CITATION:	*Chin Loong LAW v Belinda Kay COOK* [2023] NTLC 14
PARTIES:	*Chin Loong LAW* V *Belinda Kay COOK*
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	2022-00267-LC
DELIVERED ON:	27 July 2023
DELIVERED AT:	Darwin
HEARING DATE(s):	23 August 2022, 15 November 2022, 30 January 2023
DECISION OF:	Opie LCJ

CATCHWORDS:

Contract, implied terms, verbal contract, fixed fee or estimate, variations

Local Court (Civil Jurisdiction) Rules 1998

REPRESENTATION:

Counsel:

Plaintiff:	Joelon Fincher
Defendant:	Anthony J Sangster Robles

Solicitors:

Applicant:	Cozens Johansen Lawyers
Defendant:	Digital Age Lawyers

Decision category classification:	B
Decision ID number:	[2023] NTLC 14
Number of paragraphs:	69

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

No. 2022-00267-LC

BETWEEN:

Chin Loong LAW

Plaintiff

AND:

Belinda Kay COOK

Defendant

REASONS FOR DECISION

(Delivered 27 July 2023)

JUDGE OPIE

Introduction

1. In or around May 2020, the parties entered into a largely verbal contract where the Plaintiff was to develop an iOS and Android software application for the Defendant for the Darwin Street Art Festival (DSAF).
2. The Plaintiff seeks an order for payment of three invoices amounting to $21,109.62 with interest pursuant to rule 39.03 of the *Local Court (Civil Jurisdiction) Rules 1998*.
3. The Defendant disputes the above and counterclaims damages in the sum of $51,464.00 with interest.
4. This proceeding seeks to resolve the following issues in dispute:
    - 4.1 Was the agreement for a fixed fee?
    - 4.2 Was the completion of the project time sensitive?
    - 4.3 Was there a variation to the contract requiring the Plaintiff to complete additional, work for which he should be paid?
    - 4.4 Did the Plaintiff perform the contract to a satisfactory standard?
    - 4.5 Was the source code and other digital assets created in the course of the project the property of the Plaintiff or that of the Defendant's client?
    - 4.6 Did the contract permit the Defendant to engage another developer?

Background

5. It is uncontentious that the parties entered into a contract where:

   5.1 The Plaintiff would develop iOS and Android applications for the Darwin Street Art Festival (DSAF) 2020 at the request of the Defendant;

   5.2 The Plaintiff would be paid at a rate of $60 per hour plus GST;

   5.3 The terms of the contract were agreed via phone calls, texts and emails but the parties did not execute a formal written contract;

   5.4 The parties had previously collaborated on projects;

   5.5 The previous projects were for a fixed fee where the Plaintiff provided the Defendant with a detailed written outline of the cost of works[1] at the formation stage of the contract. These cost outlines included a detailed breakdown of tasks and were based on the fee of $60 per hour plus GST.

Evidence of negotiations

6. The evidence of the negotiations between the parties in formulating the agreement was limited.

7. The Plaintiff provided no evidence of the parties' negotiations. The Plaintiff failed to address this issue in his affidavit and oral evidence.

8. The Defendant gave evidence that between January 2020 and May 2020 she commenced discussions with the Plaintiff via phone calls, texts and emails regarding his involvement in projects as her sub-contractor. She stated that they discussed at least four projects between January 2020 and May 2020, and the Plaintiff provided fixed fee quotes in writing for three out of the four projects discussed.[2]

9. The Defendant gave evidence that she does not conduct projects on an hourly-based model i.e., without a fixed price. She stated that if projects required variations for additional work she would agree to pay the additional charges only after she receives a fixed quote for the extra work.[3]

10. The Defendant produced evidence of texts and emails for previous projects where the Plaintiff provided a detailed breakdown of tasks and the total number of hours required to perform the work.[4] This was done at the time the contract was negotiated and before works commenced.

