IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.314/69

171

NO.

BETWEEN FARM POULTRY SUPPLY COMPANY LIMITED
a duly incorporated company having its registered office at Wellington and carrying on the business of a Poulterer

Plaintiff

A N D FREDERICK OST
of Wellington, Registered Architect

Defendant

Hearing: 29, 30 October and 19 December 1975

Counsel: C.H. Arndt for Plaintiff
J.M. Moulder for Defendant

Judgment: 30-4-76

JUDGMENT OF O'REGAN J.

The plaintiff alleged that it commissioned the defendant to draw plans and specifications for certain alteration work to its premises at Forrester's Lane, Wellington and to supervise such work. The defendant denied that his commission included supervision. He submitted that the fees he charged indicate that his services were for a deal less than full architectural services. Evidence from architects showed that fees for full services would normally be to the order of $1,020.

The various accounts rendered by the defendant are contradictory. Nonetheless, it is quite clear that the defendant did not charge even half of the normal fee. An account dated 6 December 1966 for $250 gives the appearance of being in respect of all the work done by him. It is

subdivided into two parts, the first, $200 for taking instructions, preparing sketch plans, working drawings for cooler and store, revised working drawings, structural calculations, specifications and the arranging of the building permit and the second, $50 for "supervision as arranged with Mr L. Paris (if approved by you)". Mr Paris is the son-in-law of the general manager of the plaintiff company.

The account was not immediately paid. On 6 February 1967 defendant submitted a further account for $250 the notation of which includes the words "Fees as agreed and account rendered". On 21 March 1967 the plaintiff paid defendant $150 leaving, so it would appear, $100 outstanding. However, on 4 September 1967 the defendant sent another account showing the balance due as $200.

Mr Chait, the general manager of the plaintiff company and its representative in all the dealings with defendant, did not speak of any agreement with defendant as to fees and there appears to be no warrant for the notation "fees as agreed" in the February account. It would seem that the defendant rendered services at less than he was entitled to charge. He had done work previously for the plaintiff and was a regular customer of its retail outlet and one can only surmise that he took it upon himself to reduce his fees. There is certainly no evidence of an agreement as to fees. Be all that as it may, I am satisfied that his work included supervision of the contractor's work. The defendant's various certificates and correspondence from him to the contractor make this abundant. He issued progress certificates and the final certificate and he took up with the contractor various questions as to the standard of work and its progress. None of these things could have been done without his having

exercised supervisory functions. I do not accept that he would have so acted were it not part and parcel of his commission. I hold that his commission included the supervision of the work.

The plaintiff company has since 1931 carried on business in Dixon Street, Wellington, as wholesale and retail providores, selling and supplying poultry and cheese and a variety of other comestibles, not only to the public but also to hotels, restaurants and ships' providores. Over the years, it has had to use - and use extensively - coolstores of other firms on a rental basis. In 1966 it decided to make alterations to a building owned by it at 43 Courtenay Place to accommodate a coolstore and a chiller. The Courtenay Place premises have a rear frontage to Forrester's Lane which is quite near to the Dixon Street premises. By this operation the plaintiff would have its reserve stock readily at hand. It also would make for more convenient and practicable supply to shipping at weekends and public holidays when its rented coolstores were closed. It would make too, for a considerable saving in that it would eliminate the rental payments to other coolstore operators.

The defendant prepared plans and specifications for the alterations to the existing buildings and certain necessary new work. The specifications make it clear that no electrical work was to be done by the contractor. They do not make provision for the work preparatory to the installation of the cooler and chiller and their actual installation save for a provision that the contractor should make allowance "for connecting up cooler unit". The contract ultimately prepared between the plaintiff and the builder, inter alia, provided:-

> "20. IT IS AGREED by and between the parties hereto that there shall be excluded from the

contract work the following items:-

a) THE Builder shall not be responsible for the installation of the doors to the cooler and freezer.

b) THE Builder shall not be responsible for any work inside the freezer and cooler apart from his liabilities under the specifications of leaving the interior walls of the cooler and freezer in a proper and workmanlike manner in accordance with the specifications.

c) .....

d) THE Builder shall not be responsible for the electrical work in connection with the installation and connection of the freezer and coolroom but shall complete such electrical work as contained in the specifications."

