IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2017-004-000444
[2020] NZDC 2800

BETWEEN	PAUL DESMOND MCGRUDDY Plaintiff
AND	SPOTLESS FACILITY SERVICES (NZ) LTD Defendant

Hearing: 17 February 2020

Appearances: A Beck for Plaintiff
A Harlowe for Defendant

Judgment: 24 February 2020

DECISION OF JUDGE G M HARRISON

Introduction

[1] Mr McGruddy, known as Sam, is a self-employed painter residing in Masterton.

[2] New Zealand Steel produced colour steel roofing material which was defective. It contracted the defendant company (Spotless) to undertake painting repairs to roofs of houses throughout New Zealand where claims for breach of warranty were made.

[3] Spotless subcontracted this work to various painters across the North Island, and at the beginning of the warranty claim period it had contracted 13 painters.

[4] In 2010 there were a total 642 painting jobs but they declined over succeeding years to 273 jobs in 2014. By 2015 the work was coming to an end with only 82 jobs and by 2016 the work had effectively finished with 28 jobs, and in 2017 there were only 6.

[5] The painters, including Mr McGruddy were initially engaged orally but in 2013 they all executed written agreements. The agreement with Mr McGruddy commenced on 16 October 2013 for an initial term of three years and a right to extend that for a further 12 months. The introduction to the agreement provided as follows:

> Background: Spotless has agreed to provide the services to various principals under the head Contracts. Spotless may from time to time by issuing a purchase order or by other direction engage contractor to provide the services, and the contractor makes a standing offer to Spotless to provide the services, in accordance with the terms and conditions contained in this Agreement.

[6] Schedule 2 provided for payment of fees. For roof painting, $8 per square metre was payable. For travel there was to be no charge for the first 100 kilometres travelled and then 52 cents per kilometre thereafter. Overnight accommodation was also payable to a maximum of $130 per night, and an overnight allowance of $50 per person per night was also payable.

[7] This Schedule also provided for the contractor to pay Spotless an additional annual discount. Mr McGruddy did not agree with that and it was carefully crossed out of the Schedule. In evidence Mr McGruddy said that he was familiar with the terms of the Contract and understood them.

[8] There was no guarantee of work for any of the contractors. Clause 3.2 of the Contract provided:

> Contractor acknowledges and agrees that:
>
> (a) This Agreement does not confer any right on contractor to provide any, or any particular level of, services under the Agreement;
>
> (b) Spotless may elect to perform any or all work in respect of the services or which might otherwise have been part of the services, itself, or to have that work carried out by another party.

[9] Mr McGruddy acknowledged in evidence that he was aware throughout the Contract period that Spotless engaged other contractors, and that there was no guarantee that work would be supplied to all or any of them, including him.

[10] Spotless would not know from month to month how many jobs it would receive from New Zealand Steel, the jobs being dependent on claims made pursuant to the warranty given by the latter. On receipt of claims Spotless would allocate work to the various contractors depending on the location of the work. In general, contractors based closest to the worksite would be given the work so as to avoid the need for Spotless to pay travelling costs or overnight accommodation.

[11] New Zealand Steel would pay for the actual painting and for the hireage of scaffolding. Spotless paid for travel and accommodation.

[12] Section 4 of the Contract dealt with payment. Clause 4.3 provided:

> On or after the first day of each month, contractor must make a claim for payment for each docket or work order completed in the previous month by issuing to Spotless nominated representative written claims for each completed docket or work order (including details of any deductions Spotless is entitled to make to such claim). …

[13] Spotless would then approve an amount for payment after assessing the claim and the contractor, having received a payment certificate would provide to Spotless a fully itemised tax invoice.

[14] This was an important process for Spotless because in turn it would charge New Zealand Steel for the repair costs on each job.

[15] Mr McGruddy commenced working for Spotless in 2010. He had an oral agreement with the then Spotless Manager, Martin Bright.

[16] In October 2013 Mr Frank Fox became the new painting Manager for Spotless, and he was the Manager when the written Contract was entered into.

[17] Mr McGruddy was continuously engaged by Spotless between October 2010 and February 2015. In December 2014 it was becoming obvious that the work was falling away.