11. The Defendant stated that on or around mid-May 2020 she entered into a verbal agreement with the Plaintiff on a fixed fee of 206 hours at $60 per hour plus GST. She stated that this was based on the fact that the Defendant had provided her with a verbal quote of approximately 40 hours of design, and 166 hours of build, at the rate of $60/hour exclusive of GST.[5]

[1] Trial book pp552 - 553, Trial book pp 556 – 557.
[2] Trial book p449.
[3] Trial book p449.
[4] Trial book pp551 – 562.
[5] Trial book p450.

12. Adrienne Roberts was called by the Defendant and she gave affidavit and oral evidence that she overheard a conversation between the Defendant and Plaintiff where they agreed that the project would take between 200 and 210 hours.[6]

Was the agreement for a fixed fee?

13. Over the course of the project, the Plaintiff issued five invoices, two of which were paid and three remain unpaid.

14. On 7 July 2020 the Plaintiff claimed, and the Defendant paid, $2,600 for the scoping and design stage of the project (40 hours). In August 2020 the Plaintiff issued an invoice for $9,960 for the build stage of the project amounting (166 hours). The Defendant paid this amount. The total of the paid invoices amounted to $12,560.

15. The Defendant said she paid these invoices promptly and without a request for a breakdown of the tasks completed because (1) they were within the hours quoted in the original costs estimate,[7] and (2) the Plaintiff had completed timesheets from the Defendant's own time-recording system.[8]

16. On 11 November 2020, two months after the expected completion date of the project, the Plaintiff issued the following invoices:

    INV-00024 for work completed in August 2020 – 181 hours for $10,890.

    INV-00025 for work completed in September 2020 – 101.5 hours for $6,090.

    INV-00026 for work completed in October 2020 – 24 hours for $1,440.

17. These invoices referenced 306.5 hours of work on top of the 206 hours already claimed by the Plaintiff such that the total claim by the by the Plaintiff was for 512 hours or $33,469.[9]

18. The Plaintiff contended, without citing any documentary evidence, that the originally stated 210 hours was merely an estimate and that costs would increase with any addition to the scope of works. In an attempt to show that the Defendant should have anticipated cost increases, the Plaintiff's counsel referred the Defendant to a previous project where the agreement only referred to an estimate and not a fixed cost.[10] The Defendant did not accept counsel's proposition stating that, unlike the DSAF quote, the example cited was in its "pre-quote" stage. She explained *"So, this would be scoping out possibilities for solutions and then we give it to the client for possibilities, break down the scope and then we give, get the fixed-fee quote"*. She noted that the referenced project had not reached the stage of a fixed-fee quote and in fact that project did not proceed at all.[11]

19. The Defendant asserts that it was an implied term that the Plaintiff would provide an update of the estimate of costs if additional work was required, as occurred with the project on 16 August 2020.[12] I note that on that occasion, the additional work was

[6] Transcript of proceedings 15 November 2022 p52.
[7] Transcript of proceedings 15 November 2022 p59.
[8] Transcript of proceedings 15 November 2022 p76.
[9] Transcript of proceedings 15 November 2022 p82.
[10] Transcript of proceedings 15 November 2022 p57.
[11] Transcript of proceedings 15 November 2022 p57.
[12] Trial book p645.

agreed after the Plaintiff provided an updated estimate (the variations are explored below).[13]

20. I do not accept the Plaintiff's contention that there was merely an estimate and otherwise no set amount for the cost of the project. Such an approach would not make commercial sense. I accept, on the evidence of the Defendant and Ms Roberts, that the parties reached an agreement whereby the Plaintiff would work at a rate of $60 per hour for work to be conducted in two stages: the design phase that would take 40 hours and the build phase that would take and would be fixed at 160 - 170 hours.

21. I find that it was an implied term that if there was a variation, where additional work was required outside the scope of these hours, the Plaintiff would first seek authorisation to conduct such work as occurred on the DSAF project on 16 August 2020.