The defendant, of course, was not a party to this contract but I am satisfied that he was at all times aware of the purposes to which the premises were to be put. He was at all times aware that McAlpine Refrigeration Limited were in contract with the plaintiff for the installation work and that Winstones Limited were the sub-contractor of that firm for the work preparatory to such installation. Indeed, his certificate of 1 September 1967 records that what is therein recorded is "based on discussions and site visits with Messrs McAlpine and Winstone."

What then, in those circumstances, are the defendant's obligations to the plaintiff? I think they are twofold. First, he owes a duty to exercise reasonable care and skill in the course of his employment. In Bolam v. Friern Hospital Management Committee (1957) 1 W.L.R. 582,

586, McNair J. put it thus:-

> ".....where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

This exposition of the test was approved by the Privy Council in Chin Keow v. Government of Malaysia (1967) 1 W.L.R. 813 at 816 and is thus law in this country. For completeness sake, I observe that it was also accepted by the Court of Appeal in Greaves v. Baynham Meikle (1975) 3 All E.R. 99.

I think, too, that on the established facts of the case, the defendant's contract is subject to an implied term that his professional work if completed in accordance with the plans and specifications, would be reasonably fit for the subsequent installation of and use as a coolroom and chiller. The imposition of such an implied term is discussed by Denning M.R. in Greaves v. Baynham Meikle (supra) and what he said was accepted by the other members of the Court, Browne and Geoffrey Lane L.J.J.. Lord Denning (at p.103) said:-

> "If you should read the discussions in the cases, you will find that the judges are not looking for the intention of both parties; nor are they considering what the parties would answer to an officious bystander. They are only seeking to do

what is 'in all the circumstances reasonable'. That is how Lord Reid put it in Young and Marten Limited v. McManus Childs Limited (1969) 1 A.C. 465, 466; and Lord Upjohn (at p.471) said quite clearly that the implied warranty is 'imposed by law'.

Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case. But, when a dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums: see Samuels v. Davis (1943) 1 K.B. 526."

In the event, in that case, the defendant was held liable on both heads.

On 1 September 1967, the defendant issued to the plaintiff a payment certificate which he described as being "by way of semi-final payment for above work". Frankly, I am at a loss to know what "semi-final" means in that context or was intended to mean. Eleven days later, on 11 September 1967 he wrote to the contractor drawing attention to leaks in the building. The letter reads:-

"We inspected above premises at Mr Chait's request. The following leaks are still apparent:

1) A leak at the roof at the junction of the existing party-wall with the new parapet. Flashing at junction to be checked and made good.

2) A leak at the small drainage-roof, apparently at the existing beam.

3) A leak over the waste at the chiller which could be a weakness in the plaster (probably drummy and holding water).

Please let me know if you will take remedial action, or prefer Seniors Ltd. to do the waterproofing, in which case the amount paid to them will have to be deducted from the final payment."

On 21 September 1967, the defendant issued a certificate of completion certifying, inter alia, that the contractors had "completed above Contract and all the Maintenance work as per Contract Documents signed by both parties."

Whether the contractors had done any remedial work between 10 and 21 September or if they had, whether or not the defendant had inspected such work, is not in evidence. An inspection by him to be of any virtue would necessarily have to be made in rainy weather. I have no data on which to make a finding on these matters but it is of no moment. It is of no moment because if these things were done or attempted, they were done perfunctorily. I accept the evidence of Mr Chait, the general manager of the plaintiff company, that the building was still subject to leaks after 21 September 1967. I hold, too, that partly because of the leaks and partly for other reasons to which allusion will be later made, the premises were not in proper condition for the installation of the freezer and cooler units.