[18] Mr McGruddy received several further jobs around April 2015 and I shall return to that detail later in this decision. In April 2015 Mr Daniel Fox, who I understood to be the son of Mr Frank Fox, took over as the painting Manger. At paragraph 27 of his affidavit of 5 November 2018 Mr Daniel Fox said:

> During or around the second week of October 2015, when there were only a handful of jobs left, Spotless made the commercial decision not to allocate painting work to Mr McGruddy due to the number of paint jobs remaining and because of the higher than average cost associated with his work. He also shared an area (Masterton) with another painter so it made no sense for Spotless to use them both and Mr Smith was the more cost-effective option. Overall Spotless decided it was best to finish the few remaining jobs using the contractors as set out in Schedule A.

[19] Mr Daniel Fox said that "however, I did think it was fair that I called him to let him know that there would not be any jobs for him next season." (para 28)

[20] For his part Mr McGruddy agrees that Mr Daniel Fox called him to say that "he had made a decision not to send me any more job." (para 29 affidavit 6 September 2018)

[21] Then in paragraph 31 he said:

> Although Spotless claims that there was simply no more work, I believe that both Frank and Daniel Fox, for their own personal reasons, were happy to dismiss me from further work with Spotless.

[22] Both the Messrs Fox deny that Mr McGruddy was dismissed as such. It is quite clear from Schedule B to the affidavit of Mr Daniel Fox of 5 November 2018, which listed all of the jobs undertaken by all of the contractors from inception in 2010 until the last job in January 2018, that from late in 2015 the jobs simply ran out as recorded in para [4].

The settled claims

[23] On 27 May 2015 Mr McGruddy invoiced Spotless for $2834.10 for travel costs on 15 different jobs from 1 January 2015 to 29 May 2015. Mr McGruddy had never claimed for travel costs previously and Spotless considered whether it would pay the invoice but to keep Mr McGruddy happy, and at the time he was complaining of waiting around in Northland for further work, it was decided to pay him. A small claim for accommodation was also paid, and neither form part of this proceeding.

The claim for travel costs

[24] On 15 October 2015, and after Mr McGruddy had been advised that there would be no further work for him, he forwarded an invoice for $48,641.04 which was stated to be "for travelling expenses while working on contracts as per Schedule" and a Schedule entitled "mileage and away allowance owing to Sam McGruddy painting contractor as at 15 October 2015".

[25] Spotless denies any liability to pay this claim essentially on the basis that Mr McGruddy waived any right to claim travel costs in return for which he was given work that he would otherwise not have received.

[26] In his affidavit of 2 November 2018 Mr Frank Fox said:

> 6. Mr McGruddy was a good painter. He was always willing to take on work when able and certainly took advantage of any jobs that he could do outside on (sic) his home base of Masterton. Because it was only Mr McGruddy that would complete the work, he took longer to do a job compared to other painters who had larger teams. The larger teams could complete jobs in a more efficient and cost-effective manner than smaller operators like Mr McGruddy. In some instances, this resulted in the smaller operators charging additional accommodation costs and overnight allowances to complete a job. This meant that most jobs that Mr McGruddy was working on had a higher than average cost. There were also jobs that Mr McGruddy was not willing to undertake due to reasons of difficulty, which were not a reflection of his skills but rather the lack of support that the larger operators had.

[27] I understand these difficult jobs were multi-storey buildings or jobs involving significant scaffolding, which were undertaken better by the larger contractors with the necessary resources.

[28] Mr Frank Fox then said:

> 14. I distinctly recall on my first day at Spotless, Mr McGruddy called me to introduce himself. He was eager to let me know right away that he had an agreement with Spotless that he would not charge for mileage so that he could get more jobs out of town. He appeared to be very anxious about securing out of town work. I was happy to continue issuing Mr McGruddy jobs out of his area of Masterton on this basis, although I would always defer to the local contractor first.
>
> 15. It was important to me that Mr McGruddy did not charge Spotless for mileage because I wanted to keep Spotless cost down as much as possible, while also helping Mr McGruddy to take on additional work as he had requested. If Mr McGruddy was going to charge for mileage, Spotless would not have provided him with work outside of the Masterton area where there was someone else available in the area.

[29] Over the time he did work for Spotless up until 1 January 2015 Mr McGruddy never claimed for travel costs, where he might otherwise have been entitled to them pursuant to the terms of the Contract.

