A. No. 1547/73

IN THE SUPREME COURT OF NEW ZEALAND

AUCKLAND REGISTRY

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No Special Consideration

BETWEEN ALBERT KEITH LEWIS and KEITH EYRE WILLIAMSON practising in partnership as LEWIS & WILLIAMSON

Plaintiff

AND NEVILLE H. PRICE practising under the firm name of NEVILLE H. PRICE & ASSOCIATES

First Defendant

AND THE MAYOR COUNCILLORS AND CITIZENS OF THE CITY OF MANUK

Second Defendant

AND ROLLAND EDWARD VINCENT ADAMS, BRIAN JAMES DODD, GEORGE MUNR PATTERSON formerly practising in the partnership known as THE PRICE ADAMS DODD PARTNERSHIP

Third Party

NB-14 20-21.

Hearing: 26th, 27th, 28th and 29th April, 1976

Counsel: Galbraith for Plaintiffs
Hubble and McKenzie for First Defendant
D.L. Schnauer for Second Defendant (given leave to withdraw)
R.J. Craddock for Third Party (dismissed from suit during hearing)

Judgment: 31st May 1976

JUDGMENT OF BARKER, J.

This action is concerned with an unfortunate dispute between the plaintiffs who are consulting structural engineers, and the First Defendant, an architect. The facts are somewhat complicated; I first record my findings of fact, resolving, where necessary, any conflict.

The second defendant, the Manukau City Corporation, wishing to build a large administration building at Wiri, in May 1971, selected as its architects for the project, a firm, practising in Auckland and elsewhere under the style of "the Price Adams Dodd Partnership", (hereinafter referred to as "the PAD

partnership"). The principals in this firm were Messrs. Adams, Dodd and Patterson and, the first defendant, Mr. Price.

Mr. Price recorded in a memorandum, held after the official engagement of the PAD partnership by the second defendant, that the partnership's commission was to be "a full commission", based on the New Zealand Institute of Architects terms of engagement. The same memorandum recorded that the structural engineer for the project was to be appointed by the PAD partnership. It is usual for consulting engineers to be employed and paid by the architect and not by the client; indeed, the Institute of Architects' scale of charges contemplates that the architect will have to pay the engineer, out of the fees paid to him by the client. The engineer's situation thus differs from that of the quantity surveyor, who is engaged and paid directly by the client, although his appointment is usually recommended by the architect. I comment in passing, that the method of engagement of engineers in building projects can on occasion be a source of friction between the two professions.

I find that, on 4th March, 1972, the plaintiffs, Messrs. Lewis and Williamson, were first approached by Mr. Price, in any definite way; to be the consulting structural engineers on this project. There was evidence from Mr. Price and some of his staff of discussions with the plaintiffs prior to that date, but I prefer the recollection of the plaintiffs. My view is confirmed by a letter from Mr. Price to the plaintiffs, dated 24th March, 1972, where he appeared to offer them this assignment as a sort of consolation prize for their not being paid for a project in New Caledonia. Mr. Price stated that the Plaintiffs' appointment for the Manukau job was "against some opposition by other parties."

Mr. Price and some of his employees were of the view that there had been contact between the parties prior to this date; however, they produced no written record; I consider

both plaintiffs methodical, reliable persons, Mr. Williamson made a note of his original interview, and Mr. Lewis opened a file for this particular project. I think that the 1st defendant's witnesses are somewhat confused over the date of the first instruction to the plaintiffs, although I cannot see how the date is very material, since there was no allegation of the plaintiffs' having major attendances prior to that date.

Two letters were written by the 1st defendant to the plaintiffs dated 24th March, 1972. The first, to which I have already referred, dealt with a project in New Caledonia, where the PAD partnership had instructed the plaintiffs to do certain structural engineering work, and for which the client in Nouméa was unwilling to pay, alleging in some way that the work done by the plaintiffs was either unnecessary or faulty. Despite the fact that the plaintiffs would have had a right of action in New Zealand against the PAD partnership, they apparently elected not to pursue that right and accepted the defendant's assurances that the only way in which recovery was possible was through the Courts in New Caledonia, with little prospect of success.