Time-sensitive Agreement?

22. An alternative argument raised by the Defendant was that the contract was time sensitive and the Plaintiff's failure to comply with the project deadline placed the Plaintiff in breach of the contract.

23. The Plaintiff submitted that the agreement was not time-sensitive and that a timeline generated by the Defendant was used by the parties as a guide only.

24. The Defendant asserts that the timeline set out in a document called the "Tom's Planner Schedule" was a term of the contract. Alternatively, the Defendant contends that the Plaintiff's compliance with the Tom's Planner timeline was necessary for the effective and reasonable operation of the contract. That is, it was an implied term that the apps would be ready in time for the Darwin Street Art Festival because the apps were designed to complement the festival.

25. The Darwin Street Art Festival ran between 14 and 22 September 2020. The parties discussed the timing of the project verbally, by text and by email from as early as June 2020. Part of the correspondence explicitly stated that the apps will "go live" on 19 August 2020. This date was chosen to ensure readiness for the project launch of 14 September 2020, which was in line with the commencement of the festival. Correspondence during the course of the project reiterated that the project was time-sensitive. I have particular regard to the following evidence:

    25.1 On 2 June 2020 the Plaintiff wrote to the Defendant: *"What's the time line for Darwin Street Art again? Just scheduling my calendar, thanks"*. The Defendant responded *"August or September as well"*.[14]

    25.2 On 9 June 2020 the Plaintiff emailed the Defendant questions about the timeline and questioned whether it would be achievable given the work associated with the Laksa project. He noted *"Worried about timeline if we don't start soon."* [15]

    25.3 On 23 June 2020 the Defendant wrote to the DSAF client with a revised project schedule and indicated that *"currently we are in the Design Milestone* –

[13] Trial book p646.
[14] Trial book p572.
[15] Trial book p574.

open up each milestone by clicking on the downward arrow to view what tasks are included within each milestone and who is responsible for them." The Plaintiff was copied into this correspondence. On an attached project schedule, the iOS and android aps were marked to *"go live"* on 19 August 2020. The Launch deadline was highlighted in red as 14 September 2020. On the same day the Plaintiff sent the Defendant a text confirming receipt of the email and schedule. In that text he wrote *"Just saw your email to Tristan, so excited July is gonna be very busy!"* The Defendant wrote back *"Bloody oath…. We will need to hustle next month! Hope the timings were ok lol"*. The Plaintiff responded *"Hehehe yeah timing is ok"*.[16]

25.4 On 8 July 2020 at 1.32 pm the Defendant wrote an email to the DSAF client with the Plaintiff copied into the correspondence. She wrote "*We started the build a little early thanks to the design being signed off quickly and are making great progress developing the new iOS app and recreating previous years AR artworks. You can see the project plan below on how we're travelling. I have extended the amount of time for the new 2020 AR 3D models to be provided – worst case we can add them after launch."* Again, the email reiterates the importance of the timeline but notes that as a *"worst case"* the additional models could be added after the launch.[17] In response, on 8 July at 3.03 pm the plaintiff sent the Defendant a text accepting the additional work and reassuring the Defendant *"But overall we have enough time on the project plan"*.[18]

25.5 On 4 August 2020 the Plaintiff wrote a text to the Defendant in which he mentioned that he would be away on a camping trip from 7 September to 11 September. He texted *"It's 5 working days so I'm planning things out and hope to minimise impact to you…. DSAF will definitely be done before then, including Android."* [19] Tellingly, the Defendant responded *"Yeah the festival will be over by then."* [20] It was clearly a common assumption that the project would be completed by the launch date of 14 September with the possibility that only as a "worst case" some 2020 AR 3D models may be added at a later time. [21]

25.6 On 16 August 2020 the Plaintiff wrote to the Defendant setting out the additional work that would be required to complete the screen recording feature. He wrote *"It's roughly around 2-3 days (assuming 8 hours each) to get it working on each platform"*[22]. The Defendant responded *"Ok, let's just do what you need to do to get it going."* [23]

