IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.No. 132/82

BETWEEN I[illegible] DEAN of Tauranga, Medical Practitioner and JU DEAN his wife

Plaintiffs

AND DENNISTON and [illegible] HODGSON both of Tauranga, Architects

Defendants

A.No. 52/82

IN THE MATTER of the Wages Protection and Contractors' Liens Act 1939

BETWEEN CENTRAL BAY BUILDING COMPANY LIMITED a duly incorporated company having its registered office at Spring Street, Tauranga, Building Contractors

Plaintiffs

AND I[illegible] DEAN, Doctor and J[illegible] DEAN his wife, both of Fraser Street, Tauranga

First Defendants

Hearing: 9, 11, 12 April, 23, 24, 25 May 1984

Counsel: Gittos for Plaintiffs I Dean and J Dean
Gorringe for Plaintiff Central Bay Building Company Limited
Joyce for Defendants Denniston and [illegible] Hodgson

Judgment: 16 JUL 1984 Judgment delivered

C.W. ENTWISTLE
Deputy Registrar

JUDGMENT OF SINCLAIR, J.

Two sets of proceedings came before me when this matter first commenced, one being an action by the Central Bay Building Company Limited against Dr and Mrs Dean in respect of a sum of $22,085.13 said to be the balance due by Dr and

Mrs Dean to the building company in respect of certain work done on a property owned by the Deans at Fraser Street, Tauranga. It was intimated immediately that there was no real dispute as to liability in that action although there was an acknowledgement that the amount in issue had to be settled and that it was felt that the parties could arrive at a correct figure in due course and notify it to the Court, whereupon the appropriate judgment would be sought together with an allowance for interest and costs. Upon that intimation being made to the Court Mr Gorringe was given leave to withdraw and I record now that I have not as yet been supplied with the necessary figures which would enable a judgment to be entered in that particular action. Once the figures are made available and are accepted by the parties then if it is required judgment can be entered accordingly. In the meantime the amount and form of the judgment in the building company claim remains reserved.

The Court went on to deal with an action brought by Dr and Mrs Dean against Messrs Denniston and Hodgson who practice in partnership as a firm of architects in Tauranga. This action resulted from Dr and Mrs Dean purchasing a property in Tauranga at Fraser Street and then approaching Mr Denniston with a view to his preparing certain plans relating to proposed alterations to the house property at the above address; also involved was redecoration and repair where necessary.

The amended statement of claim alleges that on or about 8th July, 1981 the Deans engaged the Defendants as a firm as their architect to advise them concerning extensive renovations

and alterations which they proposed to make to the dwelling house. The amended statement of claim went on to allege that on the 14th July, 1981 Mr Denniston inspected the dwelling house and discussed the proposed alterations with the Plaintiffs and as a result of suggestions plans were subsequently prepared of the proposed alterations which included some further and other improvements, all of which the Plaintiffs approved.

Paragraph 5 of the amended statement of claim goes on to allege that when discussions took place between the Plaintiffs and Mr Denniston the latter was informed the Plaintiffs were anxious to commence work on the 28th September, 1981 being the date upon which vacant possession of the house would be available to them, and that they asked Mr Denniston to have adequate plans of the proposed alterations prepared in sufficient time to enable tenders to be called for the building work involved.

Paragraph 6 alleges that Mr Denniston failed to prepare adequate plans for the purpose of calling tenders so as to establish a firm contract price by the 28th September, 1981 and that the plans were but delivered on the 10th September, 1981 at which time the Plaintiffs were advised by Mr Denniston that there was no time to call tenders and recommended to the Plaintiffs that he be authorised to negotiate for construction work to be done on an hourly rate basis by Central Bay Building Company Limited who he recommended to the Plaintiffs he engage as the builder. The date of the 28th September, 1981 in the amended statement of claim is incorrect as the documents show possession was to be made on the 25th September, 1981.

