

**IN THE DISTRICT COURT
AT AUCKLAND**

CIV-2009-004-001210

BETWEEN PROVISION TECHNOLOGIES LIMITED
Plaintiff

AND DRURY INVESTMENTS LIMITED
Defendant

Hearing: 24 March 2010

Appearances: M Keall for Plaintiff
A Ram for Defendant

Judgment: 1 April 2010 at 9.15 am

JUDGMENT OF JUDGE A-M J BOUCHIER

[1] This is a claim by the plaintiff, Provision Technologies Ltd, against the defendant, Drury Investments Limited, for payment for audiovisual equipment installed at premises at 733/1 Remuera Road, Remuera, at a cost of \$12,585.75. The plaintiff's brief statement of claim claims that amount.

[2] The defendant has filed a statement of defence and counter claim, in essence disputing the amount owing.

[3] The counter claim claims under s 9 of the Fair Trading Act that the defendant's contractor was misleading or deceptive and that the defendant was misled and suffered loss and damage, and seeks damages of \$12,200 plus 18 percent interest.

[4] The second counter claim claims that the plaintiff owed a fiduciary duty to the defendant and that the plaintiff breached such a relationship of fiduciary duty and the defendant has then suffered loss in the sum of \$12,000.

[5] The third counter claim is one of knowing assistance that the plaintiff's representative assisted in the breach of fiduciary duty, therefore causing the same loss and the same damages amount is sought.

[6] The next counter claim claims exemplary damages for misrepresentation in the same sum.

[7] I will deal with some of these counter claims, all of which have been denied by the plaintiff at the outset.

[8] It is absolutely plain that, in a simple debt-collecting case, there is no fiduciary duty on the plaintiff. That counter claim is struck out.

[9] Similarly with the counter claim of 'knowing assistance'. Whatever that may mean, it is not something that I understand to be the law in this jurisdiction and it will be similarly struck out.

[10] The same with the counter claim seeking exemplary damages for misrepresentation. This, again, is a branch of legal knowledge which does not exist in this jurisdiction and will be struck out.

[11] I now proceed to summarise the evidence that has been given by both of the parties.

[12] I first heard from Mr Anthony Crump, director and shareholder of the plaintiff company, who set out that:

Provision specialises in all types of audio visual installations including fitting of plasma screens, projectors, sound systems and automation...

We have the following divisions:

- a. Sales
- b. Installation
- c. Rentals
- d. Service
- e. Video Conferencing Bureau...

[13] Mr Anthony Crump did not become involved with the defendant company until the invoice was three months overdue.

[14] He then details a discussion with Mr Ram of Drury on 9 April 2009 who, he said, promised him a postdated cheque for the whole amount no later than 15 April and that the cheque would not be dated more than six weeks out. That conversation was noted in the customer contract log for Drury. No mention was made of dissatisfaction with the product or the installation in that conversation.

[15] The cheque never arrived and a seven day demand for payment was sent on 20 April 2009.

[16] As no payment arrived, the matter was forwarded to Baycorp for collection.

[17] On 11 May 2009 the plaintiff received advice from Baycorp that the defendant was now disputing the account because of workmanship.

[18] He then said that the defendant company was removed from the register and the plaintiff had to apply to put it back on again.

[19] The money has still not been paid.

[20] The letter of 9 February 2009 to the plaintiff company from the defendant company, which had been discovered by the defendant the day before the hearing, was then put in supplementary questions to Mr Crump. He said that the plaintiff company had never received that letter. If they had, he would have gone back to his staff and asked if there had been a problem and would have tried to do a site visit and speak to Mr Ram of Drury.

[21] The signed-off quote, which the plaintiff provided Drury, was for a home theatre system. Ninety percent of the cost was equipment and 10 percent was labour.

[22] If a video conferencing facility was requested, the quote should have included items like a screen, a camera and a video conferencing unit. Most packages of such a nature are in the vicinity of \$25,000 cost and then the person has to decide

if they wish to use ISDN or IP internet, and there was no such discussion. No equipment in the quote relates to video conferencing.

[23] In cross-examination Mr Crump said that any plasma screen can be used for video conferencing and the screen that was installed could be used for such, but with the other items referred to, the camera and the video conferencing unit.

[24] In his view, the project was completed. It is completed when the staff invoice the project. The differences in the plasma screen and the amplifier from the description in the quote was due to the models being superseded, and that the plasma screen was a high definition model, which was what was specified in the quote.