25.7 On Monday 31 August 2020 the Plaintiff wrote to the Defendant *"FYI Android DSAF build is almost finished, just the screen recording left."* The Defendant responded *"Wow that's bloody impressive"*. The Plaintiff responded *"Hehe thanks. Hoping to deliver by the schedule (Friday 4/09) but may be a couple of days*

[16] Trial book p593.
[17] Trial book p614.
[18] Trial book p614.
[19] Trial book p634.
[20] Trial book p634.
[21] Trial book p614.
[22] Trial book p645.
[23] Trial book p646.

late." [24] The Defendant responded *"The screen recording?"* The Plaintiff responded "*Screen recording and testing on more devices"*.[25]

25.8 On Friday 11 September, the Defendant wrote a text to the Plaintiff *"Eek go live on Monday"* indicating her assumption that the deadline of 14 September would still be met.[26] On 13 September 2020 the Plaintiff wrote to the Defendant *"Yeah we'll miss the Monday deadline sorry"*.[27] The Defendant responded *"yeah, ok. I'm going to have to tell them pull all advertising and to pull it out of the papers being printed tonight for tomorrow"*.[28] In response the Plaintiff wrote to the Defendant *"I think there's miscommunication here, I put in my leave a while ago. On my week of leave I'm still trying to be responsive. To be fair I wasn't aware of the launch or the marketing effort until two days ago and I've been keeping you posted on the approval process"*. [29]

26. The Plaintiff's comment about being unaware of the launch deadline is patently incorrect. The launch deadline of 14 September was clearly communicated and the Plaintiff accepted that deadline as early as 23 June 2020. In light of the correspondence outlined above I find that the time for the performance of the contract was agreed between the parties as set out in the Tom's Planner timeline. I do not accept the Plaintiff's contention that there was a "*miscommunication*" about the launch date.

27. The Plaintiff launched the iOS application on 17 September and the Android Application on 22 September 2020, that is, on the final day of the festival. Even then, the applications were not complete and work was carried on throughout the subsequent months. In her evidence the Defendant asserted that even as of 25 November 2020 some of the ten augmented reality requirements still needed to be added.[30]

28. I find that it was a term of the contract that the apps were to be completed by 14 September 2020 and the Plaintiff breached this term. While the Defendant did not seek specific damages for this breach, she contends that it raised her management costs and informed her decision to engage another developer.

Contract Variation – Additional Works

29. The Plaintiff asserts that additional charges and delays arose as a result of a variation to the contract where the parties agreed on the Plaintiff performing a large amount of additional work including:

29.1 The transfer of the development app from Platter to Wikitude;

29.2 The inclusion of additional augmented (AR) reality murals;

29.3 An additional screen recording function.

[24] Trial book p654.
[25] Trial book p654.
[26] Trial book p663.
[27] Trial book p668.
[28] Trial book p664.
[29] Trial book p674.
[30] Transcript of proceedings 30 January 2023 p24.

30. The Defendant accepted that there were some additional works required that were beyond the contract.

31. The Defendant however disputed that the out-of-scope work was time-consuming and suggested that it could have been completed in the same quoted time. She maintained that the transfer of the app from Platter to Wikitude took the Plaintiff less than four hours to complete.[31] She stated that the Plaintiff advised her that the additional AR murals could be incorporated into the project without impacting the timeline and that the Plaintiff did not quote extra time for their completion.[32] She gave evidence that the additional "3D flames" work was out of scope but that it would have taken three minutes to complete.[33] She further asserted that the flame did not work properly when it was added.[34] She conceded that a request was made of the Plaintiff to add a "help screen" but noted that help information was already required for the app although it was not previously defined as a "help screen".[35]

32. The Plaintiff's counsel referred the Defendant to a number of actions that were requested of the Plaintiff after the launch date. The Defendant said that the majority of those actions were required because of errors in the Plaintiff's original work rather than being additional out-of-scope requests. [36]