It was then alleged that between 10th September, 1981

when the plans were delivered to them and the end of September, 1981 the Plaintiffs asked Mr Denniston to furnish them with an estimate of the cost of the proposed alteration work comprised in the said plans and on the last occasion of such enquiry in late September, 1981 they were advised by Mr Denniston that the cost of the works would be "about $40,000". The amended statement of claim goes on to allege that in reliance upon that advice the Plaintiffs authorised the engagement of the Central Bay Building Company Limited to carry out the works and for Mr Denniston to supervise the builder in and about the execution thereof.

The amended statement of claim also alleges that the cost of the works has greatly exceeded the above figure of $40,000 and that on the 5th February, 1982 the work came to an end with certain of the proposed work still unfinished.

As would be expected it was alleged that there was an express or implied term of the contract that Mr Denniston would exercise the normal skill and care of an architect in and about carrying out the planning, costing and supervision of such work and that he would furnish to the Plaintiffs accurate and reliable advice concerning the cost of the proposed works.

In paragraph 16 there are various specific allegations of the respects in which Mr Denniston is alleged to have failed to fulfil his duty to the Plaintiffs and in consequence a claim for $66,466.01 was made along with a claim for $20,000 general damages. There was an alternative claim based on loss in value of the property, but I leave that to one side at the moment.

The statement of defence to the amended statement of claim conceded that Mr Denniston had been engaged by the Plaintiffs as their architect for the purposes of the alterations, renovation and redecoration of the property, but alleges that the contract for the architectural services was one for a limited service only and was initially limited to arranging for measured drawings to be compiled as a preliminary to scale plan preparation and, after consultation with the Plaintiffs, preparation of appropriate plans or drawings in respect of the proposed alterations.

In particular Mr Denniston denied ever having received an enquiry from the Plaintiffs as to the possible cost of the alterations prior to October, 1981 and that he ever gave to the Plaintiffs or either of them any estimate or assessment of the cost.

The statement of defence went on to allege that the Defendants could not give any estimate of cost and that there was not sufficient information as to the soundness of the existing house; any estimate would have required preparation of detailed drawings and that was outside Mr Denniston's brief; the nature and extent of the alterations contemplated by the Plaintiffs were at all times in a state of flux and at no material time had the Plaintiffs made firm decisions as to the material to be used, including fixtures in the effecting of the proposed alterations.

The statement of defence went on to say that subsequently

the limited service included certifying for progress payments and specified architectural tasks at an appropriate hourly fee.

There is no necessity at this point to traverse the rest of the matters set forth in the statement of defence as the first and paramount matter of consideration is to determine just precisely the terms of the contract between the parties assuming, of course, that the evidence can in fact establish the terms of it.

I record now that there was a headlong conflict in evidence on this particular aspect of the matter and therefore I direct my mind initially to the evidence in an endeavour to establish just precisely what were the terms of Mr Denniston's engagement. Until that has been established it is not really possible to come to any conclusion as to whether or not he has been guilty of any breach of a duty which he owed to Dr and Mrs Dean.

There are certain matters which are by and large not in dispute and they will become apparent as the evidence is considered. From Dr Dean's evidence it became apparent, and this is confirmed by Mrs Dean, that he and his wife and three sons were living in a small three bedroom house at Welcome Bay near Tauranga. As the children were growing up consideration was given to extensions to the house at Welcome Bay and as a result of investigations made it was found that the anticipated cost for those extensions would have been about $37,000. The Deans could have afforded this but they decided against it as they had been advised it would over capitalise the property. In consequence they