[25] I then heard from Robin Arnold, the project manager of the plaintiff company. On 14 November 2008 he said he received a telephone call from Mr Ram of Drury about the possibility of purchasing audio visual equipment from the plaintiff. He visited the site at 733/1 Remuera Road on 18 November, when he discussed with Mr Ram a number of the options including a large plasma television screen and a projector. That visit was noted in an email from Mr Ram to him that day, where he asked for some quotations.

[26] Mr Arnold then responded by email, attaching a brochure and two quotations. Also in answer to a query whether a laptop could be viewed on a plasma screen if connected with a VGA computer and audio cable. He responded 'yes'. He said there was no discussion about setting up a video link from office to home or anything like that.

[27] Later that day, he said, Mr Ram forwarded a signed copy of the plasma screen quotation and he generated a work order. The installation occurred on 10 December, due to the late arrival of the screen. He was present when the technician installed the system and sat down with the technician and Mr Ram, reviewed the system and explained the remote control set-up.

[28] Hamish Crump, the installation manager, called in to see the finished job and then left again. The equipment was properly installed. Mr Ram said that he was

happy with the job in the present of Mr Arnold and the technician. The possibility of installing a projector downstairs was discussed and a contact option was given in case of problems. There was no contact.

[29] He has viewed the photographs provided in the defendant's bundle of documents and says that it is the standard installation of the plasma screen. Seen from behind the screen, it necessarily involves a large number of cables.

[30] He agreed that the plasma screen installed was not the one in the quote. He said the one in the quote was standard resolution and the installed one was high definition.

[31] The amplifier, which was again different from the one mentioned in the quote, was a 2009 model – a superseded model. There is no difference in the functionality.

[32] As to one of the speakers being left disconnected, he said the installation required five speakers in one room and two in the kitchen. Therefore, because all speakers are purchased in pairs, one was left as a spare because it was not needed. It was not necessary to connect it. There was no damage to the site.

[33] There are always a large number of cables. All cables that they supply are insulated.

[34] The plasma screen could not be attached to gib as it would fall off. A stud would have to be found.

[35] In cross-examination, when shown photographs of the cables, he said it is a completed wiring installation. He did not say that he would come back to finish the job. He was shown a photograph which depicted a square with some holes in it - at pp 158 and 159 of the defendant's bundle of documents - and said it was a hole in the wall. He said it was not the plaintiff's responsibility. He did not know whether the company had done it but he said that it is always explained to the clients that it is their responsibility to patch any matters.

[36] The company uses stud finders to find the stud and, once the job is complete, the Accounts then invoice the job. The items installed, do not of themselves comprise a video link capability. That is a completely different item. Skype and MSN could be used with it but it was not discussed. Nor did Mr Ram tell Mr Arnold that he wanted a video link to an office in the city. There was no discussion on video conferencing.

[37] The screen and the amplifier which were different from the quotation were improved items. There was no difference in price. The quoted items were superseded items.

[38] I then heard from Mr Hamish Crump, the installation manager, who gave his qualifications. He went on 10 December to check the installation. The equipment was installed by the time he arrived. He satisfied himself that it was properly installed and then left.

[39] He viewed the photograph in page 26 of the defendant's bundle of documents, which shows the cabling behind a plasma television and said it was nothing unusual. He was not aware of any complaints about the equipment until the matter was handed over to Baycorp.

[40] With reference to the plasma screen, high definition related to the number of pixels. The PS has full high definition and is a better model than the one quoted. The other model was obsolete. The amplifier was a superseded 2009 model. It had more features. There was no price difference. All cables are insulated and there was nothing exposed or dangerous. A screen such as this could not be put up on gib board only, it would fall off.

[41] This facility could not be used for video conferencing because there was no camera and no video conferencing unit and no such was quoted. It is a home theatre.

[42] He considered the job was physically difficult but he was happy with his staff's installation.

[43] As it was a finished apartment with a solid ceiling, that made it difficult, but there was no damage and no difficulties. The labour was minimal and it was not a rough job – all done to industry standard.

[44] I then heard from Linda Borland who is also a plaintiff director who said that on 10 March 2009 she telephoned Mr Ram of Drury to see if he was happy with the product supplied, which was a standard courtesy call made to every client. He advised her that it was all good and that he would be calling Robin Arnold about doing another installation in another apartment.