33. The Plaintiff did not provide an updated estimate to the Defendant for the majority of the additional work. The Defendant stated and evidence confirms that the Plaintiff only provided an updated estimate for the inclusion of the additional screen recording function. The estimate provided by the Plaintiff was for 2-3 days of work at 8 hours per day.[37] Upon receipt of the estimate, the Defendant authorised the Plaintiff to complete the additional work on the basis of the estimate.[38] The Defendant contrasts this with the other work charged by the Plaintiff where no estimate or authorisation was given.

34. The report of Mr Feick confirms that the Plaintiff performed work on the screen recoding functioning on 15 and 18 August 2022. Mr Feick estimated that the work could have taken as much as ten hours.[39] In circumstances where the Plaintiff quoted 2-3 days at 8 hours per day and the Defendant authorised payment of the same, notwithstanding Mr Feick's estimate of 10 hours, I allow 20 hours of work at $60 per hour + GST.

35. The Defendant stated that the three disputed invoices (INV-000024, INV-000025 and INV-000026) were all issued simultaneously on 11 November 2020 for work that was said to have occurred between the three months of August and October 2020, after the relationship between the parties had deteriorated, rather than incrementally as had previously been the practice. Further, the Defendant contends that the work in these invoices was not clearly described or itemised.

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[31] Affidavit Belinda Cook affirmed 4 October 2022 at para 15.
[32] Affidavit Belinda Cook affirmed 4 October 2022 at para 17.
[33] Transcript of proceedings 15 November 2022 p 60.
[34] Transcript of proceedings 15 November 2022 p 61.
[35] Transcript of proceedings 15 November 2022 p 61.
[36] Transcript of proceedings 15 November 2022 p 73.
[37] Trial book p645.
[38] Trial book p646.
[39] Trial book p780 - 781.

36. The Defendant said the Plaintiff had commenced working from his own timesheet system to record work outlined in the later three invoices and she therefore could not verify the work with her own timesheet system.[40]

37. In his trial material the Plaintiff does not provide convincing evidence of additional work that would justify the three large invoices. While he has produced timesheets, they are not clear or detailed. His affidavit material does not establish why the work took so long. He initially declined to produce the commit log books or source codes to the Defendant despite repeated requests. Even after the commencement of proceedings, the Plaintiff maintained his objection to disclosing this material, preventing the Defendant from independently assessing and verifying the work he had performed. When the Court made discovery orders, the Plaintiff only allowed access to a restricted copy of the source code.

38. The Defendant called evidence from Nathaniel Feick to assess the work performed by the Plaintiff on the basis of the discovered material. Mr Feick assessed the Plaintiff's work as amounting to between 28-47 hours of work rather than 307 hours (Feick Report paragraphs 5[13] o, p, q, r, v and x). The Plaintiff objected to Mr Feick's evidence submitting that the coding language used in the DSAF project was not that with which Mr Feick holds specific skills, knowledge or expertise. When cross examined on his credentials, Mr Feick stated that his expertise and experience does in fact relate to the ".net technology stack language" used by the Plaintiff for the DSAF project. I accept Mr Feick's evidence in this regard and I accept that he holds qualifications sufficient to admit his evidence as expert evidence.

39. In all of the circumstances, namely, where the invoices were well beyond the original fee quoted, were significantly higher than the Mr Feick's estimates and have not been adequately justified in the Plaintiff's own court material, I find that the Plaintiff has not demonstrated, on the balance of probabilities, that he performed as many as 306.5 hours of additional work. I accept the evidence of Mr Feick that the additional work amounted to 28-47 hours of work.

40. **W**hile the Plaintiff may have completed additional work, I find that the majority of this work was not in respect of agreed variations as it was not authorised by the Defendant. Furthermore, some of this work would have been as "warranty work" that would not have needed to be performed if the original work was of a suitable standard (explored next).