went searching for alternative accommodation and eventually found the house at Fraser Street, Tauranga which they bought for $87,500. From the Doctor's evidence, and also from Mrs Dean's, it is apparent that they recognised that the house had been allowed to run down and that it required quite some attention to bring it back to a reasonable state for comfortable living. In particular Dr Dean stated that he noticed some holes in the ceiling in two rooms which indicated that there probably was some water damage which had caused those two holes to appear. Dr Dean deposed to the fact that the land agent who showed him through the property felt that it would cost about $40,000 to do it up. That, I observe, must have been purely a gratuitous statement on the part of the land agent because obviously the precise nature of what was to be done was not under consideration and no one could expect that that figure could form the basis of any real assessment of what the eventual cost may be because until it was decided precisely what work was to be done, and in what manner, there could be no attempt at assessment of cost at all. However, the Doctor stated that he felt that having regard to the additions which he had in mind in relation to the Welcome Bay home he felt that the land agent's assessment was a fair estimate.

On the 8th July, 1981 Dr and Mrs Dean saw Mr Denniston and I am satisfied from the Doctor's evidence that he made it plain to Mr Denniston that he wished the latter to look after the architectural work in respect of renovations to the house because by this time the house had, in fact, been purchased and the reason for the Doctor's attitude was that

he felt he was too busy to manage the job himself and he wanted to be relieved of that responsibility. The Doctor then stated that Mr Denniston said he would have to have a look at his work schedule to see whether he could carry out the work and that if he did do the work he would charge at a rate of $30 per hour. It was stated by Dr Dean that at that stage there was no discussion as to the service to be offered by Mr Denniston and he assumed it would be the ordinary services of an architect such as drawing plans, overseeing costs and overseeing the builder in a supervisory role.

On 14th July, 1981 there was a further meeting between Dr and Mrs Dean and Mr Denniston and at that point in time Mr Denniston, according to Doctor Dean, agreed to undertake the commission and the Doctor explained to him that he needed plans in time to get quotes from builders prior to possession date which was to be the 25th September, 1981. According to Dr Dean at that time there was no suggestion at all from Mr Denniston as to any form of limited service in relation to the commission and the first he was aware of such an allegation was, according to him, when the statement of defence was first filed. Be that as it may, it was accepted by Dr Dean that Mr Denniston explained that his workload was heavy and that to get matters under way the architect would arrange for a student or schoolboy to do the floor plan. The Doctor made it plain in his evidence that he was anxious to unload the burden of the renovations from his shoulders to enable him to carry on working in an uninterrupted fashion and that when the time came to move from Welcome Bay he wished to move straight into the Fraser Street

house without having to shift into any intermediate house so as to avoid a double shift and any unnecessary interruption in his practice as a medical practitioner. This is confirmed to quite a considerable degree by the fact that when the Welcome Bay property was sold Mr Denniston was consulted by Mrs Dean as to an appropriate date on which they could give possession of Welcome Bay to enable them to move straight into Fraser Street. After some discussion with Mr Denniston it was decided that the 18th December, 1981 would be an appropriate date. That, in fact, was the date of settlement fixed in respect of the sale of the Welcome Bay property.

At some time after the 14th July, 1981 Dr Dean stated that he communicated with Mr Denniston expressing concern that the plans had not been made available, but on 10th September Mr Denniston arrived at the Dean household with some plans which were identified as being a portion of the plans which were subsequently produced to the Court. Those plans consisted of a plan of the existing house, plans showing some of the alterations and the new layout on the ground floor and first floor and a plan of the elevations on the east, west and north sides and a cross section. In the set of plans produced to the Court there were some specifications endorsed and a site plan was also endorsed. My understanding of the evidence is that at the visit to the Deans on 10th September, 1981 the specifications and the site plan did not appear on the documents.

On the 10th September, 1981 the plans were generally discussed and the Deans obtained Mr Denniston's approval for them to supply various fixtures and fittings. However,

at that time there was no discussion as to cost at all and no disclosure by the Deans as to the amount which they had available to spend. It became plain from the evidence of Mrs Dean that it was desired to see what was going to be suggested by Mr Denniston uninhibited by any question of cost as she felt that if the amount they had available was disclosed then the drawings would be tailored to meet that situation or the builders would frame any estimate of cost in terms of what amount was available, which might result in inferior workmanship and materials.