The second letter is important, and I therefore set it out in full.

"Manukau City Council New Administration Building.

This letter is to confirm your commission as Consulting Engineers to this office on the above project.

The terms of this commission are to be parallel to ours, in that the Council reserves the right to terminate our services at any time because of non-availability of funds or rejection of the scheme by the Loans Board. We would be paid for our services to the time of termination.

A term in our commission was that we had to gain approval from Council for all Consultants. We have not yet had a reply from Council as to your employment, but have verbal assurance that this is acceptable.

Would you please proceed with the preliminary investigation to provide sufficient information to Mr. David Cook so that he can prepare an accurate preliminary elemental cost plan. This office will be responsible for this initial work should, in the unlikely event, Council not confirm

"your appointment. In order to meet the programme, David Cook must have this information by Wednesday, April 5, 1972.

Yours faithfully,
The PRICE ADAMS DODD partnership
"Neville H. Price" "

This letter was followed by a letter from the 1st defendant to the Manukau City Council asking for its formal approval of the plaintiffs as consulting engineers. The 1st defendant described them to the Council as "a reputable firm of engineers highly suited to the type of project proposed. The most recent project we have employed them on is the 20-storey West Plaza Building in Down Town Auckland. ..." It is here worth mentioning that no question was raised by any witness as to the competence of the plaintiffs in any way. Mr Williamson, the plaintiff dealing with the technical side of this project, drew nothing but praise, from all witnesses, for his professional competence and high degree of expertise, particularly in the field of seismic engineering.

The Council's formal resolution approving the engagemen of the plaintiffs was not passed until 4th May, 1972; it took some three weeks more for the Council to advise the 1st defendant of the approval. I consider that the plaintiffs were quite happy to undertake whatever work there was, after their initial interview with Mr. Price, regardless of whether the Council subsequently approved of them, since they enjoyed the PAD partnership's agreement to pay them regardles

After the engagement of the plaintiffs, Mr. Williamson had a number of attendances either personally or by telephone, with Mr. Price, with two of the PAD partnership's employees, Messrs. Waters and Burrow, and with Mr. Cook, the quantity surveyor engaged by the Council.

To put the plaintiffs' involvement with the 1st defendant on this project into its context, I accept the evidence of Mr. Williamson that, at the time he was first instructed, he had 21 other professional assignments listed for that month,

two of which were very major. Like busy men in any profession, he just had to make such time as was necessary for work on this project. He said that he spent a number of hours in discussions, and in just "brooding". He kept time-sheets of a sort, but admitted that these were not entirely comprehensive. His recollection is that he did not put pencil to paper during March, 1972.

Mr. Cook gave evidence that he first spoke with Mr. Williamson on 21st March, when he said Mr. Williamson gave him some five pages of detailed information on structural sizes and members and reinforcing steel content. The time involved was three to four hours. Mr. Waters said he would have had about twelve attendances on Mr. Williamson during this period; and Mr. Burrow claimed to have had numerous attendances in the form of short meetings and telephone discussions. Mr. Williamson's records (on which an account was subsequently based) showed that he had had some 12 hours of attendances although, as mentioned earlier, Mr. Williamson considered that he may well have omitted some attendances from his records. He confirmed that he had discussions with Mr. Cook.

Taking all this evidence in the round, I do not think that the time involved by Mr. Williamson or Mr. Lewis or their staff, would have, in the period March - August, 1972 exceeded 20 hours.

However, the nature and quality of the advice given is another matter; Mr. Lewis charged out Mr. Williamson's time for this early stage purely on a scale time and attendance basis. It is by no means unknown in most professions for a person, highly qualified, experienced and talented, to be paid other than on a pure time and attendance basis for an exercise by him of judgment. Thus for example, Queen's Counsel would be justified in charging out his services for advice given on a proposal to settle a large claim which required 2 hours' consideration, at a rate greater than that charged by

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a junior barrister spending the same amount of time in briefing evidence in some minor dispute. Likewise, an eminent surgeon would be entitled to charge more for performing an hour-long operation of an intricate nature, than would a general practitioner for giving an hour's routine advice in his consulting room. Consequently, I am prepared to hold that advice from a person of the skill or professional reputation of Mr. Williamson, in the preliminary stages of a building project, is something to be valued by its recipient. Quantification of the value of Mr. Williamson's advice will have to be determined by me in due course.