41. Taking all of the above matters into account I will allow 20 hours for the Plaintiff's claim for additional work for the screen recording function.

The Quality of the work performed

42. The Defendant has counterclaimed alleging the Plaintiff breached an implied term that the work performed by the Plaintiff was to be of reasonable quality and delivered on time.

43. Mr Feick gave evidence that in his assessment, the DSAF project was not up to industry standards because the applications were not delivered on time; were not bug-free; and the intellectual property assets were not provided to the client.

[40] Transcript of proceedings 15 November 2022 p76.

44. The Defendant also described having a range of problems with the Plaintiff's work performance and the apps he produced including:

    44.1 The apps were not added to the Digitally Buzzed store account but instead were added to the Plaintiff's own private account contrary to industry practice[41];

    44.2 On 19 August the Plaintiff admitted that he had not commenced the Android app despite having already charged 166 hours in build time in invoice 18[42];

    44.3 On 19 August the Plaintiff said that he had commenced a new job and would not have time to continue the DSAF work[43];

    44.4 Between 23 and 24 August 2020 the Plaintiff told the Defendant that he would not be able to continue with the project;

    44.5 The Plaintiff published the iOS application for user acceptance testing eleven days after the due date;

    44.6 The Plaintiff published the android application for user acceptance testing 32 days past the due date;

    44.7 When the Plaintiff was unable to continue with the project, he did not transfer the apps or the source code to the Defendant as promised, preventing the Defendant from arranging an alternative developer to work on them[44];

    44.8 The Plaintiff, having prevented an alternative developer from working on the apps, carried on working and failed to meet the launch deadline;

    44.9 On 15 September the Apple store had still not received a request from the Plaintiff for publishing;

    44.10 By 17 September 2020 the Android app was still in draft form;

    44.11 The Plaintiff mistakenly set the iOS app to Austria instead of Australia[45];

    44.12 The iOS application was launched three days late and the Android application was launched eight days late; and

    44.13 The client reported a number of bugs with the product that required fixing.

45. The Plaintiff disputes that the quality of his work was substandard. On his evidence he provided a working and live product on 17 September (iOS) and on 22 September 2022 (Android). He points to evidence that on 22 September 2020 the Defendant wrote him a text indicating that the client thought that DSAF is *"awesome"* and; on or around 17 November 2020 the Defendant won the NT Award for Digital Excellence and project of the year for the DSAF project[46].

[41] Trial book pp452 and 666.
[42] Trial book p452.
[43] Trial book p452.
[44] Trial book p453.
[45] Trial book 684.
[46] Trial book p124.

46. The Plaintiff asserts that the Defendant only questioned the quality of his work after he issued the three November invoices. I do not accept this contention. Evidence shows that prior to November 2020, the Defendant raised the following issues with the Plaintiff:

    46.1 On 11 September 2020[47] and 13 September 2020[48] that there was a need for "fixes";

    46.2 On 12 September the UAT testing showed that the camera did not work on the augmented reality. In her oral evidence the Defendant explained *"If the camera doesn't work on an augmented reality that is 90% of the app's purpose. I would say that is an extremely large and detrimental issue…. A major issue"*[49];

    46.3 On 13 September 2020 that she had been *"blasted"* by the client for the delays to the project[50];

    46.4 On 15 September that she had been *"hounded"* because the android app was not published[51];

    46.5 That the client was *"beyond fucked off with us"*[52];

    46.6 On 17 September that the Plaintiff had mistakenly *"set it [the app] to Austria"* rather than Australia; [53]

    46.7 On 17 September that *"I am simply asking you to fix your mistake"*; [54]

    46.8 On 17 September that "*I have been shielding you from all the blows I have been receiving over the past two weeks and have been absolutely screamed at by the client because we missed the deadline, which is not their fault. As soon as the apps are transferred to my account you won't need to worry anymore*".[55]

47. I accept the evidence of the Defendant and Mr Feick and find that the quality of the Plaintiff's work was substandard.

