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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.No.124/83

BETWEEN GLENROY GOUGH of 7 Waldron Crescent, Abbotsford, Dunedin, Motor Trimmer and RUTH LORRAINE GOUGH his wife

Appellants

AND M.J. GRAY & K.P. GRAY trading as Gray Brothers Builders, both of 9 Brooklyn Street, Green Island, Dunedin, Building Contractors

Respondents

JUDGMENT OF VAUTIER, J.

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Hearing: 19 March, 1984.

Counsel: K.C. Marks for Appellants
J. Conradson for Respondents

Judgment: 26th March, 1984.

JUDGMENT OF VAUTIER, J.

This is an appeal against a judgment of the District Court at Dunedin delivered on 11 August, 1983 in respect of a civil action in which the appellants were the plaintiffs and the respondents trading as Gray Bros., Builders were the defendants. The basis of the action is succinctly stated in the judgment in the following way:

> "In this case the plaintiff sues for damages for breach of a partly written and partly verbal contract to build a garage erected by the defendants for the plaintiff in 1976.
>
> The Amended Statement of Claim alleges two causes of action, both of which are fully denied, namely:-
>
> (1) that the defendants in erecting the garage were in breach of an implied term that the retaining walls would be drained and backfilled; and

(2) that, alternatively, the defendants were negligent in failing to drain and backfill the retaining walls.

The damages claimed total $5,936.09 made up as follows:-

(a)	Cost of remedial repairs to the property	$3,018.24
(b)	Civil Engineer's fees for inspection report and recommendations as to remedial work	917.85
(c)	General damages for general trouble worry and inconvenience	2,000.00
		$5,936.09

In addition, there is a prayer for interest and costs."

Having heard the evidence of the two plaintiffs, an excavator driver Mr Finlayson and a consulting registered civil engineer Mr Hadley called for the plaintiffs and the two partner defendants and a further consulting engineer's report obtained by the defendants having been placed before him by consent, the District Court Judge, G.J. Seeman, Esq., found for the defendants with the usual award as to costs.

The reserved judgment in this case is said by the appellants to reveal a number of errors as regards the findings of fact and the law as applied. In the first place, it is said that the judgment proceeds in several respects to deal with the case on grounds which were not advanced on behalf of the plaintiffs and formed no part of their case. It should be mentioned that in this case the record of proceedings in the District Court is very complete and gives every indication of being presented with meticulous accuracy. It includes a verbatim record of counsels' opening submissions. For this reason I think it must indeed be said at once that the

plaintiffs' case was indeed advanced solely upon the basis of breach of contract although the reference in the pleadings to alleged negligence on the part of the defendants may have caused the Judge to think that the position was otherwise. All that was here intended, it seems clear, was to rely upon negligent performance of the contractual obligations as distinct from breach of an implied term which, of course, involves very much the same ground on the facts. Mr Marks in his argument on the appeal sought to reserve his right to argue that a tortious basis of liability was indeed available to him as an alternative cause of action but did not seek to argue this as regards the authorities on the question. He was indeed wise not to do so, I think, because the force of his criticisms against the judgment appealed from rests to a fairly substantial extent on the contention that the Judge was led into error by his concluding that the matter was, to a substantial extent, to be determined on the basis of tortious principles regarding negligent misstatements and was affected by the stand adopted by Courts in this country with regard to the question of concurrent liability in tort and contract - the law as established by the decision of our Court of Appeal in McLaren Maycroft & Co. v. Fletcher Development Co. Ltd. (1973) 2 NZLR 100 (which that Court now recognises as at least warranting reconsideration in the light of the subsequent decisions of the House of Lords to a contrary effect) - (see Rowe v. Turner Hopkins & Partners (1982) 1 NZLR 178 at p.181, per Cooke and Roper, JJ.)

The basis of the appellants' argument that the judgment in question is founded upon wrong premises rests on

plaintiffs' allegation that the contract was of such a nature that there arose an implied term that the retaining walls of the garage would, as part of their construction, include provision of drainage of the footings and backfilling behind the wall. These walls, it should be mentioned, were so placed as to involve the very important function of providing support for the foundations of the house itself once the excavation had been carried out to provide for positioning of the garage in the desired position.

There was indeed throughout the lengthy evidence presented a complete unanimity on one question. This was that sound building practice unquestionably required such retaining walls as these to be drained and backfilled. It was not at any stage disputed that a contract for the construction of such a garage as this involving a site excavated as it was right up to the foundations of a substantial brick veneer dwelling, called for drainage and backfilling. The plaintiffs' evidence was very clear and definite, that this was not a matter discussed in any way when the contract was entered into. It was only, Mr Gough says, when the rear retaining wall of the garage was partly constructed that he raised a query as to the matter of drainage and backfilling.