After this preliminary advice from Mr. Williamson, no further work was called for by the 1st defendant until August, 1972. However, by mid-April 1972, the 1st defendant, prior to his marriage and departure overseas in mid-April, 1972, had completed the first phase of the PAD partnership's engagement with the Manukau City i.e. the partnership had performed work to the stage where, in terms of the Institute of Architects' Conditions of Engagement, 20% of the total fee was payable by the City to the partnership. This 20% would (from the client's point of view) include any money properly due to date to the structural engineers by the architect.

The Architect's Conditions of Engagement spread payment of the total fee payable, over four different stages, as follows:

Preliminary design 10%
Developed design 20%
Working drawings 70%
Contract administration and inspection 100%

The final design had been agreed upon by the Council and sketch drawings had been presented by the partnership, with the result that the partnership was able to bill the Council for this work in July, 1972. On 25th July, 1972, the 1st defendant advised the Council that he and the others in the PAD partnership had undergone what he termed "an amicable

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"dissolution" and that his new firm, Neville H. Price and Associates, was fully competent to administer all works and services on the new Council buildings. The other members of the partnership meanwhile continued to practise under the name "Adams Dodd Patterson Partnership".

In the event, the Council required Mr. Price to re-submit his credentials; in so doing, he mentioned that he had relinquished certain time-consuming responsibilities overseas in connection with offices in Fiji and Sydney. He also recommended the continuation of the plaintiffs as Structural Engineers.

Mr. Price was duly approved by the Council as architect for the working drawing and construction phases of the project. There was, however, no official advice to the plaintiffs that the partnership had dissolved. I suspect that they must have known of the dissolution from the "grapevine", and also by reason of Mr. Lewis' admitted friendship with Mr. Adams. What was not communicated to them, however, was that Mr. Price, in his personal capacity, and not as a member of a partnership, had been re-appointed as the architect for the Council.

I hold that the first knowledge the plaintiffs had of Mr. Price's reappointment was at a meeting on 3rd or 4th August, 1972, when Mr. Williamson and Mr. Price met for an hour or two. A more important meeting is one on 19th September, 1972, concerning which Mr. Williamson recorded, inter alia:

(a) "Send Neville A/c for prelim. work"

(b) "send Neville paper on earthquake risks" and

(c) "Next meeting Tues. afternoon fortnightly 2 p.m."

At this meeting, I accept that Mr. Price asked Mr. Williamson to submit an account for the work to date for the partnership. He also asked him for a paper on earthquake risks: Mr. Williamson, on 27th September, 1972 sent him a precis of a seismic design seminar held at Auckland University the previous month, at which Mr. Williamson had given a paper. His note also

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indicated that he and Mr. Price were to have regular fortnightly meetings on Tuesday afternoons.

Mr. Lewis, being the partner concerned with administration in the plaintiffs' practice, on receipt of the request for an account referred to above, went through Mr. Williamson's records starting from March, 1972; he sent the partnership an account for $180; Mr. Lewis analysed the account in evidence as being for 12 hours' work at $15 per hour, in accordance with the then scale recommended by the Institution of Engineers. Mr. Lewis stated (and I believe him) that he would not have sent an account for more than he thought his firm was entitled to receive.

In the meantime, Mr. Williamson proceeded with what he regarded as his normal work on a project of this sort; it is important to note that, on 6th October, 1972, he wrote to the Engineers' Computer Bureau seeking a preliminary lateral load analysis for the structure, and saying "the design is in the very preliminary stage, but there is, as usual reasonable urgency in confirming the structural sizes of the architect." He attended a meeting with Council representatives at Mr. Price's office on 9th October, 1972 when he advised the meeting that the building would be designed within the Public Buildings Code for earthquakes.

