Achille Constructions P/L v Beare [2000] NTSC 87

PARTIES:	ACHILLE CONSTRUCTIONS PTY LTD (ACN 059 758 897) v MICHAEL BEARE & GAVIN BEARE T/AS BEARE HOMES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	LA11 of 2000 (9916654 & 9916653)
DELIVERED:	13 October 2000
HEARING DATES:	21 August 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL FROM MAGISTRATE

Appeal – appeal from Magistrate – non-suiting the plaintiff's cases – plaintiff not contracted with defendant – application to substitute plaintiff – admissions and denials in pleadings - whether an admission is an issue for determination at trial – issue between parties is faulty workmanship – magistrate erred in non-suiting the appellant – appeal allowed

Local Court Rules 1900 (NT) r 5.14, r 12.05 and r 12.06

Warner v Sampson [1959] 1 QB 297, JN Taylor Holdings(In Liq) v Bond (1994) 62 SASR 605; cited.

Vordermeier v Alguna Developments Pty Ltd & Kenmore Developments Corp Pty Ltd (No 3) (1997) 195 LSJS 472; referred to.

REPRESENTATION:

Counsel:

Appellant:	B O'Loughlin
Respondent:	J Dearn and F Davis

Solicitors:

Appellant:	Cridlands
Respondent:	Davis Norman
Judgment category classification:	C
Judgment ID Number:	tho200024
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Achille Constructions P/L v Beare & Another NTSC 87
No. LA 11 of 2000 (9916654 & 9916653)

BETWEEN:

ACHILLE CONSTRUCTIONS P/L (ACN 059 758 897)
Appellant

AND:

MICHAEL BEARE & GAVIN BEARE T/AS BEARE HOMES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 13 October 2000)

[1] This is an appeal from the decision of a stipendiary magistrate in the Local Court in Darwin. On 6 April 2000 the learned stipendiary magistrate made orders in which he non suited the plaintiff company. The plaintiff company's claim was dismissed and the application to substitute Mr Alf Maimone as the plaintiff was dismissed. The essential basis for the order non suiting the plaintiff company was that the learned stipendiary magistrate found there was no evidence of a contract between the plaintiff company and the defendant, Beare Homes.

[2] The grounds of appeal are as follows:

"1. The learned Stipendiary Magistrate erred in law in non-suiting the plaintiff's case.

2. The learned Stipendiary Magistrate erred in law in finding the plaintiff had not contracted with the defendant.

3. The learned Stipendiary Magistrate erred in law in dismissing the plaintiff's application to substitute Alf Maimone as plaintiff.

4. The learned Stipendiary Magistrate assumed the role of advocate for the defendants and so created an impression that there was not a fair trial."

[3] In answers to Further and Better Particulars dated 4 August 2000, solicitors for the appellant indicated that the appellant no longer relies on Ground 4 of the Grounds of Appeal.

[4] The background to this matter is as follows:

[5] The plaintiff company (hereinafter referred to as the appellant) commenced two separate actions in the Local Court in Darwin against the first defendant, Michael Beare and Gavin Beare trading as Beare Homes (hereinafter referred to as the respondent). In action No. 9916653 Symone Ivy Brooks and Chief Executive Officer (Housing) were named as second defendants and in action No. 9916654 Dianne Elizabeth Stevens and Chief Executive Officer (Housing) were named as the second defendant.

[6] The hearing of the two actions proceeded together.

[7] The appellant in its statement of claim in respect of both actions was claiming money for work carried out by the appellant, namely, constructing interior and exterior brick walls at the request of the respondent who were

the contractors responsible for the construction of houses on Lots 5333 and 5334 Hutcheson Terrace, Bakewell, Palmerston. The second defendant in the two actions before the Local Court were the owners and registered proprietors of Lots 5333 and 5334 Hutchison Terrace, Bakewell, Palmerston.

[8] The appellant alleges that it entered into a contract with the respondent to construct block work walls on the two houses that were on the blocks of land owned respectively by the second defendants in the two Local Court actions.

[9] The sole director of the appellant company is Mr Alfio Maimone. The appellant company claims that it performed the work at the request of the respondent who has declined to pay.

[10] It is the appellant's submission that the only basis on which the respondent declined to pay was because the respondent alleged poor workmanship on the part of the appellant. It is the appellant's submission that the alleged poor workmanship was the only issue between the appellant and the respondent in the trial before the learned stipendiary magistrate. It is the appellant's contention that the respondent had admitted that it had a contract with the appellant company in the course of the pleadings and accordingly there was no basis for the learned stipendiary magistrate to have non suited the appellant for failing to establish on the evidence that the appellant had a contract with the respondent.