Both Dr and Mrs Dean made it plain that they felt they had conveyed to Mr Denniston that they wished to get quotes from various builders so that they would have comparative prices from which to work and that if those prices exceeded their budget then they could delete items which were non-essential so as to bring the project within their budget. However, suffice it to say there was at this time absolutely no discussion on either side as to cost, nor as to the amount of money which the Deans had available to expend on this particular venture.

Specifically at that time Dr Dean stated that he and his wife had sold the Welcome Bay house for $73,000 and on that house there was a mortgage for $23,000; they had saved $33,000 and they had available from the bank a home improvement loan of $12,500 and hoped to raise on first mortgage in respect of Fraser Street $35,000 which might be elevated to $40,000. On that basis the Deans considered that they would be able to pay for the Fraser Street house and have somewhere in the region of $40,000 to expend on the renovations, etc.

On 15th September, 1961 the Doctor said that his wife came home and related to him a discussion she had had with Mr Denniston which clearly perturbed them both. As a result both of them saw Mr Denniston the following day, that is the 16th September. At that meeting Dr Dean stated that for the first time Mr Denniston suggested that the work be done at an hourly rate on a charge up basis. To quote the Doctor he said to Mr Denniston that he was opposed to that method of employing a builder as he did not want to get "ripped off". However, he claims he was assured by Mr Denniston that so long as Mr Sutherland was the builder that would not happen as he was as honest as the day was long, and that they were persuaded to follow this course of action as there was no longer any time left to get a quote or a contract price. (Mr Sutherland is the principal officer in the Central Bay Building Company Limited and wherever he is referred to hereafter he is referred to in that capacity). Dr Dean stated that having placed his trust in Mr Denniston and relying upon his judgment as a professional man, he felt compelled to accept the recommendation. He repeated that the Welcome Bay house had been sold and due to his professional involvement he was not able to manage this particular project and handed it over to Mr Denniston.

On the 2nd October, 1981 Dr Dean stated that he saw a letter from the builder, which was produced in evidence but which was undated, and it did confirm what had been relayed by Mr Denniston, namely that the chargeout rate was $10 per hour with a mark-up on all sub contracts and material at 9% with cartage to and from the job added. The letter further stated that supervision, ordering and organising would also

be charged at $10 per hour.

According to Dr Dean some time in late September there was relayed to him by his wife a conversation which she had had with Mr Denniston in which the question of cost was involved and the message which was relayed to Dr Dean by his wife was that Mr Sutherland thought the price of the proposed work would be about $40,000. That was later confirmed by Mrs Dean in evidence and for the sake of clarity I simply repeat that it was a statement made by Mr Denniston, according to Dr and Mrs Dean, but attributed by him as having come from Mr Sutherland.

On the 21st September, 1981 a loan of $40,000 was approved by the National Mutual Life Association and having regard to the assessment as to cost, instructions were given for Mr Sutherland to undertake the work. However, Dr and Mrs Dean did not meet the builder until 7th October when work had already begun and at that time the evidence of Dr Dean is to the effect that he was informed by Mr Sutherland that a builder's risk policy should be taken out in the sum of $30,000. In fact such a policy was taken out, but I record now that I have not heard at all from Mr Sutherland and if, in fact, that was said I have no basis before me for his having made that statement.