Who Owned the Intellectual Property?

48. The Defendant gave evidence that between 11 and 19 November 2020 the parties engaged in discussions over the three unpaid invoices and that in response to the disagreement, the Plaintiff refused to provide the source code and digital assets to the Defendant.

49. The Defendant alleges that on or around 18 November 2020 as the invoice discussions took place, she noticed that the Digitally Buzzed's shared folder with augmented reality models and other items for the DSAF project were being removed and that the Plaintiff had denied Digitally Buzzed's user access to the server with DSAF information. She stated *"Renfred essentially locked Digitally Buzzed out of anything DSAF related while*

[47] Trial book pp663 – 664.
[48] Trial book p671.
[49] Transcript of proceedings 30 January 2021 p20.
[50] Trial book p672.
[51] Trial book p680.
[52] Trial book p681.
[53] Trial book p684.
[54] Trial book p685.
[55] Trial book p685.

knowing full well that the client required the assets and that I was requesting access to the source code, commit logs and comments. [56]

50. The Plaintiff said that he did not lock the Defendant out of access to the DSAF material but admitted to preventing the Defendant from having access to the source code and commit logs.

51. The Defendant was cross examined on whether the Plaintiff had prevented her from accessing DSAF material. It was suggested that she was only prevented from accessing the source code. She remained unshaken in cross examination and I accept her oral and written evidence.

52. The Plaintiff's counsel submits he was entitled to retain the intellectual property of the source code and assets but that he was nevertheless willing to transfer the intellectual property upon the Defendant's payment of the three later invoices.

53. The evidence establishes that the parties had agreed that the source code and assets would be provided to the client in the course of the project. I have regard to a text exchange between the parties from November 2020 where the Defendant wrote *"We still always need to hand the code over to the client because it's their intellectual property."* The Plaintiff responded *"Oh yeah that's not a problem."* [57]

54. I find that the Plaintiff's failure to relinquish the intellectual property of the project to the Defendant was a breach of the agreement between the parties.

Counterclaim for Cost of Alternate Developer

55. The Defendant claims damages as a result of the Plaintiff's substandard work and his failure to provide access to the digital assets. She alleges she was forced to spend additional time dealing with the defects and engage another developer to recreate the apps and thereby meet her contractual obligations to the DSAF client. The Defendant claims that this led to a loss in the amount of $51,464 as follows:

Defendant's management time - original project with Plaintiff -	$11,749
Defendant's management time - New project with third party -	$13,200
Third party developer to perform substituted services -	$18, 543
Third party designer and 3D artist to perform substitute services	$6,483
Software licenses	$1,488

56. In cross examination the Defendant was questioned as to why she contracted a third-party to rebuild the apps instead of simply paying the Plaintiff the amount owing for the three remaining invoices and thereby accessing the source code. The Defendant responded *"The issues were so great with the app, it was becoming out of date, it was broken, I needed to get a working app ready for the client, because he would not give it back to me"*.[58]

57. Counsel for the Plaintiff challenged the Defendant about whether the app was actually broken. He asked how a "broken app" could win an award. The Defendant responded *"I*

[56] Trial book p455.
[57] Trial book p700.
[58] Transcript of proceedings 15 November 2022 p85.

did not submit myself for this award and yes, the app was absolutely broken, as the Minister highlighted personally with me that evening".[59]

58. Counsel for the Plaintiff questioned the Defendant as to the total cost of the third-party app build in circumstances where the Plaintiff had previously developed the app. Counsel put to the Defendant: *"It must be easier and cheaper for a company to redevelop an app after everything is compiled. Mr Law has already developed the application, all the animations are already organised and the functionality has all – the tweaks have already been developed. You would think it must be easier and cheaper?"* [60]