[11] Set out hereunder are the learned stipendiary magistrate's reasons for non suiting the appellant (t/p 25 – 27):

> "…… Earlier today I indicated that there was no evidence to the intent that the plaintiff company, Achille Constructions Pty Ltd, had contracted with the Beares. The best evidence was that there was a contract between Mr Maimone and the Beares, a contract with a different person. I then embarked on a process to, for want of a better expression, try to salvage this situation. I did not proceed to immediately non suit the plaintiff company because I was conscious of the fact that we'd spent a day in court yesterday on one issue that could have been resolved if Mr Maimone had been substituted as the plaintiff; that issue being the issue of, for want of a better expression, the faulty workmanship, what must be done in that situation.
>
> Now, since that occasion I've had cause to consider r 12.05 and 12.06 of the Local Court Rules. I do not think that it is appropriate that Mr Maimone be substituted for the plaintiff company. Rule 12.05 of the Local Court Rules, were relevant, states: 'At any stage of the proceedings the court may (inaudible) paragraph (c) a person to whom paragraph (b) refers be substituted for the person whom paragraph (a) refers'. If I go through paragraph (b) I am not satisfied that Mr Maimone is a person who should be added for – by virtue of the operation of paragraph (c) (inaudible) substituted as a party. Paragraph (b) subparagraph (i) refers to a person who ought to have been joined as a party.
>
> Mr Maimone cannot be joined as a party; here the company and Mr Maimone have a different interest. It's not a situation where Mr Maimone and the company can join together (inaudible) common interest to sue (inaudible) different (inaudible). It would seem that in this case a mistake has been made as to who holds the right to, for want of a better expression, take the action. Who holds the right to take a course (inaudible) proceedings and breach of contract? Who holds the right to take action to (inaudible). The matter is proceeded on the basis that the company holds that right.
>
> The best indication from Mr Maimone's evidence is that the company does not hold that right but Mr Maimone himself does. It would seem that because Mr Maimone and the company do not have a common right it cannot be seen as if (inaudible) the plaintiff and Mr Maimone can sue together because they have (inaudible) discretion a common interest.
>
> In relation to paragraph (b)(ii), Mr Maimone's presence before the court could ensure that some questions must be – are properly

and completely – properly determined, that is the issue relating to the faulty workmanship. Reference is made in paragraph (b)(ii) to completely (inaudible) Mr Maimone's complete – if he's joined all issues before the court will not be completely returned. The only issue could be determined if Mr Maimone (inaudible). As I've said the issue that I've shortly expressed as the faulty workmanship.

I look at paragraph (b)(iii), 'the person in respect of whom there may exist a question arising out of, relating to or connecting to a claim in proceedings', and it's (inaudible) to determine the question between that person (inaudible) between the parties to the proceedings. The claim here, to my mind, has to assume – the words 'a claim in proceedings', assumes that the proceedings are sound and far ongoing. Here these proceedings and, as I apprehend them, are not sound; the wrong party is suing. The claim by the company cannot be established. It is not a valid claim, and it seems to me that any joinder – and (inaudible) pursuant to paragraph (b)(iii), has to be in the context of a valid ongoing claim (inaudible) claim which was unsound.

Rule 12.06 does not apply. I don't have an affidavit from Mr Maimone seeking to join. I don't think it's appropriate for – reliance cannot be made on r 12.05 or 12.06. It seems to me that all that can be done in this case is non suit the plaintiff. The plaintiff sues in its own right. It is clear on my consideration of the evidence of Mr Maimone who was given a chance today, having been recalled to clear up any gaps in the evidence, that it's clear that the contract from the point of view of the plaintiff – I can say that from the point of view of Mr Maimone it was between Mr Maimone and the Beares.

Mr Maimone gave his evidence in the first person, I've already gone over this. There was question about work (inaudible) carried out on lot 533 and 534 Town of Palmerston. A lead up to the contracts – any head contract with Michael Beare – met him in his office, 'he gave me a copy of two plans for two houses; approximately one week later I' – first person – 'started working in the houses'. He was asked: 'who was the agreement between?' 'Between myself and Michael Beare trading as Beare Homes.' He was asked: 'what was Achille Constructions to do?' Answer: 'I –' I, in the first person – 'was to go on site and lay the blocks and I did and supply the mortar (inaudible) sand and cement'.