Work proceeded on the property and the first certificate for payment came from Mr Denniston dated 24th November, 1981 and was for a total of $22,000. A second certificate arrived, being dated 22nd December, 1981 and the total amount of work certified as having been done, including materials on the site, was $42,500. There was still work to be done and while the

certificate was dated 22nd December, 1981 quite obviously it could not include all work which had been done up to that date as some accounts, particularly from sub-contractors, would not then have been to hand. The third certificate for payment was dated 27th January, 1982 and it was the receipt of that certificate which really brought matters to a head. The value of work done and materials on the site was assessed by Mr Denniston to be valued at $72,500. In consequence a meeting was held with the architect and the builder at which it was decided that work would have to come to a stop as the Deans were not in a financial position to carry on. The builder was requested to make an assessment of what it would cost to complete the job. Eventually by a letter dated 3rd March, 1982 the amount assessed for completion was $10,393.82. Suffice it to say no further work was done under this arrangement although in consequence of the January meeting the shingling work on the first storey area was completed. Thereafter Dr Dean stated that they had to live in the house in its unfinished state for quite some time and that he had some rather upsetting financial troubles with his bank. Eventually his wife went back to work and from her earnings from time to time various work was done until the house was virtually completed. I record that at one stage, and I think the Plaintiffs were quite genuine, they were so despondent they felt that they would have to sell Fraser Street.

During cross examination Dr Dean re-affirmed that when the house was bought it was in a run down condition and that he was so busy with his professional practice that there was no possibility of him really having very much to do at all

with the work on the Fraser Street property, let alone be bothered with doing any running around to get fixtures and fittings. But he reiterated in a very forthright manner that it was essential to be in before Christmas of 1981 and that at all costs he wanted to avoid a double shift. He did acknowledge that right at the outset he had been warned by Mr Denniston that being a renovation job it may be difficult to get quotations, but he maintained that it was his view that an attempt should be made to obtain them. To Mr Joyce Dr Dean stated that he was very pleased with the plans when they were eventually delivered to him, particularly as they had been prepared in such a way as would allow for a fourth bedroom so as to enable each son to have his own separate bedroom. When pressed as to whether or not it had been agreed or at least strongly suggested in July, 1981 that Mr Sutherland should do the work, that was denied save that it was conceded that Mr Sutherland's name was mentioned as being a person who might be a suitable builder.

During the course of cross-examination, as he really had to, Dr Dean did concede that not all the plans were placed before himself and his wife on the 10th September, 1981, but that sufficient were to enable a decision to be made to proceed. He also acknowledged that certain changes were made from what had been originally envisaged and instanced the instruction or agreement to have all the existing doors replaced with panelled doors. Suffice it to say that Dr Dean did not know, or have any real idea as at the date the work started, what would be involved by way of cost although, according to him, he did have in mind that which had been relayed to him by his wife, namely that according

to Mr Denniston Mr Sutherland had assessed the cost in the region of $40,000. Plainly at that time, however, there had been no enquiry from Mr Denniston as to the Deans' financial position and certainly no disclosure by them as to the amount of money they had available for the renovations, nor was the architect given any hints of the limits of their financial resources which would have warned Mr Denniston as to whether or not the project was getting too extravagant.

Mrs Dean, like her husband, gave her evidence very openly and disclosed that she was an intelligent and capable person. Much of that which her husband said she agreed with and there is no necessity to repeat it. She confirmed that there was no discussion as to cost in the early part and that at no time before the work commenced was there any discussion as to the amount of cash which the Deans had available for the project. Indeed, at page 41 of the notes of evidence she stated that had Mr Denniston asked what amount of money they had available she probably would not have told him on the basis that she felt it was usual to get quotations in and then decide whether they could afford it without cutting out various items beforehand quite unnecessarily.

In the early part of her evidence Mrs Dean really repeated that which her husband had stated, that when Mr Denniston agreed to do the work she believed that they were to get a full architectural service which she understood would consist of a draftsman preparing the plans and the architect looking after the financial interests of the client, supervising the carrying out of the work and keeping the builder on his toes. She claimed that she had never heard of a limited service so far as an architect was concerned

but she conceded that very early in the piece Mr Denniston had raised the question of his workload and stated that he would be charging $30 per hour. I simply observe at this point that it is somewhat difficult to accept Mrs Dean's suggestion that the architect could look after the financial interests of the client if he had no idea, as was the case here, what the limits of the financial resources of the Plaintiffs were. Mrs Dean confirmed that the reason for going to Mr Denniston was to relieve her husband of the burden of their alterations and that to assist in this direction she was the one who did almost all of the running around to obtain various fixtures and fittings which it was agreed the Deans could supply. She was the one who saw Mr Denniston as required in relation to progress of the work and obtaining his approval or suggestions in relation to colours for such matters as tiles and floor coverings. Mrs Dean was the person who in fact had the discussion with Mr Denniston in relation to the fixing of the possession date of the Welcome Bay property so as to ensure that the family would be in the new house before Christmas.