The plaintiffs acknowledged that they undertook to have the excavation carried out but understood that this would be done under the control of the defendants. There was no dispute as to this but what the defendants claim is that there was an express term in the oral contract agreed upon that all drainage and backfilling

their contract and dealt with by the plaintiffs themselves. This was not pleaded by them but it is confirmed by letter prior to trial the plaintiffs' solicitors were advised that this defence would be put forward. The situation thus resolved itself into a simple question of fact. Did the plaintiffs enter into an open contract in which the ordinary principles operated as to compliance with accepted standards of good workmanship for the type of construction involved and such is to be implied, or was a special contract entered into whereunder the defendants were absolved from carrying out a part of the work acknowledged as essential?

For the plaintiffs it is argued that the judgment fails to deal satisfactorily with the question of an implied term and as regards the question of the express term contended for by the defendants overlooks the fact that the burden of proof on this issue rested upon the defendants who were asserting the existence of such a term.

With all respect to the Judge it must, I think, be accepted that the point that there must here clearly have arisen an implied term relating to drainage and backfilling, unless such was expressly excluded, seems to have been overlooked or obscured by other considerations which do not, I conclude, have any real relevance to this point or were not relevant by reason of the evidence as adduced and the way in which the respective cases of the parties were presented.

Both the engineers and the defendants themselves

and should not have been omitted. It is beyond doubt in the evidence that the omission was causative of the partial collapse of the house foundations in the vicinity of the retaining wall of the garage. On p.3 of the judgment it is said:

> "It is not disputed in either of the engineering reports, that because the retaining wall at the rear of the garage was not provided with an adequate drain and was not backfilled the land upon which the house was originally built slipped forward into the gap left at the rear of the retaining wall (and under the sun deck) with the result that there was considerable settlement and movement under the house rendering it structurally unsound and there was flooding of water through the rear wall, up to nearly half its height, into the garage area."

There is, however, a statement on p.6 which appears to be in conflict with this earlier finding as to causation. I refer to the sentence reading:

> "In regard to physical causation I would also be left in considerable doubt that the major damage to the plaintiff's house could be attributed to the failure to backfill behind the garage wall."

In the judgment it is also said:

> "The real issue in this case, however, is that the plaintiffs say that they relied on the builder as an expert tradesman not only to erect the garage, but to complete all consequential work thereon in accordance with good trade practice; and the defendants claim that the control of the operation was solely in the hands of the plaintiffs, particularly Mr Gough, and that as Mr Gough had made it clear that he was arranging for some of the work to be done by another contractor engaged by him and doing a lot of the work himself, they were really on no different level than other sub-contractors to the plaintiffs.
>
> The defendants further contend that the consequential work, that is the necessary drainage and backfilling, was no part of their contract, and that such work, if it was necessary, was a matter exclusively under Mr Gough's control."

The findings on this aspect of the case, it has to be noted, are prefaced by the following reference to the burden of proof:

> "It is important to emphasise the importance of the burden of proof - and to specifically point out that the general principle is the proof of matters in legal proceedings is that he who asserts a fact has the burden of proving it, and in a civil claim, must do so on the balance of probabilities."

The judgment then continues:

> "Here, frankly, there is a paucity of evidence and a dispute as to what was the verbal agreement between the parties. Mr Gough claims that he took advice from the defendants, as builders. He says he relied on them to advise him as to what should be done. On the other hand there is evidence that he retained control of the operation by arranging for his own contractor to excavate the site for the garage, although claims that his contractor was to do that work under the defendant's supervision.
>
> The defendants as builders owe the obligation to build in proper and competent manner. They are also liable for professional advice given as builders. That may be argued as extending to the failure to give advice as to what is good building practice, but only where it is clear to the builder that his trade skills and expertise are being relied upon by the owner. It is one thing to engage a skilled tradesman to give professional advice relating to his trade, but it is quite another to rely on casual remarks made in the course of conversations while work is being carried out, without making it clear that any questions or remarks are being asked in a professional capacity and that the answers are being relied upon as professional advice.
>
> The defendants deny that they were asked any advice but they do accept that they were asked to prepare a plan of the garage and that they applied for the Building Permit from the Green Island Borough Council. The defendants' advice is that Mr Gough retained overall control of the operation, and that he would take charge of the 'excavation, footings, field drains, and that sort of thing'."