In October, 1972, with the approval of Mr. Price, he referred to a specialist firm of foundation engineers for certain technical information in relation to the foundations. The Council subsequently, on 17th October, 1972, approved the engagement of these specialists.

On 10th November, 1972, Messrs. Lewis and Price had a discussion on the question of payment of fees. Mr. Lewis was, not unnaturally, concerned that his firm should have a reasonable cash flow, because it had to pay wages to qualified engineering and draughting staff. There were, as background matters to this discussion, both the unhappy history of the New Caledonia project, and the suggestion that

the PAD partnership had dissolved, leaving owing to the plaintiffs, a sizeable amount in fees. It was said, by Mr. Price, although no detail was given, that the partnership, at the time of its dissolution, was insolvent.

It is agreed between the parties that the basis of the contract between them is what is called in both professions, Document B, being a booklet entitled: "Conditions of Engagement and Scales of Minimum Fees for Consulting Engineers, when engaged as secondary adviser to the client." The relevant engineers' fees are there expressed as a percentage of the structural content of the total works. it is fairly usual for there to be some disagreement between the engineer and architect as to the quantum of the structural content. Unlike the Architect's Conditions of Engagement, which have 4 stages at which a percentage of the fee becomes payable, Document B provides only for 3 as follows:

a) Preliminary phase 20%
b) Design phase 80%
c) Construction phase 100%

Mr. Lewis gave evidence that he telephoned Mr. Cook, who while relucant to put an estimate on the structural content, eventually placed a figure of $800,000 as a fair but conservative figure at that stage. Mr. Lewis then multiplied that figure by the scale percentage of 6% and, taking 80% thereof, came to a figure of $38,400. He took 80% because Document B states that 80% of the total fee is payable at the end of the design phase. Mr. Lewis said that he rounded this figure off to $38,000, and told Mr. Price that that was what their fee would be, based on the structural content then given by Mr. Cook, which was anticipated to rise (with consequential increase in the fee). Mr. Price, on 10th November, 1972, wrote confirming the arrangement reached as to payment of progress fees in the following terms:

> "I am pleased to confirm that after discussions with the Manukau City Council, progress fees by this office to your office will be as follows:

"November 1972	$7,000
December	$5,000
January 1973	$5,000
February	$3,000
March	$5,000
April	$13,000 - or balance
	$38,000 - "

In fact, payments were made of $38,000 by the defendant to the plaintiffs approximately in accordance with the above schedule, with irrelevant variations as to time and payment.

On 30th April, 1973, Mr. Lewis sent an account to Mr. Price in the following terms:

"Revised Fee Calculation based on priced schedule.

Total engineering fee based on structural value of $1,203,459.00 (as detailed on attached sheet) @ 5.75%	$69,198.00
80% of fee now due:	55,358.40
Less invoices to date	38,000.00
	$17,358.40

By this stage, Mr. Lewis had received from Mr. Cook up to date costings and had estimated the structural content at a considerably higher figure than the $800,000 contemplated in the previous November. It should, for the sake of completeness, be noted that, where the structural content exceeds $1 million, the percentage rate goes down from 6% to 5.75%. Mr. Price's reply on 5th June, 1973, queried the accompanying schedule calculating the structural content, but apart from the quantum of structural content, he did not query the basis of the fee, which I consider was, in the account, accurately portrayed by Mr. Lewis in terms which Mr. Price, as a practising architect, should have understood. Mr. Lewis replied, next day, stating that the items listed were, in his view, correctly included in the structural content, and asking for payment. On the same day, he also wrote to the PAD partnership pointing out that he had sent out an account the previous year for $180, saying that he had not, in invoicing Mr. Price, made allowance

for this sum and asking whether they would credit Mr. Price. No reply was received to that letter. Mr. Price replied on 11th June, asking for a meeting, but still not querying the basis of the calculation. Mr. Price wrote again on 26th June, 1973, again stating his unhappiness with the method of calculation of structural content, but again not querying the basis of charge, other than to complain that the engineering fees exceeded 50% of the total architectural fee. I here note in passing, that several witnesses mentioned that the structur engineering fee should be about one third of the architect's total fee. It may so work out in practice, in the average case, but I pay no attention to such statements, where there is a clear, stipulated basis of charging; obviously, some buildings have a greater structural content than others.