For the first time, as everyone agrees, Mrs Dean saw the plans on 10th September, 1981 and various variations and alterations were discussed such as a laundry chute from the upstairs portion of the house, dormer windows in the upstairs portion and wooden shingles on the outside at first floor level. Mrs Dean stated that on 15th September, 1981 she informed Mr Denniston that the plans were accepted with certain defined alterations and that she then asked if he would get quotations from builders, whereupon, according to her, for the first time she was informed that there was

no time left to call tenders and that the work would have to be done on an hourly rate basis. She stated that she asked Mr Denniston to try and get other builders' ideas on cost and that later she had a ring from Mrs Denniston stating that no other builders were interested in such a project at such short notice. She claimed that Mr Denniston was then asked whether he could give any idea of the cost, but his reply was non-commital and the only thing she heard on cost was towards the end of September or the beginning of October when she was informed by Mr Denniston that "Jim (that is Mr Sutherland) thinks it will be about $40,000". Mrs Dean stated that Mr Denniston did not comment on that figure and seemed to adopt it. She said she expressed her pleasure, stating that that was just the figure which they had borrowed and that it was a coincidence that originally the land agent thought that the cost of the renovations would be about $40,000 and that that was the figure that they thought they had available to spend.

Mrs Dean confirmed that on or about 2nd October she saw the letter from Mr Sutherland confirming his charge-out rates. Much of Mrs Dean's evidence was given over to her activities in making various purchases for the house and it is obvious that in making those purchases she was assisted to a great degree by Mr Denniston who, for instance, went with her to select and obtain the light fittings for the house. She also made various decisions with regard to alterations and variations from the original concept, some of which I will refer to shortly. Mrs Dean did confirm her husband's evidence that on receipt of the third certificate they were very concerned at the cost because by

that time they themselves had spent in excess of $8,000 on obtaining various fixtures and fittings so that even adding that to the second certificate in December, by that time over $50,000 had been spent with obviously still more work to be billed and more work to be done.

During the cross-examination of Mrs Dean it became apparent that she had taken a very active part in the alterations and renovations and, indeed, it was suggested that some work was done by the builder on direct instructions from her. At page 42 of the notes of evidence there is a significant statement from her which was made when she was questioned as to a discussion which she had with Mr Denniston on the 23rd July, 1981. That day she stated that she had only then found out that the student who was to do the floor plan had not commenced doing it although she had believed that he was to be instructed to do it after the original meeting in July. She was then questioned as to whether Mr Denniston discussed with her possible builders who might be available and who had the "facility" to do the job to the Deans' timetable. She replied that Mr Denniston might have mentioned Mr Sutherland then and she carried on to say "because he mentioned Mr Sutherland right through the project and always assumed that Sutherland was the builder who was going to do the job". That was repeated at the foot of page 43 in relation to the meeting of the 10th September, 1981 and once again Mrs Dean stated he, (that is Mr Denniston) "might have mentioned Mr Sutherland that evening because he always seemed to assume that Mr Sutherland would do the job." I concede that she went on to say that at that time Mr Denniston still was not authorised to have the work done