Then later on there was a question about the supply of blocks: 'is it normal for blocks to be supplied by another?', and then he gave an answer which included the words: 'some builders supply a package deals'. Well, the best evidence here is that Mr Maimone, himself, contracted. There is no evidence for Mr Maimone that he said: 'when I dealt with Mr Beare I said I am contracting on behalf of my company. Please bear in mind I am contracting on behalf of my

company'. There was not even one bit of evidence from Mr Maimone that he was contracting as an undisclosed principal. He was asked: 'who was the agreement between?', his answer: 'between myself and Michael Beare'. He did not say: 'between my company and me as an agent (inaudible) as the company's agent and Michael Beare'.

(Inaudible) for those reasons the plaintiff company is non suited. The plaintiff company's claim will be dismissed and the application to, for want of a better expression, join Mr Maimone or substitute Mr Maimone for the company is refused."

[12] The submission of Mr O'Loughlin, counsel for the appellant, is that on the pleadings the appellant had in its statement of claim alleged that the appellant and respondent had entered into a contract and in the notice of defence and counterclaim the respondent had admitted it had a contract with the appellant company.

[13] Accordingly, it is submitted on behalf of the appellant this was not a live issue in the trial before the learned stipendiary magistrate who erred in requiring proof of an admitted fact.

[14] Williams Supreme Court Civil Procedure states in Chapter 9 (9.03):

"The pleadings give notice to each side of the case which the other party will present at trial. They also help to define the issues on which the court must adjudicate. The pleadings are complete on service of the last pleading. Then, the pleadings will show what facts are alleged by both sides, and also which of those facts are admitted and which denied. An admission removes the fact admitted from the arena of controversy and evidence to establish the fact cannot be introduced at trial. Only facts that are denied or stated to be not admitted remain; they constitute the questions of fact which the court will decide at trial."

[15] It is appropriate to turn to the pleadings and the relevant paragraphs in the appellant's Amended Statement of Claim and the respondent's Amended Notice of Defence and Counterclaim. The pleadings are similar in each action but to avoid confusion I have set them out separately. In respect of action No. 9916653:

> "**Particulars of Claim**
>
> 4. By an oral agreement made on or about 13 June 1999 between the Plaintiff and the First Defendant ("the Agreement") the Plaintiff and the First Defendant agreed that the Plaintiff would undertake the works necessary to construct the brick walls both exterior and interior on Lots 5333 and 5334 for the consideration of $11,000.00.
>
> 5. Up to and including 29 June 1999, pursuant to the Agreement the Plaintiff undertook work and furnished materials on the Land with the consent of the Second Defendants, completing the construction of the dwelling house on Lot 5334.
>
> **Particulars of Work**
>
> The particulars of work undertaken and the materials furnished (not including bricks) by the Plaintiff on the Land was the construction of exterior and interior walls.
>
> 6. The Plaintiff tendered an invoice for the contract price pursuant to the Agreement for $11,000.00 to the First Defendant, with the sum of $5,500.00 being that part of the contract price which relates to the construction of Lot 5334. The First Defendant has failed and/or refused to pay the Plaintiff the contract price.
>
> 7. On or about the 20 July 1999, pursuant to section 10(2)(a) of the Act, the Plaintiff gave to the First Defendant a notice in writing demanding the payment of the sum of $5,500.00.
>
> 8. On or about the 20 July 1999 the Plaintiff pursuant to sections 10(3) and 10(4) of the Act registered lien in respect of its claim for the sum of $5,500.00 by lodging a notice of lien with the Register–General at Darwin in the Northern Territory of Australia."

[16] The respondent's Notice of Amended Defence on action No. 9916653:

"4. The First Defendant refuses to plead to this Paragraph upon the basis that the Paragraph refers to separate causes of action. The second cause of action is contained in action 9916654. The First Defendant further says that paragraph is not a proper pleading.

5. The First Defendant does not plead to Paragraph 5 as it makes no allegation against them except to say that the Plaintiff never completed any Contract between it and the First Defendant.

6. In respect of Paragraph 6, the First Defendant relies upon the Statement that the Contract price in respect of Lot 5334 was $5,500.00. The First Defendant further raised the Special Defence that the issue of proceedings by the Plaintiff for the sum of $5,500.00 is an abuse of the due process of the Court and the First Defendant relies upon the provisions of the Small Claims Act and in particular Sections' 5 and 24 of that Act.