[30] Mr McGruddy did not reply to the affidavit of Mr Fox, although he did file an affidavit in reply dated 4 December 2019, in respect of affidavits sworn by a Mr Smith, and Mr Daniel Fox.

[31] In cross-examination Mr McGruddy denied ever telling anyone at Spotless he would not charge for mileage. He acknowledged that he had not charged for mileage until October 2015 and said in answer to a question whether he forgot about claiming mileage, he answered:

> Well I'm saying that I didn't do it. (NOE p.5)

[32] I do not accept the evidence of Mr McGruddy. I prefer the evidence of Mr Frank Fox and accept that the conversation he described took place. At that time Mr McGruddy knew how the system worked. He was confronted with a new Manager. He wanted to ensure the continuation of work outside the Masterton area which would only be given to him if he did not charge mileage. As a consequence he continued to

receive work outside that area and did not charge for mileage. Indeed, at one stage Mr McGruddy's brother was undertaking work in the Wellington area and a special arrangement was entered into whereby he was paid mileage because he preferred to return to his home in the evening, and so Spotless did not have to pay accommodation and agreed to pay the travel costs instead.

[33] Mr Harlowe for Spotless described the Contract as being in the nature of a standing offer. I accept that is the case. He quoted from the Laws of New Zealand (Laws of New Zealand Offer and Invitation to Treat) online ed at [20]):

> An exceptional form of contractual relationship which may arise out of a tender amounts to a "standing offer": that is, a tender which indicates a continuing willingness to supply such goods or to perform such services, without stipulation as to the particular quantum of goods or the extent of services, as may be requested by the offeree from time to time. In such a case the acceptance of the tender on any one occasion leaves the offer in existence for the future and there may be repeated acceptances, each giving rise to a separate contract.

[34] That the Contract is a standing offer contract is also confirmed by clause 3.2 of the Contract as referred to in para [8].

[35] The issue then becomes whether or not there can be an oral variation of a written agreement. This was considered by Associate Judge Osborne in *Beneficial Finance Ltd v Brown.*[1]

[36] He referred to various authority and concluded at [77]:

> *Virulite* is accordingly authority for the proposition that whether an oral variation becomes operative turns on the intention of the parties. The burden of proof rests on the party alleging the variation. The standard of proof is the balance of probabilities. The Court will need to assess all relevant evidence relating to the parties' contractual dealing. Finally, as recognised by Gloster LJ in *Energy Venture Partners*, there may be formal relationships, (such as banking relationships), in which the factual matrix of the Contract and other circumstances preclude the raising of an alleged oral variation to defeat an entire Agreement clause.

[1] *Beneficial Finance Ltd v Brown* [2017] NZHC 964.

[37] Spotless claims an affirmative defence of estoppel, in that it would be unconscionable for Mr McGruddy to be paid his historical mileage costs given that he has benefitted from the fruits of not doing so and getting more out of town work.

[38] I do not think that the Agreement with Mr Frank Fox not to charge mileage amounts to an estoppel as such. In my view the answer lies in whether or not the failure to charge mileage amounts to a waiver or forbearance.

[39] In Chitty on Contracts 33rd Edition at 22-040 the following is stated:

> Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the Contract, the Court may hold that he has waived his right to require the Contract to be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the Contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

[40] The fundamental difference between a variation and forbearance is that "the Agreement which varies the terms of an existing Contract must be supported by consideration". (Chitty op cit 22-035). Forbearance however does not require consideration.

[41] In this case I am satisfied that there was a waiver by estoppel in that the Agreement by Mr McGruddy not to charge travel costs resulted in him receiving additional work from Spotless which he would not have received without that Agreement, and which amounts to consideration supporting the waiver. It is accordingly now unconscionable for him to seek payment of travel costs when it is impossible for Spotless to recover those costs from New Zealand Steel.

[42] The claim for travel costs is accordingly dismissed.

Termination

[43] Mr McGruddy claims that he was entitled to 30 days' notice of termination. He claims that when Daniel Fox called and told him in October 2015 that there would

be no further jobs for the next season, that that amounted to termination of the Contract.

[44] As Mr Harlowe points out, any right to 30 days' notice under the sub-Contract is not a right to 30 days work and even if it was there was no work available for that 30-day period.

[45] It is clear that work was falling off. The parties were aware that jobs could cease at any time.