The final phase of the engineer's work is supervision during construction (although Mr. Williamson preferred cautiously to refer to "observation" rather than "supervision" Mr. Lewis, on 29th June, 1973, proposed that, since construction was expected to last 21 months, that their fee for this phase (the final 20% of total fee) be spread out over 7 equal quarterly payments.

On 2nd July, 1973, the plaintiffs' solicitors wrote to Mr. Price asking for payment in accordance with the account sent by the plaintiffs to him on 30th April, 1973. On July 14th, 1973, Mr. Price wrote, not to the solicitors, but direct to the plaintiffs, deprecating their having had recourse to solicitors, acknowledging receipt of a letter they had sent enclosing Document B, and offering to submit the dispute as to the structural content to arbitration. He was also prepared to agree to the 7 equal quarterly payments for the supervision fee.

It was not until 10th September, 1973, more than 4 months after receipt of the account, that Mr. Price wrote

to the plaintiffs and, for the first time, disputed, not merely the quantum of structural content, but the very basis of their account. He claimed that the only fees for which he was liable were for the design and construction phases, and that therefore, in respect of the design phase which had just ended, he was liable to pay 60% and not 80% of the fee, based on a percentage of the structural content. This letter, for the first time, stated the basis of the contention which Mr. Price maintained throughout the hearing and in respect of which there was a large amount of evidence from persons eminent in both architectural and engineering professions.

The plaintiffs' account to the PAD partnership was not paid until November, 1973, after an interview at which Mr. Croker, a chartered accountant acting for both Mr. Price and his former partners, suggested to the plaintiffs that they should have increased the account substantially.

As I have said, the parties agree that Document B formed the basis of the contract between the PAD partnership and the plaintiffs and also the basis of the contract between Mr. Price and the plaintiffs, whether that was merely the same contract or an entirely separate contract. The basic dilemma in this case stems partly from the difficulty in marrying up the architect's four stages with the engineers' three. Ideally, the 20% stage (i.e. Phases I and II) of the architect's conditions should coincide with the 20% stage of the engineer's conditions. No doubt eminent men in both professions would like to see the two coinciding, but in my view they often do not and cannot. However, there is in neither document any reference to the other - a matter which might be given some attention when both documents receive their periodic revisions.

Basically, Mr. Price and his witnesses say that the engineer's preliminary phase, where he earns 20% of his total fee, coincides with the 20% phase of the architect, and that, therefore, Mr. Price, when he asked Mr. Williamson

for an account, expected one for at least $11,000.

The plaintiffs' reply to this is (a) they did only 12 hours' work, for which they charged on a time and attendance basis, and, (b) in this particular project, the engineer's preliminary phase did not coincide with the architect's 20% phase, (c) it would be difficult, if not impossible, for them to define the work done in the preliminary phase in any clear-cut way, and (d) 20% of the total fee of some $70,000, i.e. $14,000 would be grossly exorbitant for the work they did.

The plaintiffs' time records showed that they and their staff spent a total of 2,669 principal's hours on the project up until July, 1973, (about the end of the design or 80% stage), which figure, of course, contrasts with the 12 hours recorded for the preliminary stage for which Mr. Price says they should have been paid 20% of the total fee.

Whichever way my decision goes, some hardship will be caused. Mr. Price claims that the 20% of the engineer's fee in dispute, which was included in the architect's fee, has already been paid by the client, who cannot be asked to pay again. A finding against him would mean that he would have to pay out of his own pocket for work which he says, was properly commissioned by the PAD partnership. The plaintiffs, on the other hand, say they have not been paid for work which they have performed, and there has been no complaint as to their method of performance.