The plaintiff refused to pay the amount certified for in the final certificate. The contractor sued him and the action came to hearing on 10 June 1968. The plaintiff was held liable on the grounds that the contract obliged him to pay on the architect's certificate. Whilst the litigation was pending, the plaintiff took no steps to have remedial work

done. In the circumstances, I think that this was wholly reasonable.

In preparation for that case, the plaintiff's advisers had the building inspected by Mr T.R. Green, Quantity Surveyor, in early April 1968. Mr Green is also a plasterer by trade. He inspected the premises on both fine and wet days. On the wet day, he found water on the surface of the interior walls and on the floor. On seeking the cause, he found that where the roof of the new structure abutted the old building, the flashing was defective; that the parapets of the new structure had not been capped or plastered and that large areas of the external plastering were cracked and hollow. He found also that the plaster work on the internal walls was defective. It was undulating and wet. These defects rendered the premises totally unsuitable for the ultimate purpose inasmuch as it would be impossible to affix the necessary cork insulation to the surface. To affix the cork, it is the practice first to dip it in hot bitumen and then place it on the walls whilst the bitumen is still hot and liquid. The bitumen sets and acts as an adhesive which holds the cork in place. A prerequisite to the success of this process is that the walls be dry.

Mr Green did not inspect the roof of the new structure. It was, however, inspected by Mr R.K. Mercer, Registered Architect, in early 1969. The specifications required that the roof framing be constructed with 8" x 2" rafters and 3" x 2" purlins as shown on drawing No.2 and that wire mesh and sisalkraft (building paper) be fixed prior to the laying of the roof. They provided also that the new roof be of 24 gauge galvanised 'Dimondek' and the contractor was required "to allow for apron flashing as shown" -

presumably in the plans. Mr Mercer found that instead of the long-run roofing iron without joins at the roof surface, the contractor had used sheets of corrugated iron which were nailed along the run of the rafters. There was no fall in the roof. This circumstance made the use of corrugated iron sheets ineffectual. In Mr Mercer's opinion, there must be a pitch of at least 15^{o}. in a roof of corrugated iron to keep rainwater out of the interior of the building it is protecting. He found, too, that there were no adequate flashings and later when the work was opened up, that no purlins had been laid and no wire netting or building paper installed as specified. Mr Mercer was of the opinion that 90% of the troubles which beset the plaintiff were due to the faulty installation of the roof. He found other defects which I will shortly deal with individually. He recommended that the roof be removed and replaced. His recommendations as to the replacement roof vary but little from the provisions of the specifications prepared by the defendant. The replacement roof has been entirely satisfactory.

I think that the defendant in passing and certifying completion of the work in the condition Mr Green and Mr Mercer found it to be, failed to exercise the ordinary skill of an ordinary competent architect and is liable in damages for all loss suffered by the plaintiff resultant upon such failure.

A deal of the remedial work was done by Hall and Kiel Limited. When Mr Mercer was consulted, that firm was engaged in modernising plaintiff's Dixon Street shop under Mr Mercer's supervision. At Mercer's request, Hall and Kiel Limited furnished a quotation of $1,077 for the following

work:-

1. Take up existing roofing
2. Supply and fix purlins at 2' centres
3. Replace roof
4. Extend roof with 10" overhang
5. New spouting on brackets
6. New flashings over parapet, on adjoining wall
7. New box guttering and rain watershed
8. Weatherproofing of wall at end of fire escape
9. Weatherproof and fill in cracks in adjoining wall
10. Handrail around hatch - first floor
11. Cover lino to 3 toilet areas (p.c. sum $50)
12. New 4" x 2" framed false wall on ground floor inside wall lined with gibraltar board and painted with three coats with high gloss finish
13. Floorsanding of first floor

Items 1, 2, 3, 6, 7 and 9 were, in my view, clearly necessary to make good the defects in the work required to be done pursuant to the plans and specifications and which the defendant had negligently approved.