The immediate difficulty which arises concerning all this is that there was, as the record shows, no evidence

of the operation" insofar as the building of this garage was concerned. All that the evidence showed was that the plaintiffs undertook to get the excavation carried out to provide the site for the garage, to put a floor in the garage themselves when it had been constructed and to carry out any lining work and landscaping walls and the like to complete the landscaping layout suited to the new construction. This clearly did not in my view amount to assuming control of the operation of the construction of the garage itself. The evidence indeed of the defendant Mr M.J. Gray himself shows that the conclusion reached by the Judge that the defendants were simply in a position equivalent to that of sub-contractors is not in accord with the evidence presented. In his evidence in chief at p.50 the following passage appears:

> "Now, did you understand yourself to be the main contractor in this job? ... We were employed to design the plan, but yes, I suppose we were. We took the permit out.
>
> The Court
>
> The permit of course would be in your name to carry out the job wouldn't it? ... Yes."

Consistently with this there was the evidence of the excavator driver who deposed in his evidence as to carrying out the excavation to the requirements and under the direction of the defendants and whose evidence was not in any way called into question.

It further has to be noted that the statement of claim in the action, and indeed the opening address on behalf of the plaintiffs also, make it clear that the plaintiffs were not seeking to found their claim in

advice given by the defendants and what is said in this regard, therefore, does not serve to clarify the position.

The aspect which counsel for the appellant put to the forefront of his argument in support of the appeal, however, relates to the two issues to which I have already referred and which I must agree, must on the way in which the matter was presented and the evidence which was adduced determine the question of liability in this case. The first is, as I have said, whether or not the contract on the basis of the evidence presented by the plaintiffs was one in which there was to be implied a condition that the defendants as builders of the garage would, in the construction of the retaining walls thereof, provide drainage and backfilling. On this aspect there is, of course, no doubt that in general where a contractor undertakes to erect a building there is a condition implied in such a contract that accepted trade usages will be observed in the carrying out of such work but of course the incorporation of such an implied term will not arise if the actual agreed terms exclude such an implied warranty. It was necessary in this case, therefore, to consider, first, the nature of the contract to ascertain whether it was of such a kind as to give rise to an implied condition that drainage and backfilling would be provided for the retaining walls in the absence of some express agreement to the contrary. The principles to be applied are, as Mr Marks stated, to be found conveniently collected in the joint judgment of Cooke and Quilliam, JJ. in Devonport Borough Council v. Robbins (1979) 1 NZLR 1 at p.23. From the passage commencing at line 17 it will be seen that, in general, the conditions

be satisfied if it is - (1) reasonable and equitable; (2) necessary to the business efficacy of the contract so that the contract would not be effective without it; (3) so obvious that it goes without saying; (4) capable of clear expression; and (5) does not contradict any express term of the contract. The judgment does not in fact contain any examination at all of this question as to whether or not a condition such as that relied upon by the plaintiff could properly be regarded as one that should be implied. The reference to "there being no written evidence to support the plaintiffs' claim regarding the alleged and implied terms of the contract" appears on its face to be a contradiction in terms but it may well be, as Mr Conradson submitted, what was intended to be read out of this statement is that insofar as the contract was reduced in writing it was not of such a nature as to support the implied term for which the plaintiffs contended. If this is so, of course, then there is the difficulty that no reasons for this conclusion are given. The existence of an implied term could, of course, be negated by proof of an express term with regard to this aspect. It is to this aspect that the appellant directs its major attack on the judgment. The evidence shows that it was the defendants and the defendants alone who were endeavouring to establish that the oral terms of the contract included the express term that the plaintiffs would provide the drainage and the backfilling for the wall, items which the defendants fully appreciated were necessary for its safety. As will be seen from the passage in the judgment which I have quoted above, the treatment of this issue is prefaced by a reference to the burden of proof of a particular

and the tenor of the judgment as a whole can only, I must say, in my view, be read as indicating that the burden of proof with regard to the question of the existence or non-existence of an express term relating to drainage and backfilling was regarded as resting upon the plaintiffs. This it clearly did not, as indeed Mr Conradson concedes. The record indeed shows that he made just such a concession in the course of the submissions made by counsel at the hearing. It was the defendants and they alone who were asserting that there was such an express term.