It is here convenient to mention that, in March, 1974, there was an order made ex parte by the Chief Justice, joining as third parties, the remaining members of the PAD partnership. There was also a motion filed by Mr. Craddock, on their behalf, seeking to strike out the third party notice, with an affidavit in support and numerous affidavits in opposition, mostly from witnesses who were subsequently called on behalf of Mr. Price. For some reason unexplained to me, this

motion was not dealt with before the hearing. It should have been, in my view. The form of the third party notice made it unclear to me exactly what was the legal basis of the defendant's claim against the third parties, bearing in mind the necessity that a cause of action be alleged by a defendant against the third party. (See Karori Properties Limited v. Jelicich and Others [1969] N.Z.L.R. 698, where Speight, J. gave a clear and informative exposition of those situations in which a claim for contribution or indemnity may arise.)

By arrangement between the parties, Mr. Price gave evidence first: after he had been cross-examined by Mr. Galbraith, I again raised with counsel the question of the identity of the cause of action alleged against the partnership; I pointed out that the plaintiffs had chosen not to sue the partnership. After an adjournment, counsel advised that, by consent, judgment should be entered in favour of the third party against the first defendant, with costs agreed at $500, including disbursements. I made this order by consent. Thereafter, Mr. Craddock and his clients took no further part in the proceedings. I did not take this step until Mr. Price's evidence-in-chief had concluded and he had been cross-examined by plaintiffs' counsel, in case there had been oral evidence from him of some agreement by the partnership to indemnify him against the plaintiffs' claim. There was no such evidence.

I think that Mr. Price should have taken steps, when the partnership was dissolved, to ensure that there was some clear understanding as to who was liable for the plaintiffs' fees; moreover, he should have told the plaintiffs what was going on. Indeed, if their first engagement was to be terminated, Document B requires the Engineer to be given reasonable notice in writing of termination. Had he kept them fully informed, I have little doubt that some clear arrangement would have emerged at that stage. However, it was a long time, as the narrative discloses, before the

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plaintiffs learned of the exact nature of Mr. Price's contention.

I, of course, must decide the matter on the terms of the contract between the parties, regardless of any questions of equity; to do that I must determine whether, in this case, the 20% phase of the architect's engagement with his client corresponds with the preliminary phase (the 20% phase) of the engineer's engagement by the architect. On this point evidence was given as follows:

(a) Mr. Price was of the view that the two always coincided, and that this contract was no exception.

(b) Mr. E.T. Smith, a consulting engineer, called by the 1st defendant, was of the view that, unless the architect and engineer have arranged to the contrary prior to the commencement of the engineer's service, the engineer would be entitled to the normal scale fee according to Document B, upon the completion of each phase of his service; he inclined to the view that the two coincided.

(c) Mr. T.E. Dixon, the current chairman of the Auckland Branch of the Institute of Architects, called by the plaintiffs, said, in reply to a hypothetical question from Mr. Hubble that, given a situation where the architect has received 20% of his fee, and has received from the engineer all the necessary information to present preliminary design and scale drawings, then in his view the engineer would normally be entitled to his full 20%. He said there were times when the two scales coincided, but, that in the greater number of projects, there would be disparity.

(d) Mr. Lewis said that it was not the practice of his firm to send an account for the preliminary work at the early stage. It was clear from his evidence, that he did not regard the two as coinciding.

(e) Mr. A.H. Curtis, an architect of seniority and experience in his profession, accepted that if his firm as the architects had received 20% of the fee, they would then be liable to pay to the engineer 20% of his fee.

(f) Mr. K.D.T. Shores, a consulting engineer of considerable experience and with service on various engineering professional bodies, gave as his view that it is very hard to draw firm lines between the two scales, although the intention of both professional bodies was that there should be a coincidence between the architect's and engineer's work at the 20% stage.

It also seemed clear, from Mr. Smith and Mr. Shores' evidence, that an engineer may not spend so much time in this preliminary phase as in the later phases, but that he would, in the preliminary phase, be drawing heavily on his skill, knowledge, judgment and experience in giving opinions, rather than doing detailed drawings.