[45] She also noted – and dated that conversation in the plaintiff's database. She was not aware the account had not been paid. She also noted in the database the invoicing of the supply and the installation in late January, the intention to send a seven-day demand in April and the instruction of Baycorp in May, then the arrival of Drury's counter claim in the latter part of June 2009, and she made handwritten notes to the same effect. All of these documents were produced. As far as she was aware, no complaint was received until after the matter was referred to Baycorp. She had never seen the letter dated 9 February 2009. It had not been received by the plaintiff company. She would have alerted Mr Arnold to it, addressed the issue, and recorded it in the database. Nor when she was speaking to Mr Ram, did he mention that letter.

[46] She did not recall, when cross-examined about it, speaking to Mr Ram about the video conferencing for a company called Hames International Limited, and reiterated that when she spoke to Mr Ram no problems were raised. She noted that the letter of 9 February 2009 was addressed to the company's physical address and not emailed, faxed or sent to their post box. The plaintiff then closed its case.

[47] I then heard from Mr Ram, who is a director of the defendant company. He said that he first heard about the plaintiff when Ms Borland approached his employer, Hames International Limited, to install video links in a corporate boardroom. That was not pursued but he said on viewing the plaintiff's website it was clear that they undertook video link installation work.

[48] He said Ms Borland continued to call him for video installation for home office and marketed Provisions capabilities to him over the telephone on many occasions, which was not put to Ms Borland.

[49] He said in late 2008 he contacted her to install video link equipment and she said Mr Arnold would contact him. Again, this was not put to Ms Borland.

[50] When he spoke to Ms Borland after the installation he did not recall saying to her that all was good and he would be calling Mr Arnold about doing another installation, but told her the work was incomplete, it was not what was contracted for, the equipment supplied was different and the installation was incorrect, and that he had written to the plaintiff on 9 February advising them of the problems in the poor workmanship.

[51] He said that she told him she would follow it up and come back to him. He said he called her office and no calls were returned. He said Provision had abandoned him and refused to come back and make good the defects, which he had complained about on 9 February 2009.

[52] When speaking to Mr Arnold, he spoke with him around 15 November 2008 and then, around 18 November, met with him at the site where he could work from home. Mr Arnold marketed to him two installations at the same location but he said he insisted that only connectivity for home office would suffice. He said he relied on Mr Arnold's advice – that he was the expert – and said that this was for work purposes, and that Mr Arnold understood that he required a video link capability. He said he showed him a quotation from Harvey Norman Electronics which, again, was not put to Mr Arnold. He said he advised Mr Arnold it was not for home theatre or family purposes because he did not require one.

[53] The quotation was emailed. He signed the quotation and relied on Provision to install the exact and precise specifications and provide video link connectivity. He said he exchanged emails, making sure that computer links in usage were a capability requirement.

[54] The installation was done in early December 2008 when, he said, Mr Arnold assured him that the installation would suit his requirements and he said that was great, he looked forward to using it for work commencing in 2009. He said as the installers and Mr Arnold were leaving, he noticed there were exposed wires and cables which were visible and potentially dangerous and he queried Mr Arnold about this, who told him that they would come back another day and finish off the work.

[55] He then moved to the product supplied. The plasma screen was specified in the quote as a TH 58PH11. That was not installed but what was installed was a TH 58PF11. He did not agree to that installation.

[56] He then moved to the amplifier, which was specified as a Denon 2308 but what was supplied was a 2309, which was silver instead of black. He did not agree to the supply and installation of the different product.

[57] He then discussed the speakers and said that one speaker was left uninstalled, but Drury charged for eight.

[58] He said that the cables were left exposed and that the hanging of the plasma was an earthquake risk, because it was not attached to a stud beam but only to the gib board.

[59] He said that the contract had not been complied with because there was no video connectivity which he had asked for, and that had been discussed prior to signing the contract.

[60] He then went on to speak about the restoration of the company and said that this had come about due to inadvertence of the accountants and he was attending to it at the time and that the actions of the plaintiff were unnecessary.

[61] He was asked in cross-examination why there was no reference in the contemporaneous documents to his request for a video conferencing facility which he said he had requested. He said that Mr Arnold referred to audiovisual installation, which referred to video conferencing. He said he never told Mr Crump that he

would send a cheque because the defendant does not have a cheque book. He said that when he told Mr Arnold about the cabling at the end of the installation Mr Arnold said he would come back and he understood that the facility which was installed would provide him with video link capability.

[62] He said that the letter of 9 February 2009 was posted to the legal address. The letter was created on that day and, when asked whether it was created on a computer, he said yes. Was that computer still in existence, he agreed. But when asked whether he would consent to having the computer forensically examined, he said no.