7. The First Defendant admits receiving what is alleged to be a request for payment of $5,500.00. The First Defendant denies that the alleged request was valid notice pursuant to Section 102(2)(a) for the following reasons:-

   (a) The Plaintiff had repudiated any Contract as alleged.

   (b) The Act referred to does not exist and the First Defendant refers to and repeats Paragraph 1(b) hereof.

   (c) The Plaintiff had repudiated any Contract as alleged when the Plaintiff refused to rectify faulty workmanship.

   (d) The First Defendant executed a Lien before any notice as alleged was executed, Section 102(2)(a).

8. The First Defendant denies Paragraph 8 in that whilst it admits that on or about the 20 July 1999, the Plaintiff registered a lien for the amount of $5,500.00, it raises the Special Defence that:-

   (a) The Plaintiff has repudiated the Contract as alleged.

   (b) That at the time of registration of the lien, the Plaintiff knew that it had no enforceable right to register the lien as no payment was due to it.

   (c) That the registration of the lien was to the knowledge of the Plaintiff and it's Solicitor, vexatious and/or without any reasonable grounds and was motivated by malice to embarrass the First Defendant."

[17] Paragraph 2 of the respondent's Counterclaim on action No. 9916653:

"2. That the First Defendant claims from the Plaintiff the following amount being the cost of rectifying faulty work subsequent to the Plaintiff repudiating any Contract:-

(a) Cost of repairing faulty door frame and surround – amount not yet known.

(b) $1,886.50 being the cost of faulty brick wall.

(c) The Plaintiff represented to the First Defendant that it only employed superior tradesman. Upon the basis that the Plaintiff represented to the First Defendant that it, the Plaintiff, was required to pay it's employee 10 cents extra per brick, such extra cost was passed onto the First Defendant. The representation was false as evidenced by the faulty workmanship. The First Defendant seeks a variation of any Contract by 10 cents per brick. The total amount involved being $270.00.

(d) That during the month of July 1999, a Director of the Plaintiff told both the persons named as the First Defendant that if certain money was not paid to the Plaintiff then the house property being the subject matter of this action would be damaged. In fact, the Plaintiff as previously described herein maliciously caused damage to the brick block wall of the property and the First Defendant was required to expend $340.00 to repair the damage."

[18] In respect of action No. 9916654:

"**Particulars of Claim**

4. By an oral agreement made on or about 13 June 1999 between the Plaintiff and the First Defendant ("the Agreement") the Plaintiff and the First Defendant agreed that the Plaintiff would undertake the works necessary to construct the brick walls both exterior and interior on Lots 5333 and 5334 for the consideration of $11,000.00.

5. Up to and including 29 June 1999, pursuant to the Agreement the Plaintiff undertook work and furnished materials on the Land with the consent of the Second Defendants, completing the construction of the dwelling house on Lot 5333.

Particulars of Work

The particulars of work undertaken and the materials furnished (not including bricks) by the Plaintiff on the Land was the construction of exterior and interior walls.

6. The Plaintiff tendered an invoice for the contract price pursuant to the Agreement for $11,000.00 to the First Defendant, with the sum of $5,500.00 being that part of the contract price which relates to the construction of Lot 5333. The First Defendant has failed and/or refused to pay the Plaintiff the contract price.

7. On or about the 20 July 1999, pursuant to section 10(2)(a) of the Act, the Plaintiff gave to the First Defendant a notice in writing demanding the payment of the sum of $5,500.00.

8. On or about the 20 July 1999 the Plaintiff pursuant to sections 10(3) and 10(4) of the Act registered lien in respect of its claim for the sum of $5,500.00 by lodging a notice of lien with the Register–General at Darwin in the Northern Territory of Australia."

[19] The respondent's Notice of Amended Defence on action No. 9916654:

"4. The First Defendant refuses to plead to this Paragraph upon the basis that the Paragraph refers to separate causes of action. The second cause of action is contained in action 9916653. The First Defendant further says that paragraph is not a proper pleading.

5. The First Defendant does not plead to Paragraph 5 as it makes no allegation against them except to say that the Plaintiff never completed any Contract between it and the First Defendant.

6. In respect of Paragraph 6, the First Defendant relies upon the Statement that the Contract price in respect of Lot 5333 was $5,500.00. The First Defendant further raised the Special Defence that the issue of proceedings by the Plaintiff for the sum of $5,500.00 is an abuse of the due process of the Court and the First Defendant relies upon the provisions of the Small Claims Act and in particular Sections' 5 and 24 of that Act.