Items 4 and 5 were in Mr Mercer's opinion, essential to ensure that no water got into the building. This work was on the side of the building exposed to southerly weather. The old work gave no protection against driving southerly rain and made no provision against water getting into the building between the roof and the top of the wall. Having regard to the absolute necessity to protect the cork insulation from water, it was prudent that eaves and spouting should be provided and in my view the defendant was negligant in not specifying that such be provided. I think that the remedial work carried out by Hall and Kiel Limited at Mr Mercer's

behest was essential to ensure that the building was watertight and the cost of such was the measure of the damage occasioned by defendant's negligence. The same considerations apply to item 8. The joists of the fire escape were built into the concrete and it was possible that water could get in the cracks between the side of the joists and the concrete. The work covered by item 8 was to eliminate this possibility. In the circumstances, it was reasonable that this should be done and provision should have been made for its being done by the defendant.

Items 10 and 11, although no doubt desirable in the interest of a good finish, are not referable to the plans and specifications and their execution was not directly referable to negligent omissions of the defendant.

Item 12 relates to what Mr Mercer considered and I accept to be necessary remedial work. It has to do with a portion of the wall surfaces on the ground floor which had been poorly plastered. There was warrant for the stripping off the plaster and replastering. Mercer was of opinion that an effective and less expensive method of achieving the intended end result was to hardboard over the defective work and paint the hardboard and I accept this to be so.

Item 13 relates to floorsanding the first floor. I was not directed to any requirement for this in the specifications, nor could I find any such reference myself. Though such work was no doubt made for a neat finish, I do not think it is related to the original contract.

Hall and Kiel Limited were paid, on Mr Mercer's certification, $1,153.56. Their quote was $1,077. The difference has not been satisfactorily explained. I think,

in that circumstance, that I should take the figure of $1,077 as a starting point. A p.c. sum of $50 was provided in the quotation for the lino work. I have no evidence as to the cost of the handrail and the floorsanding. In the nature of things, it would not be high. I think that the justice of the situation is met if I allow the plaintiff $950 as damages for the loss to him directly arising from the defendant's negligence as to that part of the original work remedied by Hall and Kiel Limited.

I am satisfied that the plastering work on the external walls was defective. The walls also required sealing and waterproofing - work which was done by Gunac (Wellington) Limited at a cost of $348. Mr Chait said that the replastering and consequential repainting of the outer walls was done by a painter whose name he did not remember, at a cost of $907. This evidence does not measure up to the standard required and I am not disposed to mulct the defendant in damages on it. There was evidence as to the proper cost - $10 a square yard but no evidence as to the area involved. A commercial concern such as the plaintiff is, should, so it seems to me, readily be able to produce vouchers and accounts for such an expenditure. It has, however, proved an item of expenditure for remedial plastering work done on the interior of the building by I.M. Johnston Plastering Company Limited. I hold that the work done by that company and Gunac (Wellington) Limited, made good work which should not have been passed by the defendant if he had exercised the ordinary skill of an ordinary competent architect and the amounts of those companys' accounts are the measure of the damages accruing to the plaintiff of such negligent omissions by the defendant.

The defendant, in his final certificate, certified for certain extras. These included:-

Drain pipe to chiller and cooler	26.00
Drainage area slab	48.40
Gibraltar board lining to workshop	208.60
Hand basin on first floor	59.50
Corner hand basin	32.50
One toilet and cistern	50.40
	$425.40

Mr Mercer, whose evidence I accept on the topic, was of opinion that these items were shown on the plans and were part and parcel of the contract and accordingly should not have been allowed as extras. I think that the defendant was negligent in so certifying and that the plaintiff's consequential loss is $425.40. The contractor was allowed 10% on the plumbing extras (the last three of the items listed above) and an adjustment of $14.24 is required. The total loss referable to this part of the claim is therefore $439.74. The only other item included in paragraph 9 of the statement of claim which was pursued, was for $40.00 in respect of pipes for floorwaste. There is no evidence to support this item and it is accordingly disallowed.