[63] When asked why he did not send his letter of 9 February 2009 to either email or fax or the company post box he said he was panicking. There were big problems. He got it out as soon as possible so he used the physical address and he thought that the company was in Newton, although that is not on the company letterhead.

[64] He said that he did query Mr Arnold as to why the amplifier was silver and not black. He had never seen the seven-day demand letter, although the post box it was sent to was, in fact, the defendant company's correct box number, and he did concede that the letter of 9 February was not disclosed to the plaintiff until the day before the hearing.

[65] It was put that he did not realise the difference between the models of the plasma screen and the amplifier until it was actually pointed out in the documents which he saw last week. He said no, that he was concerned all the time, and he was very concerned about it.

[66] When asked why he signed the quote for the system which was provided he said he relied upon the plaintiff company. When asked why he did not raise problems with the installation until after he received the initial Baycorp contact, he said he did raise the matter with Mr Arnold and that, as to the supply of different goods, the black colour of the amplifier was material to him. The plasma screen is still, in fact, on the wall.

Credibility findings

[67] Being the Judge who has seen and heard the evidence of the witnesses, I make the findings as follows:

Evidence of the plaintiff's witnesses

[68] The witnesses from the plaintiff company all impressed me as being knowledgeable in their field, capable and competent and the company officers appeared to have governance systems which were detailed and ensured quality control and customer satisfaction. They all impressed me with their integrity and honesty.

Defendant's witness

[69] Mr Ram did not impress me in the slightest. He is the representative, being a director of the company. He is also apparently a lawyer but one could only comment from his drafting of the statement of defence and counter claim that his knowledge of civil law is not up to the standard that is usually expected in this court. His evidence did not impress me one little bit.

[70] He became increasing florid and theatrical as his evidence progressed, and I was particularly unimpressed with his answer to Mr Keall for the plaintiff as to whether he would consent to have his computer forensically examined regarding the authenticity of the letter of 9 February 2009. His answer of 'no' was redolent to me of a lack of credibility and also a lack of authenticity of that letter.

[71] None of the contemporaneous documents otherwise indicated anything which corroborated the evidence which he gave. And where there is a conflict of evidence between the plaintiff's witnesses and Mr Ram as to their discussions, I unhesitatingly prefer the evidence of the plaintiff's witnesses.

Findings of fact

[72] It is plain from the evidence and the contemporaneous documentation that the plaintiff company installed audiovisual equipment in an apartment at 733/1 Remuera Road on behalf of the defendant.

[73] A quotation was supplied which clearly shows a home theatre audiovisual setup. Two items were supplied, which were different from the quotation: the plasma screen and the Denon amplifier. Each of those items was an upgrade on what was quoted and the price was no different. No possible harm to the defendant could have resulted in the supply of better product.

[74] On the basis of my findings of credibility, I find that a home theatre was what was quoted, a home theatre was what was installed, that video conferencing was never discussed and was never mentioned at all. The installation was complete. The installation was proper.

[75] There is no substance in the complaint of Mr Ram about the cabling and about the installation of the plasma screen. If the apartment had had internal cabling already installed, then the cables would not be so visible, but it did not. If the plasma screen had been attached to gib board, it would not be still there now.

[76] No complaints, I find, were made until after the involvement of Baycorp. The plaintiff company has performed the contract. They have not engaged in misleading and deceptive conduct under the Fair Trading Act, and the plaintiff is entitled to its judgment.

[77] The plaintiff's defence to the claim of breach of contract has failed. The other remaining counter claim of misleading and deceptive conduct under the Fair Trading Act has not, by a long stretch, been made out and, therefore, there is judgment for the plaintiff on that counter claim.

[78] The hearing of this matter occupied one day. It finished at about 4.50 pm. It was set down for half a day. Fortunately, what was set down in my court for the

afternoon was taken over by another Judge. The hearing was extended by the lengthy, repetitive and unnecessary cross-examination of the plaintiff's witnesses by Mr Ram and, in my view, the plaintiff is entitled to indemnity costs, having had to pursue a small amount and thus incurred significant costs as a result.

[79] I therefore request that the plaintiff file a memorandum seeking indemnity costs within seven days of the receipt of this judgment. The defendant is to reply within seven days and any further reply by the plaintiff seven days after that.

Dated at Auckland this 1st day of April 2010 at 9.15 am

A-M J Bouchier
District Court Judge