7. The First Defendant admits receiving what is alleged to be a request for payment of $5,500.00. The First Defendant denies that the alleged request was valid notice pursuant to Section 102(2)(a) for the following reasons:-

   (a) The Plaintiff had repudiated any Contract as alleged.

   (b) The Act referred to does not exist and the First Defendant refers to and repeats Paragraph 1(b) hereof.

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(b) That at the time of registration of the lien, the Plaintiff knew that it had no enforceable right to register the lien as no payment was due to it.

(c) That the registration of the lien was to the knowledge of the Plaintiff and it's Solicitor, vexatious and/or without any reasonable grounds and was motivated by malice to embarrass the First Defendant."

[20] Paragraph 2 of the respondent's Counterclaim on action No. 9916654:

"2. That the First Defendant claims from the Plaintiff the following amount being the cost of rectifying faulty work subsequent to the Plaintiff repudiating any Contract:-

(a) Cost of repairing faulty door frame and surround – amount not yet known.

(b) $1,886.50 being the cost of faulty brick wall.

(c) The Plaintiff represented to the First Defendant that it only employed superior tradesman. Upon the basis that the Plaintiff represented to the First Defendant that it, the Plaintiff, was required to pay it's employee 10 cents extra per block, such extra cost was passed onto the First Defendant. The representation was false as evidenced by the faulty workmanship. The First Defendant seeks a variation of any Contract by 10 cents per brick. The total amount involved being $270.00.

(d) That during the month of July 1999, a Director of the Plaintiff told both the persons named as the First Defendant that if certain money was not paid to the Plaintiff then the house property being the subject matter of this action would be damaged. In fact, the Plaintiff as previously described herein maliciously caused damage to the brick block wall of the property and the First Defendant was required to expend $340.00 to repair the damage."

[21] Counsel for the respondent argues that at the time of trial before the learned stipendiary magistrate, counsel for the then plaintiff only referred the court to paragraph 4 of the Amended Statement of Claim and Amended Notice of Defence. The learned stipendiary magistrate did not in his discretion find an implied admission of a contract between the plaintiff and the defendant.

[22] It is the submission on behalf of the respondent that the plaintiff has, in effect, accepted that which stood before the court before amendment as being no longer material before the court (*Warner v Sampson* [1959] 1 QB 297).

[23] Further, Mr Dearn on behalf of the respondent, states that at the conclusion of the appellant's evidence before the learned stipendiary magistrate the appellant did not raise with the Local Court that it was not required to prove a contract between the plaintiff and the first defendant as regards the plaintiff's claim against the second defendant (*JN Taylor Holdings (In Liq) v Bond* (1994) 62 SASR 605).

[24] With reference to the decision in *Vordermeier v Alguna Developments Pty Ltd & Kenmore Developments Corp Pty Ltd (No 3)* (1997) 195 LSJS 472, it is the respondent's argument that the learned stipendiary magistrate was quite properly of the view that he had to address the aspect of the unsatisfactory evidence on the issue of whether there had been a contract entered into between the appellant and the respondent.

[25] The transcript of evidence of proceedings before the learned stipendiary magistrate sets out on pp 5 – 6 on 6 April 2000 the magistrate's concerns about what he perceived to be a defect in the evidence as to whether there was a contract between the appellant and the respondent. The then counsel for the appellant in the Local Court did not provide a great deal of assistance to the learned stipendiary magistrate. After a brief discussion as to par 4 in the Amended Statement of Claim and par 4 in the Amended Notice of Defence filed for the first defendant, counsel for the plaintiff appeared to concede the point raised by the learned stipendiary magistrate and sought to amend the pleadings to join Mr Maimone as a party to the action.

[26] The court held that there was no admission on the pleadings of a contract between the plaintiff and the first defendant and there was, by necessary implication, a denial of any such contract.

[27] The learned stipendiary magistrate did not have drawn to his attention paragraphs 5, 6, 7 and 8 of the Amended Statement of Claim, Notice of Defence and paragraph 2 of the respondent's Counterclaim, which have been set out in paragraphs [15] to [20] inclusive above.

[28] On a reading of all of the relevant paragraphs in the pleadings, I have concluded that the clear inference to be drawn is an admission that the respondent had entered into a contract with the appellant and this was not an issue for determination at trial in the Local Court.