The plaintiff claimed $2,481.15 as damages occasioned by the defendant's negligence, the cost of storage of goods with the Co-op. Dairy Producers' Freezing Company Limited between the date of the issue of the final certificate by the defendant on 21 September 1967 and the date the premises were ready for use as a coolstore and freezer, 28 November 1969. I find that the plaintiff paid the amount claimed to the company for such purpose in respect of the period from December 1967 to the end of September 1969. The premises, however, were not ready for use as a coolstore when the final

certificate was issued. The insulation work of Winstone Limited and the refrigeration work of McAlpine Refrigeration Limited had yet to be done. When it was ultimately done, it took two months in the doing. That, in the event, is no moment because the claim as finally presented was in respect of a period commencing on 1 December 1967. The remedial work was not undertaken with the despatch that might have been reasonably expected. I have already expressed the view that in all the circumstances, the plaintiffs not proceeding with the work until after the conclusion of the litigation with the builder was not unreasonable. The litigation was concluded in June 1968. After its conclusion, there were what proved to be fruitless discussions with the present defendant for some three months. Mr Mercer was brought into the picture in late August or early September 1968. He was instrumental in obtaining the services of Hall and Kiel Limited who gave a written quote on 25 February 1969 for the part of the work ultimately done by it in April 1969. I.M. Johnston Plastering Limited, in the meantime, had done its part of the work in October 1968. There is no evidence as to when Gunac (Wellington) Limited did its work or for that matter when any other work was done. Making due allowance for the difficulties of obtaining the services of builders and tradesmen in allied services at any time and in particular to complete work either partly done or badly done by other contractors, I am of the view that the remedial work could well have been completed a great deal earlier than it was. Doing the best I can with the data at my disposal, I think the coolstore and freezer should have been ready for use by the end of June 1969. In that circumstance, the cost of storage referable to the defendant's negligence is that in respect of the period from 1 December 1967 to 30 June 1969

or 19 months, whereas the amount claimed is in respect of a period of 22 months. It is clear from the evidence of Mr Maskill, general manager of the Co-op. Dairy Producers' Freezing Company Limited, that more than a mere addition of the items shown on the ledger card put in evidence is required to establish the actual cost to the plaintiff for goods preserved in his company's coolstore and the only method available to me is to reduce the amount rateably. I calculate 19/22 ths. of $2,481.15 to be $2,142.25. The plaintiff would over the period have had to pay electricity charges in respect of his own plant, had it been in use, at an average cost of $40 each three months or $253.33 and this amount was saved by the use of storage other than his own. On deducting this sum from $2,142.25, the loss is reduced to $1,888.92.

The plaintiff did not pay the amount certified for in the defendant's final certificate until the end of June 1968. It follows that during part of the period in respect of which he claims loss under the head of damage now under consideration, namely from 1 December 1967 to 30 June 1968, he had the use of the money involved namely $3,940.12. I think that his general loss should be diminished by interest on that amount for the period. In my view a reasonable rate of interest in the circumstances is 8% which for the seven months involved amounts to $183.86. Such deduction reduces the loss to $1,705.06. I hold that this loss was occasioned by the defendant's negligence in the supervision and the certification of the original contractor's work.

In the result, the plaintiff must have judgment for $3,727.80 made up as follows:-

Damages claimed under para.10 of the statement of claim	1,705.06
Work done by Hall and Kiel Limited	950.00
" " " Gunac (Wellington) Limited	348.00
" " " I.M. Johnston Plastering Company Limited	185.00
Extras wrongly certified for and adjustment of contractor's percentage therein	439.74
	$3,627.80

The defendant is ordered to pay the plaintiff's costs according to scale with disbursements. I certify for 2 extra days of hearing at $42 each.

Solicitors for Plaintiff: C.J. O'Regan, Arndt, Peters and Evans, Wellington

Solicitors for Defendant: Messrs Sladden, Stuart, Joseph and Moulder, Wellington