I cannot hold that there is any custom or implied term that the architect's and engineer's 20% phases must necessarily coincide. As I understand the recent cases on the doctrine of the implied term, such as Southland Harbour Board v. Vella, [1974] 1 N.Z.L.R. 526 and Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 2 All E.R. 260, it is not enough for a Court to find that a term would have been adopted by the parties as reasonable, even if it had been suggested to them: it must have been a term that "went without saying" or a term "necessary to give business efficacy to their contract." I cannot see that it could be said as necessary for business efficacy that the two phases had to coincide at the 20% stage - particularly when the work required of the engineer in the preliminary phase is defined. Document B has no reference to the architect's Conditions of Engagement with his client which is, strictly, res inter alios acta. The definition of the work to be done in the

preliminary phase of the engineer's work is set out in document B clause 3.03.1 as follows:

"Preliminary Phase

(a) Consultation with the Principal Adviser and the Client and the ascertainment and analysis of all available data or information relating to the project.

(b) Attendance at necessary conferences in respect of the engineering design during the preparation of the design.

(c) Collaboration in the investigation of various structures or services, materials and comparative costs, and preparing preliminary design drawings as necessary.

(d) Advising as to the necessity for soil and foundation investigation, surveys and other investigation or tests as may be necessary for the proper completion of the engineering works and arranging for such tests and other investigations as may be approved.

(e) Advising at an early stage the approximate space requirements and weights of structural elements and of electrical and mechanical services. "

It is interesting to note that (e) above was not included in the 1969 edition of the present Document B which was approved in 1970.

Looking now at what happened in this contract, there being, as I have found, no custom or implied term, I accept the evidence of the plaintiffs as to what work they did; I find that in this particular job, the boundaries between the preliminary and design phases were considerably blurred. I accept Mr. Williamson's evidence that much of the work stated in the above definition of the preliminary phase was not performed by him until after his re-engagement (if that is the correct term) by Mr. Price. Mr. Lewis says it would be extremely difficult to assess the work in the preliminary phase as described even as a <u>proportion</u> of the total work in that phase. Mr. Shores, whom I accepted as a helpful witness, was of the view that an engineer could send an account for a proportion of the 20% (rather than an account based merely on time and attendance) where the architect has drawn on the engineer's skill and judgment but the engineer has not necessarily spent a vast amount of time. This was a matter raised by me with this witness and it has the following relevance:

Where work is postponed, cancelled or abandoned, document B makes the following provision:

"17.01 Work postponed, cancelled or abandoned shall include the following cases and fees shall be charged as set out hereunder:-

(a) Where the works are not constructed.

(b) Where the works are postponed, cancelled or abandoned because of variations in the Client's or the Principal Adviser's instructions or requirements or because of variations in the requirements of the controlling authority.

(c) Where the Consulting Engineer's engagement is cancelled before the works are completed.

17.02 Should the costs or liabilities incurred for such partly completed work be greater than the fee set out hereunder, the Consulting Engineer shall be entitled to additional reimbursement accordingly.

17.02.1 When fees are on a percentage basis

(a) The Consulting Engineer shall charge the percentage of the full fee in accordance with the table in Clause 15.02.1.

(b) Should the engagement be cancelled before completion of a phase the Consulting Engineer's fee shall be fixed either on a time basis or as a proportion of the percentage fee to which he would have been entitled if the phase had been completed.

(c) Where one Consulting Engineer is commissioned for the Preliminary and Design Phases only, and a second Consulting Engineer is commissioned for the Construction Phase, the first Engineer shall receive 80% of the basic fee and the second 35% of the basic fee.

17.02.2 When fees are on a time basis

The Consulting Engineer shall charge the full fee earned at time of postponement, cancellation or abandonment on the agreed time basis. "

I consider that the PAD partnership's engagement of the plaintiffs was cancelled before the works were completed by the PAD partnership. Certainly their engagement was postponed whilst the Council was deciding whether to engage Mr. Price in his new status as sole practitioner.

If, as the parties agree, document B, including the above provision, contained the terms of their contract, I

think Mr. Price, when he came to re-enter into a new contract, or re-affirm the old, should reasonably have expected that some proportion of the 20% would have been earned. I do not think it would be right for the plaintiffs to be paid twice for that part of the preliminary phase which they already did for the PAD partnership.