Having regard to all these considerations I am constrained to take the view that there are indeed errors here in the application of the law to the facts and that the judgment for the defendants cannot be allowed to stand. The question then is as to whether there are sufficient facts presented to this Court to enable the matter to be adjudicated upon instead of it being referred back for further consideration. I think that there are. As indeed the Judge finds near the beginning of his judgment, the facts relating to the building of the garage and the cause of the damage are not really in dispute. I am quite satisfied that in the absence of some special stipulation to the contrary incorporated into the contract the defendants, as a firm of building contractors by their contract to build this garage including as it did walls which clearly had to fulfil the function of retaining walls, assumed an implied obligation to build the wall according to accepted building standards which, on all the evidence including that of the defendants themselves, required drainage behind such walls and backfilling. Such an implied condition clearly in my view

satisfied all the requirements which in law must exist before an implied term is incorporated into a contract. Both the expert engineers and the defendants themselves acknowledged that such work was required by accepted standards of good building practice. The defendants, by accepting the role of the builder for the purposes of the local authority's building by-laws would be the persons to whom the local authority would look to see that the requirements of the building by-laws were met and the engineer, Mr Hadley, although conceding that these particular matters were not specifically dealt with in the by-laws said that compliance with accepted standards of building practice which the by-laws do call for clearly required such work to be done. The defendants in effect acknowledged that it was their responsibility to deal with the requirement of the building by-laws. They, and not the plaintiffs, dealt with the local authority over the question of substituting block construction for re-inforced concrete in the retaining walls. In my view, the argument in favour of an implied term on this aspect is, on the evidence, overwhelming and the only question was whether the implying of such a term was negatived by express agreement as the defendants contended it was. This, as has earlier been pointed out, necessitates a consideration of whether the defendants had discharged the burden of proof resting upon them to show that the oral contract did incorporate such a term. This requires an evaluation of the evidence to determine which of the two versions should be preferred. There are, as Mr Marks has submitted, a number of facts appearing from the evidence, particularly that of the consulting engineer and of the defendants themselves, which tend to show that the

preferred to that put forward by the defendants. There was, for example, the evidence of Mr Hadley that once the wall had been erected in the way it was it was impossible to drain behind the wall. There was, further, his evidence that once the defendants had completed the wall it would be extremely difficult to backfill behind the wall. The detailed plan prepared and submitted by Mr Hadley makes it quite obvious that this was so and supports his statement that he did not believe it was intended that there be backfill after the job was completed or, as he said, if that was intended "it was a pretty odd arrangement". When there is coupled with this evidence the statements of the defendant M.J. Gray as it being "possible" to backfill the wall after it was completed although obviously on all the evidence in a completely unworkmanlike, difficult and time-consuming manner, the admissions that nothing is said to the plaintiffs after the completion of the wall about the fact that no drainage or backfilling had been carried out and the admission that the defendants went ahead and completed the work while the plaintiff, Mr Gough, was away from Dunedin, it becomes clear in my view that the preponderance of evidence tended strongly in favour of the conclusion that the plaintiffs' version that nothing was said when the contract was entered into about this matter of drainage and backfilling was more probably true than the version put forward by the defendants.

As Mr Marks submitted, it would indeed be a somewhat extraordinary situation that the plaintiffs and the defendants, when discussing the work and making deletions from the original specification prepared by the defendants in

were to accept responsibility, should deal with the matter of the excavation but record nothing at all about the drainage and backfilling of the retaining wall - notwithstanding the fact that the defendants, according to their evidence at the hearing, clearly appreciated that this work was vital and that the defendants had always previously made provision for such in building a retaining wall.

The recorded evidence overall certainly leaves me in no doubt at all that the defendants here failed to establish their version of the terms of the contract as more likely to be true on the balance of probabilities than that of the plaintiffs and indeed there are statements in the judgment appealed from which indicate that had the matter been approached on the basis which I accept was the correct one, the Judge would have come to the like conclusion.

I accordingly conclude that the plaintiffs are entitled to succeed in their claim. There being no suggestion that any further evidence needs to be called to enable the damages to be properly quantified, I proceed to deal with this aspect also. It is undisputed that the account of Downer and Company Limited for repairs to the property related solely to repairs necessitated by the failure to drain and backfill the retaining walls and this amount, viz., $3,018.24, is, I adjudge, properly recoverable. The parties themselves reached agreement that the fees of the civil engineer for inspecting, reporting on the damage to the dwelling and superintending repairs, totalling $917.85 should be apportioned as to 80%

balance to unrelated damage to the house. The amount to be included here is accordingly $734.28.

