

HOSKIN (TONY AND EMMA) v SILVA (JIM AND DORA)

Supreme Court Apia  
Ryan CJ  
1 August 1990

CONTRACT - Breach - failure to pay - counter-claim for defective and poor workmanship - damages sought.

HELD: Plaintiffs entitled to succeed on their claim for the balance of the money outstanding on the contract but defendants entitled to succeed on their counter-claim for defective workmanship. The Plaintiffs therefore had to pay the defendants \$1,116.24.

Kamu for Plaintiffs  
F Drake for Defendants

The Plaintiffs sue the defendants for the grand total of \$22,117.01. The Defendants counter-claim against the plaintiffs is even higher amounting to \$279,071.38. Both figures are out of all proportion to the evidence I have heard today.

Mrs Hoskin and Mrs Silva are first cousins and in 1988 both their husbands agreed that the Hoskins would erect a house on the Silva land at Afiamalu. Mr Hoskin went ahead and prepared some plans in accordance with the instructions given by the Silvas and those plans were for a rather elaborate dwelling totalling by my recollection inclusive of patio, attic and garage some 6,575 sq. ft. There was no set price for the dwelling. It was to be on what is commonly known as a cost plus basis.

An agreement was reached as to cost of labour and that the Hoskins would supply the materials and in addition that Mr Hoskin would be paid a supervision fee which was another factor in the equation. Work duly commenced initially with the clearing of the property by Mr and Mrs Hoskin and their employees and then the building proper was commenced. Accounts were submitted at regular intervals and were paid after Mrs Silva checked out the accounts which supported those statements or invoices until December when for one reason or another there was a short payment

amounting to \$7,890.55. Further work was carried out on the site after that statement of 5 December and a further account was rendered on 12 March for a total of \$36,117.01 which included the \$7,890.55 outstanding from the earlier account.

On 14 April some \$14,000 was paid leaving a balance of \$22,117.01, the Plaintiffs claim, including the claim for \$7,890.55, together with interest of 19% at overdraft rates which was never mentioned in this Court today on the \$22,117.01. Some little time was spent discussing the reasons for non payment in March but I have a strong inclination towards the view that at that particular point in time the Silvas were pressed for money and there was accordingly a short fall. Mr Silva was not here to give evidence today but various allegations were made in his absence. I must accept Plaintiffs evidence to the effect that he was going overseas to raise some more money. For whatever reason, work stopped and at some later point not very long thereafter Mr Craig was consulted and he inspected the site and was unwilling to take over the job. He was however prevailed upon to do so and commenced work to complete the house in July or August 1989.

Defendants counter-claim includes a figure of \$94,572.80 to remedy defects and poor workmanship. Today it has not been substantiated anywhere near that figure and in fact the witness Mr Craig and his electrician have established a sum of \$23,283.25 only. The cost of the electrical work was quite separate from the cost of completion. This was basically a claim for a quantum meruit for goods and services supplied and labour expended on remedying walls etc, the claim for costs, repairing the poor workmanship and bad practice.

The workmanship complained of is in four parts. The first relates to cracks in the floor slab. First of all Mr Hoskin denies there are any cracks. He has referred to cracks in the photographs produced here today as nothing more than is normal on a floor of this construction. Mr Craig placed strong emphasis on the fact that the series of photographs taken by him do not reveal the whole extent of the problem. The original claim under this heading was \$15,000.00 but all that has been substantiated has been the cost of repair of one of the alleged cracks namely \$4,019.25. The first aspect of the dispute relates to the workmanship carried out by Mr Hoskin and his employees and on that issue it is a matter for me to look at the evidence of Mr Hoskin and look at the evidence of Mr Craig and whatever other evidence that they have in support of their verbal testimony.

Mr Craig took some photographs. It has often been said that one photograph is worth a thousand words but the photographs were supported by other evidence. He referred to the crack and I have already mentioned that. He also referred to poor workmanship, the effect of which is that dividing walls have no strength,

block walls were not satisfactory and there were no cross pieces as stipulated in exhibit 6. Mr Hoskin said that that was normal practice and there was nothing untoward about that. Mr Craig also referred to the concrete walls which were out of plumb, to the failure to put felt under the interior walls. He said the Plaintiffs failed to put polythene under the concrete slab to prevent the leak of the concrete cement into the sand base. Wherever there is a conflict between the evidence of Craig and Hoskin I much prefer the evidence of Mr Craig. His evidence and the evidence that he has supplied from the photographs describes graphically to me that the Plaintiffs workmanship was defective and amateurish and lacking in any really proper workmanship for a so-called builder.

Dealing with the wall for example, he seemed to think that there was nothing wrong with the wall being a couple of inches out; that can be remedied when the outer layer of lava rock and an inner layer of plaster was put in place. That of course would cover up the bad workmanship but would not resolve the problem. Mr Craig mentioned that a builder would have problems completing the roof as a result. Mr Craig then did the work necessary to straighten the back wall. The counter-claim in that regard amounted to \$20,000 and all that has been proved here is a cost of \$6,000.

As to the structural defects once again Mr Craig has satisfied me that \$12,864.00 was necessary for that purpose.

As far as the electrician is concerned somebody whether it was Mr Hoskin or whoever it was, removed the electricity from the pole to the house and that required replacement. It seems to me that Mr Hoskin must bear the cost of that given that had there not been any bad workmanship there would be no need to employ Mr Craig and his workers to remedy the problems.

Mr Kamu has urged upon me not to decide on the plea of a bleeding heart of a young girl touching on my heart strings. I can assure him I feel nothing of the sort. What has occurred here quite demonstrably is that Mr and Mrs Silva were taken for a ride by Mr and Mrs Hoskin and were quite innocent parties.

The Silvas were no experts in this particular field and it is fortunate that they did run out of money when they did because by doing so they were able to uncover the problems which had occurred to that point in time as a result of poor workmanship. The Plaintiffs are entitled to succeed in their claim for the balance of the money outstanding but in the ultimate that will not mean a great deal because ultimately money must be paid by the Plaintiffs to the Defendants in the final analysis. The Plaintiffs strictly speaking are entitled to judgment for \$22,117.01. There is no question of being able to succeed with regard to any other part of their claim and or prayer for relief.

There will be no order for costs attached to that amount. On the counter-claim by the Defendants there will be judgment for \$23,283.25 together with costs and disbursements as fixed by the Registrar on that sum. The net result is that the Plaintiffs will pay the Defendants \$1,116.24 plus the costs that I have referred to.