions to enter into the contract by a

different mistake about the same matter of fact, namely what was being quoted for. I am further satisfied, that at the time of the contract, the mistakes resulted in a substantially unequal exchange of values, and that the contract did not expressly or by implication provide for the risk of mistakes.

[23] Bearing in mind the evidence that the defendant provided considerable labour on an unpaid basis in relation to other aspects of the works, including demolition of the previous building, and taking account of the fact that many other members of the marae worked long and hard for nothing on this project, and would have willingly undertaken some or all of the work undertaken by the plaintiff, I consider this is an appropriate case for the Court to exercise the discretion to grant relief under the provisions of s 24(2) of the Contract and Commercial Law Act 2017.

[24] Both parties are to some extent to blame here. The plaintiff is to blame, for not making it clear in his quote what he was going to do for the money, as he accepted in the course of his evidence. The marae committee likewise bear some limited blame for doing business by text on a written quote for $71,446.00 without obtaining clarification as to exactly what was to be provided. In my view, the plaintiff should bear most of the blame for the lack of clarity. The law requires that contractual documents be construed *contra proferentum*, which simply means that any ambiguity or imprecision goes in favour of the party receiving the document, and against the party who prepared the document, which is the plaintiff in this case.

[25] After careful consideration, I have reached the view that the merits of the case require that the plaintiff forgo claims to payment for anything other than a reasonable assessment of his labour. The independent evidence establishes that something in the region of 200 hours work may have been required to undertake the excavation, and then spreading and compaction of the fill material. There were 29 days between 11 April and 9 May, and at least 4 days would have been lost to rain or other delays. I allow 8 hours per day, accepting that some days would have been longer, but other days would have been shorter and some may have been lost altogether. That would result in 8 hours work on 25 days, or 200 hours.

[26] I acknowledge too that the engineering specifications were changed during the job, due to the discovery of unstable material as the excavation progressed, and further soil had to be spread over the compacted basecourse to provide a yielding surface for the plastic liner prior to the concrete pour. I allow a further 25 hours for that as an extra for the work not initially expected.

[27] Bearing all those matters in mind, I have come to the view that an allowance of 225 hours at $40 per hour would be an appropriate assessment of the defendant's financial obligation to the plaintiff, a total of $9000. The plaintiff has already paid the defendant $6000, leaving a balance of $3000.

[28] In case I may be wrong as to any of the findings set out above, I record my view that on a *quantum meruit* assessment, I consider that the same considerations would produce the same calculation and the same outcome.

[29] There will accordingly be judgment for the plaintiff in the sum of $3000.

[30] The parties are entitled to apply for costs, but I discourage any move to do so. I would need some considerable persuasion to award costs in this particular case because of the background circumstances. In particular, I am persuaded that this is a case of a genuine mistake made by both parties, and I would need a lot of persuasion to depart from the view that costs might best lie where they fall. If costs are sought, counsel may file submissions within 14 days of the date of this judgment.

[31] Finally, I thank counsel for their hard work, able assistance and co-operation in reducing this case to the stark and very clear material provided for my consideration.

T R Ingram
District Court Judge