This leaves for consideration the claim of $2,000 by way of general damages advanced by the plaintiffs. The consideration of this head of damage is made more difficult because in the amended statement of claim no facts at all are pleaded upon which any claim for general damages could be founded whether as damages for breach of contract or in tort. No objection, however, seems to have been taken to the inclusion of the claim in the prayer for relief and no point was taken as regards pleading in the argument before me. The plaintiffs, Mr and Mrs Gough, without objection, gave quite lengthy evidence at the hearing in accordance with the statements on this aspect made in the course of the opening address for the plaintiffs. This evidence was, in the main, confined to a detailed description of the limitations placed upon the use of the house following the subsidence such as the fear of using the fireplace in its insupported condition, the limiting of the number of people in the front room at any one time because of the movement in the floor, keeping the children out for fear that the subsidence might suddenly progress and the like. Mrs Gough also spoke, however, of being frightened about remaining in the house at night.

As is mentioned in the article in the Otago Law Review by Christine French, The Contract/Tort Dilemma (1982, Vol.5, No.2, p.236) to which counsel referred me, it has been recognised that in New Zealand there is a difficulty peculiar

general damages in contract. This arises from the operation of the Accident Compensation Act, 1974. Claims for emotional upset and frustration have been held to be excluded whether based on contract or tort. (Gabolinscy and Another v. Hamilton City Corporation (1975) 1 NZLR 150 and Maxwell v. North Canterbury Hospital Board (1977) 2 NZLR 118). Although there are also still authorities which can be referred to to support a contention that awards for inconvenience and annoyance are also still not permissible in the case of claims based on contract, there have in recent years been repeated instances of damages being awarded on that basis. As a contributor to The Law Quarterly Review (1976) Vol.92, p.328 suggested, the position may now be said to be that such damages will be recoverable provided they can be said to fall within the principle of Hadley v. Baxendale (1854) 9 Exch. 341 of being within the reasonably foreseeable contemplation of the contracting parties but the Courts have been exceedingly reluctant to imply such a contemplation, particularly in employment contracts. There has been such an implication in the so-called frustrated holiday cases (Jarvis v. Swan Tours Ltd (1973) QB 233, Jackson v. Horizon Holidays Ltd (1975) 1 WLR 1468). Awards on this basis have by no means been confined, however, to such circumstances as those above. Cox v. Phillips Industries Ltd (1976) 1 WLR 638 is an instance of such an award in relation to a breach of a term of an employment contract and in Haywood v. Wellers (1976) QB 446 the decision in Cox's case was approved and the principle applied to the case of negligent performance of a contract by a solicitor for a client. It is also true, as Mr Marks said, that damages on this basis have been allowed

An instance is Batty and another v. Metropolitan Property Realizations Ltd. and others (1978) 2 All ER 445, where it can be seen from what is said on p.446 of the report that Mrs Batty was awarded £250 general damages for breach of contract for the effect of the foreseeable disaster of the house becoming unfit for habitation on her health and peace of mind. One, of course, must be careful with regard to these cases in view of the different view now taken in England on the question of concurrent actions in contract and in tort.

I accordingly conclude that there is a basis for some award of general damages in this case. I am not unmindful of the fact that the Judge in the District Court expressed the view that even if liability had been established he would not have thought the matter an appropriate one for the award of general damages. It is to be noted, however, in that regard that he was approaching the matter on quite a different basis from that which I have been discussing. The parties must in my view clearly here be deemed to have had within their contemplation that a subsidence of the foundations of the house was likely if a retaining wall was constructed in such a way that it did not operate as a retaining wall at all, which was of course the situation here. It being known to the defendants that the house would continue to be occupied and a subsidence of its foundations being likely to cause the very type of effects of which the plaintiffs spoke, the requirements of the principle in Hadley v. Baxendale (supra) are in my view fulfilled here. I do not think, however, that it is permissible to infer such contemplation and to include in a general damages assessment some of the items which

award of interest because I note that the plaintiffs only made clear the basis upon which they were founding their claim in an amended statement of claim filed only eight days before the hearing in the District Court.

The appeal is accordingly allowed and the matter is remitted to the District Court at Dunedin with a direction that a judgment be entered for the plaintiffs against the defendants for the sum of $4,152.52 made up as follows:

Cost of remedial repairs:	$3,018.24.
Engineer's fees:	734.28.
General damages:	400.00.
	$4,152.52

In addition, the appellants should have judgment in their favour for costs according to the District Court scale for the above amount, together with disbursements and witnesses expenses as fixed by the Registrar of that Court. Costs of $150 are allowed to the appellants in addition in respect of the appeal to this Court.

SOLICITORS:

Aspinall Joel & Co. Dunedin for Appellants.

Lemon Duff & Caudwell Dunedin for Respondents.