I am therefore holding that the plaintiffs are entitle to succeed on a claim for their fees against the defendant, based on document B, but I consider that I should deduct from their claim more than the $180 which was the modest account sent by Mr. Lewis. In so doing, I bear in mind the suggestion of Mr. Smith that the 20% for the preliminary phase often does not require so many hours as the 20% of the construction phase. I also bear in mind the knowledge and expertise of Mr. Williamson and his enviable reputation in his profession and the fact that, in my view, he was unduly modest in charging only $15 an hour for advice which, although it took a relatively short time to give, was nevertheless extremely useful to Mr. Price; this is evidenced by the fact that the PAD partnership was able to complete its commission with its client up to the 20% stage to the client's apparent satisfaction.

It is difficult to know how much to allow by way of deduction. I do not think that any further evidence could help me; the plaintiffs' evidence is that it would be difficult, if not impossible, to differentiate between the two stages.

I think that the plaintiffs, in rendering the account to the partnership, should have taken the option given to them by 17.02.1 of document B and charged a proportion of the percentage fee to which they would have been entitled, if the phase had been completed. In this view, I derive some support from Mr. Shores' evidence.

Viewing all the evidence and doing the best I can with the limited material available in a technical area, I conside

that the account that they should have rendered to the partnership should have been for 33 1/3% of the preliminary phase stage.

I therefore give judgment for the plaintiffs for the amount claimed in respect of the preliminary stage less a deduction of 33 1/3% from this 20% of their total fee. I expect counsel will be able to work out the amount due in terms of this judgment. I do not attempt to do so in view of a possible controversy over structural content.

In addition, the plaintiffs are entitled to judgment for the supervision fee to the extent of the instalments at present due. I am not certain as to whether I noted the amounts owing in this regard correctly and I would therefore appreciate a memorandum from both counsel, indicating the amou for which judgment should be entered, should this become necessary.

In the absence of argument concerning the right to a charge, under the provisions of the Wages Protection and Contractors Liens Act 1939, I think that the action of the plaintiffs in seeking a charge on the monies held from the Council was a justifiable protection of their rights, and reasonable in view of their past history with the 1st defendan particularly over the New Caledonia proposal. The amounts awarded will bear interest from the date on which each particu payment was due, at the maximum rate for the time being in force under the Judicature Act 1908.

The plaintiffs are entitled to costs as per scale based on the amount claimed on the amount awarded, plus interes (See Blackley v. National Mutual Life Association (No. 2) [1973] 1 N.Z.L.R. 668.) They are also entitled to disbursements and witness' expenses to be fixed by the Registrar.

I should be obliged if counsel will make written submissions as to whether a declaration of charge is needed or,

indeed, legally possible. It may be that they will wish to argue this matter, which was not argued before me, as to the entitlement of an engineer to a charge under the Act. I do not agree with Mr. Hubble that the judgment of the Court of Appeal in Caldow Properties Ltd. v. Low [1971] N.Z.L.R. 311 establishes that a consulting engineer, such as the plaintiff, is necessarily disentitled a lien or charge. I refer to the case of Baylis v. Wellington City [1957] N.Z.L.R. 836, which was by no means disapproved of by the Court of Appeal in the Caldow case.

The Manukau City Council appeared at the hearing and its counsel, Mr. Schnauer, was given leave to withdraw; since the Council's role has been merely that of a stakeholder. In my view, it is entitled to its costs, and I fix these costs at $100 plus disbursements, payable by the 1st defendant.

Counsel are at liberty to file written submissions as to the form of final judgment or, if they wish, to argue about the entitlement of the plaintiffs to a charge. I certify for 3 extra days and for the whole costs of the action, if necessary to so certify. If necessary, I am prepared to make any consent orders required to "unfreeze" the moneys held by the Council.

R.D. Barker, J.

Solicitors:
Kendall & Wilson, Auckland for Plaintiffs
Bamford & Brown, Auckland for 1st Defendant
Brookfield, Prendergast, Schnauer & Smytheman, Auckland for 2nd Defendant
Holmden, Horrocks & Co., Auckland for Third Party