

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : MINOQUE C.J.
Tuesday,
27th July 1971

BETWEEN DAVARA HOUSE PTY. LTD.
Plaintiff

AND DESMOND JAMES HAYWARD, TRADING AS
BOROKO RADIO & ELECTRONIC SERVICES
Defendant

NIL
nil 19, 20
nil 27.
AND HENNESSY.
Minogue C.J.

The plaintiff sues for damages for the non-performance of three contracts for the supply of goods and for work and labour to be done. As I see it strictly there are two contracts, the third being in reality a variation of the second. Each of the contracts relates to the supply and installation of electronic sound equipment in the Davara Motel.

The first contract is set out in Order No.101 given to the defendant by the plaintiff on 7th June 1969 and was for the supply and installation of standby amplifying equipment, the details of which were set out in a quotation attached to a letter from the defendant to the plaintiff and dated 1st May 1969. For reasons which were not made clear to me although the defendant stated that delivery could be expected within five weeks the equipment was not in fact installed until about the time that the new wing of the Davara Motel was opened on 24th May 1970. However, apart from the frustrations suffered by the plaintiff in the completion of this new wing no particular point seems to have been made up to that time of non-delivery and in fact the equipment was installed in apparent working order and remained so for some two or three weeks. As I understand the evidence its performance was in large measure affected by the wiring which was the subject of the second contract and within a short time it ceased to function and an amplifier or more than one of the amplifiers blew out. I appreciate that in the performance of this contract the defendant suffered a number of difficulties, not the least of which was the failure of the head contractor for the building to allow him on the site to efficiently and properly instal his wiring. It may be too that the lack of a properly enclosed cabinet had something to do with the failure of the equipment to function. However, there was no evidence before me that the plaintiff was advised that the equipment would not or may not function due to any wrongdoing or default on its part. Although originally time was not made of the essence of the contract, by a letter dated 7th July the defendant was called upon to complete the contract by 13th July and threatened that if the completion was not effected the contract would be cancelled for non-performance and the defendant would be compelled to refund the deposit of \$300.00 which had been paid in

June 1969. I am satisfied that the defendant did not perform his contract and the plaintiff properly repudiated its obligations under the contract and that it is entitled to the refund of its deposit, \$300.00.

However, the plaintiff has also sought damages for the loss of the use and enjoyment of the amplifying equipment resulting, as it was asserted, in the hire of a band to provide music for the public areas of the Davara Motel. The cost of providing this entertainment I am satisfied amounted to \$4,470.50. I cannot regard this amount as being in the contemplation of the parties at the time of the making of the contract, and I do not regard the hire of the band as naturally flowing from the breach nor am I satisfied that such a hiring was the not unlikely result of the defendant's breach. I say nothing of the duty of the plaintiff to mitigate its damage and in my view the hire of the musicians was an unforeseeable after-thought. There has not been shown me any other damages, for example by way of loss of patronage, which the plaintiff should succeed in recovering and so under this head of claim I find for the plaintiff in the sum of \$300.00.

The other two contracts have caused me greater difficulty, the more so as the evidence is both scanty and to some extent inconclusive. The second contract contained something of a hotch-potch of items. By Order No. 075 of 15th August 1969 the defendant was requested to supply the undermentioned goods in good order and condition:

- (1) 33 bedhead speaker outlets at a total cost of \$660.66;
- (2) 15 loud speaker units complete for lounge, reception, car park, lift and poolside bar, at a total cost of \$230.00;
- (3) cables for connections, conduits and outlets, \$223.00; and
- (4) labour, installation and technical services for installing and wiring 48 speaker units including the bedhead units, microphone outlets, converting and modifying Toshiba sound system to Supply stage 2 requirements matching into new standby amplifier and including all repairs to Toshiba amplifier after burn-out. Also to finalize to satisfactory conclusion for radio-music and paging to all units of complete installation.

The amount quoted for this last item was \$400.00.

The order in setting out a required delivery date set out the building completion date which was then noted as 15th February 1970. As will be seen there are a number of disparate matters comprised in this contract. A Toshiba sound system which had been installed in the original section of the Motel had burnt out and needed repair. The amplifying equipment the subject of the previous contract was to be supplementary to the Toshiba equipment and the defendant was to supply 48 speaker outlets for the second stage of the Motel building, it being understood that both the Toshiba and the standby equipment

were also to service the original building. A considerable amount of wiring was required and the contract included the supply of 1700 yards of cable.