[46] In terms of the Contract Spotless was not obliged to give work to Mr McGruddy even if such work was available. The Contract would therefore come to an end when no further work was offered to Mr McGruddy, whether notice of termination was given or not.

[47] The claim for 30 days' income therefore cannot stand. Mr McGruddy's income only came from completed jobs, and those could be referred to him on an intermittent basis or not at all. There is accordingly no basis in logic for this claim.

[48] Furthermore clause 6.2 of the Contract states that:

> Notwithstanding any other provision of this Agreement, to the maximum extent permitted by law, Spotless will not be liable to contractor for any claim in the nature of loss of profits or revenue or for any indirect or consequential loss whatsoever related to or in any way in connection with the subject matter of the Agreement or the services.

[49] Mr McGruddy confirmed his familiarity with the terms of the Contract which he had signed and to which he was bound, and even if he was entitled to the income claimed, I am of the view that any such claim is precluded by clause 6.2, which might also have precluded the travel costs claim, although I did not have to consider that.

[50] Various reasons were advanced by Mr McGruddy to support his contention that the Contract had been terminated such as an allegation he had stolen paint, that Mr McGruddy had raised a "botched roof job" with possible implications for Mr Daniel Fox, and that there was a desire to prefer another contractor Mr Mike Smith

because of his personal connection with Mr Frank Fox. It is unnecessary to analyse these allegations.

[51] As I have said the Contract essentially came to an end because there was no further available work that Spotless, in its discretion could direct to Mr McGruddy.

Loss of earnings

[52] This is a claim by Mr McGruddy that he stayed in accommodation for 17 days from around the last week of March 2015 to wait for jobs that were meant to be sent to him by Frank Fox.

[53] In his affidavit Mr Fox said:

> 21. In around February 2015 I received a phone call from Mr McGruddy. He told me that he was going to the Coromandel to visit his daughter and to do some work and after that he was going to complete a job in Ruawai remaining from the 2013/2014 season. I advised Mr McGruddy against going to Ruawai as there were no other jobs up there for him and as such I would not be able to allocate him any work in the area. I would have got the local contractor up North to take care of that job. Mr McGruddy said that he had to go up North any way to do some work for a friend. Since Mr McGruddy insisted on going to Ruawai, I agreed to the Ruawai job but told him not to expect any other work.

[54] Mr McGruddy also claimed that there was a job in Ruakaka. Mr Fox said that in February 2015 that job did not exist. It was issued on 23 March 2015 and assigned to Mr McGruddy by Daniel Fox on 13 April 2015.

[55] There were inconsistencies in Mr McGruddy's evidence. He was unsure of the dates when he alleged that he was promised the job in Ruakaka. While allegedly waiting for these jobs to be referred to him Mr McGruddy stayed in Russell which is a substantial distance from both job locations. Mr McGruddy admitted that he had a friend in Russell although denied doing any work for him. Furthermore, while staying in Russell he had an unfinished job back in Masterton where Spotless had been incurring costs for scaffolding. New Zealand Steel refused to pay those costs.

[56] In April 2015 Mr Daniel Fox offered Mr McGruddy four jobs in Pokeno, Hibiscus Coast, Western Springs and the Ruakaka job. Mr McGruddy accepted the jobs at Pokeno and Ruakaka but declined the others as being too difficult for him to undertake.

[57] I accordingly reject the claim for loss of earnings on the basis that that claim has not been proved, and that when jobs became available they were offered to Mr Gruddy, he accepting two of the four that were available. Furthermore, in the event that this amounted to a valid claim it was again precluded by clause 6.2 of the Contract.

Conclusion

[58] Those findings effectively conclude the proceedings. There was a defence raised in reliance on the Limitation Act in respect of some early parts of the travel costs claim but that having been dismissed there is no need to consider the limitation argument.

[59] There was also a claim for distress damages, but that would require findings in favour of Mr McGruddy which has not been the case. In any event, such damages are not recovereable for breach of an ordinary commercial contract – *Mouat v Clark Boyce*.[2]

[60] All claims by Mr McGruddy having been dismissed, judgment is entered in favour of Spotless.

[61] Costs should follow the event assessed on a category 2B basis on which I invite the parties to agree, failing which I will receive memoranda.

G M Harrison
District Court Judge

[2] *Mouat v Clark Boyce* [1992] 2 NZLR 559.