59. The Defendant explained that the work completed by the third party was more onerous and time consuming than the project completed by the Plaintiff. She gave evidence that the DSAF client had originally provided the Plaintiff with a number of augmented reality files, assets and 3D models. The client did not retain copies of that material. Therefore when the Plaintiff denied the Defendant access to the material, the third-party developer had to recreate them. The Defendant gave evidence that the work required of the third-party developer was therefore greater and more time consuming than that which was required of the Plaintiff.[61]

60. The Defendant gave the following evidence: *"The client provided us with all of the assets and 3D models that we needed. In this amount for $26,000 we had to redo everything, including the designs which Renfred took as well. So, all the design files has to be recreated, done from scratch. All 3D models had to do that and he had locked us out of the rest of the account. So we had to start a new augmented reality system and account, set it all up from scratch and recreate it …. He had locked me out of the cyber and everything else that went with that….Renfred had everything"*. [62]

61. I am satisfied that the Defendant gave honest and credible evidence regarding her decision to engage another developer. The Plaintiff was making claims that I have found were beyond the terms of the contract. The relationship between the parties had broken down. The Defendant clearly did not trust the Plaintiff to complete his work in a timely manner and to a satisfactory standard. He had charged her what she described as an "*extortionate*" amount for work that that had taken far longer to complete than was envisaged or reasonable and for work that was still incomplete. The Plaintiff had blocked her from accessing digital assets such that she was unable to perform work on the project.

62. In those circumstances, the Defendant elected to start afresh with a new developer. This course required the Defendant to outlay considerable money. I find that this expense was incurred as a result of the Plaintiff's breach of the contract as described above.

63. The Defendant provided invoices to justify the work completed by the new developer. The Plaintiff suggested that the invoices may have been amended or altered. I do not accept this accusation. No evidence was presented to justify it.

64. In all of these circumstances, I accept that in order to satisfy her contractual obligations to her client, the Defendant arranged for the redevelopment of the apps. I accept that

[59] Transcript of proceedings 15 November 2022 p86.
[60] Transcript of proceedings 15 November 2022 p86.
[61] Transcript of proceedings 15 November 2022 p88.
[62] Transcript of proceedings 15 November 2022 pp87 - 88.

the cost of redeveloping the apps was high because the Plaintiff had withheld access to the required intellectual property. I am satisfied that the amounts paid by the Defendant to the third party were reasonable.

65. I will order damages payable to the Defendant for the cost incurred by employing third parties to recreate the project namely:

Third party developer to perform substituted services -	$18, 543
Third party designer and 3D artist to perform substitute services -	$ 6,483
Software licenses -	$ 1,488
Total	$26, 514

66. The Defendant claims that the Plaintiff should pay the cost of her time spent managing the first project with the Plaintiff ($11,749.25) and the second project with the third party ($13,200). The Defendant did not tender documentary evidence, such as timesheets, to establish these losses. I am not satisfied that the Defendant has proved this loss and I do not consider it appropriate to make an order for damages for such fees.

Conclusion

67. I find the Plaintiff is not entitled to payment for the three invoices. While the Plaintiff may have completed additional work, the majority of this was not authorised by the Defendant. Furthermore, such work may well be described as warranty work where the Plaintiff was correcting substandard work. I find the Plaintiff is entitled to payment for the screen recording function at a rate of $60 per hour for 20 hours.

68. I find the Defendant is entitled to damages for the cost of third parties re-doing the work.

69. My preliminary view is to award costs to the Defendant at 100% of the Supreme Court scale but I will give time for any application for costs.

The Court orders:

1. The Defendant is to pay the Plaintiff $1200 + GST;
2. The Plaintiff is to pay the Defendant of $26,514 in damages;
3. The Plaintiff is to pay interest on the above sum pursuant to rule 39.03 of the *Local Court (Civil Jurisdiction) Rules 1998;*
4. Any application for costs is to be made within 30 days.

Dated this 27 day of July 2023

Thomasin OPIE
LOCAL COURT JUDGE