I found the sequence of events somewhat confusing. However it seems that probably in November 1969 Mr. Allan Woodward, a Director of the plaintiff, was called upon to solve the problem of the head contractor's (Warobe Constructions) not having, as it was supposed to do, inter alia installed conduits for the defendant's wiring. Mr. Woodward acquired a diamond drilling machine and did a considerable amount of drilling both in the flooring and walls of the building. The defendant subsequently installed his wiring but I am satisfied that it was not done in a good and workmanlike manner and that it was insufficient or inefficient for the purpose for which it was required. There seems to be a very real probability that the wiring in the bar area is causing short circuits but as most of this is embedded in concrete it is virtually impossible to achieve certainty on this aspect. I appreciate that the defendant was working against time so that everything would be ready for the opening day on 24th May but this cannot excuse him for non-performance of his contract to finalize his wiring to a satisfactory conclusion for radio-music and paging to all units of the complete installation. In the result the wiring is unsatisfactory and inefficient.

As to the repair of the Toshiba equipment the defendant ran into trouble, partly if not wholly it seems owing to the failure of the Toshiba company to supply him with a proper amplifier panel. However, that is something for which the plaintiff cannot be held liable and whatever loss there is in this regard must be borne by the defendant. It seems that at some stage the defendant advised the plaintiff that the only satisfactory solution would be for the defendant to design and build three new amplifiers for the Toshiba equipment. This led to the order given by the plaintiff on 24th April 1970 to supply three new amplifiers at a total cost of \$579.00. Although it was said that \$300.00 was paid as a deposit against the supply of these amplifiers I am not satisfied that more than \$300.00 was so paid. Again on 7th July 1970 the defendant was called upon to complete this contract by 13th July. He had failed to do so as late as September and the plaintiff, justifiably in my view, repudiated the contract and is entitled to the return of his deposit of \$300.00.

It was urged upon me that I should also award to the plaintiff a sum by way of damages for non-performance of the two latter contracts which would take into account the necessity of the plaintiff's having to have the new portion of the motel rewired and to allow for the greater expense incurred by the plaintiff in having Amalgamated Wireless (W/Asia) Limited carry out the rewiring and the repairs to the Toshiba equipment at a greater cost than that initially contracted for.

This aspect of the case has caused me some difficulty. I have omitted to mention that the defendant in fact supplied (and indeed installed) the 33 bedhead speaker outlets and seven of the other speaker units and in my opinion is entitled to be paid for those items, an entitlement to \$767.67. The plaintiff paid a deposit of \$500.00 against these items and the other goods and labour comprised in the contract of 11th August 1969. Whilst the defendant is not entitled to be reimbursed for the wiring which he has carried out I do not think that he can be charged with the new wiring which is to be undertaken by Amalgamated Wireless. It is a different and more expensive type of wiring and one which he had not contracted to instal. He has failed to perform his contract which was to instal satisfactory wiring and of course if he had been paid for the performance of that contract he would have been bound to have reimbursed the plaintiff. He would also be bound to reimburse the plaintiff for any proven loss or damage sustained by reason of the inefficient wiring, for example the cost of removing such wiring if it were found necessary to remove it, but there was no evidence before me that any such cost has been or will be incurred.

As I see it the plaintiff is entitled to recovery of his deposit on the first contract, \$300.00, and the recovery of his deposit on the contract for the supply of amplifiers, also \$300.00. In the case of the second contract he is not entitled to the return of the deposit because the contract was in part completed and it is not an entire contract in the sense that the defendant is not entitled to any payment until the whole of the work has been completed. In fact it appears there is a balance of \$267.67 owing to the defendant. However, the defendant has not counter-claimed for this amount and unless the plaintiff is prepared to treat the action as if a counter-claim had been lodged I would find for the plaintiff for \$600.00. If the plaintiff is prepared to treat the matter on the basis that a counter-claim has been lodged then my judgment would be reduced by the amount of \$267.67.