[29] Rule 5.14 of the Local Court Rules provides as follows:

> "(1) An allegation of fact in a pleading is to be taken as admitted unless, in the pleading of the opposite party, it is –
>
> (a) denied specifically or by necessary implication; or
>
> (b) stated to be not admitted.
>
> (2) A party who specifically denies an allegation of fact must state what facts he or she relies on as the basis of the denial.
>
> (3) A party who intends to prove facts that are different from those pleaded by the opposite party must –
>
> (a) specifically deny the facts pleaded or state that the facts pleaded are not admitted; and
>
> (b) plead the facts he or she intends to prove."

[30] The learned stipendiary magistrate did not have the benefit of submissions on Chapter 9.03 of Williams Civil Procedure.

[31] I have read the transcript of the evidence given by Mr Maimone in the Local Court. Mr Maimone gave evidence that he is the director of the appellant company, Achille Constructions Pty Limited. His evidence is the appellant company is a building company which carries out brick and block laying contracting. The Certificate of Incorporation of the appellant company was marked Exhibit 1. Mr Maimone did state that the agreement was between himself and Michael Beare trading as Beare Homes. He said the agreement was that he was to go on to the site and lay the blocks and supply the mortar being sand and cement. He gave evidence that in accordance with a normal contract Beare Homes supplied the blocks. Mr Maimone gave further evidence in chief as to the contract price, the conversations he had with Gavin Beare in relation to the blockwork and Mr Maimone's concerns that

the blocks were uneven, the work he carried out to complete the two houses, the conversation with Michael Beare about payment of the invoices, the subsequent meeting with Michael Beare who complained about the poor workmanship in the block work and the steps Mr Maimone subsequently took with respect to the two houses. Mr Maimone was cross examined quite extensively. From a reading of the transcript the whole thrust of the cross examination was directed to the issue of faulty workmanship. During the course of cross examination a number of photographs were referred to and questions asked relating to Mr Maimone's claim that the blocks that had been supplied by the respondent were damaged and uneven. I am unable to discern any cross examination in which the respondent raises the issue that there was no contract between the appellant the respondent.

[32] This reading of the evidence given in the proceedings confirms that the issue between the parties was the standard of workmanship. This confirms the submission made on behalf of the appellant that the respondent had acknowledged on the pleadings either directly or by implication that the appellant company and the respondent did have a contract between them in which the appellant was to carry out certain work under contract with the respondent. Mr Maimone did give evidence that it was he personally who discussed matters with the respondent and arranged for the work to be done. This is understandable as Mr Maimone is the sole director of the appellant company and the person doing the work and involved in discussions about the work. However, in the context of the pleadings and the issues at trial,

the issue of a contract between the appellant company and the respondent had been removed from "the arena of controversy".

[33] After the learned stipendiary magistrate had raised a query as to uncertainty as to whom the contract was between, the then counsel for the appellant pointed out that it had not been denied on the respondent's pleadings that the contract was between the appellant and the respondent. He then called Mr Maimone to give further evidence on this issue. Mr Maimone stated he was the sole director of the company, that he ran the company and had authority to enter into contracts on behalf of the company. In cross examination he stated the dealings with Michael or Gavin Beare were always with himself and not the people he employed. There was no written contract. His Worship expressed his concern about the inadequacy of the evidence that there was a contract between the appellant and the respondent and that when asked who the agreement was between, Mr Maimone had replied myself and Michael Beare trading as Beare Homes.

[34] Counsel for the appellant in the Local Court advised his Worship that the respondent had not expressly denied a contract between the appellant and the respondent.

[35] Counsel for the appellant did not then proceed further to draw his Worship's attention to all of the pleadings or address the Court on the effect of the pleadings which was that it was not a matter for evidence whether there was

a contract between the appellant company and the respondent because such a contract had been admitted on the pleadings.

[36] The learned stipendiary magistrate was not given a great deal of assistance by counsel as to the situation with the pleadings or that the issue of whether there was a contract between the appellant and the respondent was not a matter for evidence. In his reasons for non suiting the appellant the learned stipendiary magistrate made no reference to the pleadings and confined himself to the evidence. I have come to the conclusion that in proceeding in this way the learned stipendiary magistrate fell into error.

[37] I accept the submission made by Mr O'Loughlin on behalf of the appellant that the learned stipendiary magistrate erred in law in non suiting the appellant for failing to prove that it contracted with the respondent.

[38] Accordingly, I would allow the appeal.

[39] I will hear the parties as to the appropriate consequential orders and the question of costs.

———————————————————