on an hourly rate basis and that in the Deans limited knowledge they still thought that they would be able to get quotations from other builders. Mrs Dean re-affirmed during cross-examination that it was not until 15th September that she was informed by Mr Denniston that there was not sufficient time to call tenders and that no authority was given for work to be done on this basis until the 16th September, 1981. In response to a suggestion to her that Mr Denniston on the 7th October, 1981 would not give any estimate as to cost because there were too many unknown factors, Mrs Dean stated that that was not so because by that date she had already had passed on to her Mr Sutherland's assessment of the cost and she went on to say that they would not have been silly enough to take on the project without some idea of the cost. What does become apparent from her cross-examination is that the final layout for the kitchen, laundry and bathrooms was not settled until the October plan was produced and that even then, on her request, there were certain alterations made which had, as it transpired, quite a material effect on the cost of the work. I mention some of the matters now: it was Mrs Dean's desire to have cantilevered lavatory pans installed to assist in the cleaning of the house, particularly with three boys in the family. The existing skirting boards were removed and replaced with moulded skirting beams. A television alcove was constructed and there were shelves in the cupboards. There are other variations which will become apparent when I discuss some of Mr Denniston's evidence.

Considerable time was also spent on evidence from Mr Haughey, one of Auckland's most experienced and respected

architects. A considerable amount of time was spent going through with him the Code of Practice and Professional Conduct of Architects, and also a practice note which was issued in August 1976. In addition there was considerable reference to the conditions of engagement used by architects and to what was known in the profession as "Appendix 'B' scale of professional charges". This provided for an alternative method of charging on a time basis and it provided that where the calculation of a standard charge as set out in the main scale of professional charges was not possible, or not proportional to the work involved, fees could be charged by an architect on the basis of the time occupied. At the time this work was done by Mr Denniston the principal's time was to be charged at an hourly rate within the range of $30 to $60. Mr Denniston's rate was $30.

It is common ground between all parties that here, so far as the architect's term of engagement was concerned, nothing was reduced to writing, which was probably brought about by the fact that the parties knew one another and, indeed, Dr Dean treated some of Mr Denniston's family on a professional basis and that there was mutual trust existing between the parties at least up until January 1982. Mr Haughey, however, highlighted the fact that without writing and without there being written frames of reference, misunderstanding, confusion and disappointment can arise all round. That is a particularly appropriate comment in this case and all are now very much aware that it would have been far better if something had been reduced to writing right at the outset. Mr Denniston acknowledges that, and I am sure that Dr and Mrs Dean realise that. However, I do not see that really, there being nothing

in writing, either party can be criticised. Admittedly Mr Denniston was the architect and it may have been more in his corner than in any one else's to have recorded precisely the parameters of the work he was going to do. But by the same token Dr and Mrs Dean are intelligent people; indeed, both are professional people, Mrs Dean being a physiotherapist. There was nothing to prevent them, if they had directed their minds to it, to have written to Mr Denniston confirming the terms of his employment, their understanding of what he was to do and under what conditions. This just did not happen and I repeat it was in all probability due to the fact that there was mutual trust between the parties.

Returning to Mr Haughey's evidence, I accept immediately all that he had to say if this was a contract which fell within Appendix 'A' and, subject to whatever arrangements the parties had made between themselves, then his evidence is equally applicable in very many respects where the contract falls to be considered under Appendix 'B'. His criticism of the plans and the specifications such as they are can be well justified, particularly if this were a situation where the builder was being asked to give a price for submission to a client. For instance, to adopt some of Mr Haughey's criticisms from what is on the plans and from what is included in the specifications one would not know what type of timber was to be used, what type of paint was to be used, the manner in which the painting work was to be carried out or whether there was to be any special texturing of the surfaces.

Both in examination-in-chief and cross-examination

Mr Haughey did accept that it would have been possible for an architect to have given some estimate of the figure which may well have been involved and it is implicit from his evidence that while that may have been so, the architect, with a suitably worded letter setting forth the assessment of price, could have covered matters in the event of the quoted price or suggested price being inadequate. It is to be noted from Mr Haughey's evidence that he regarded the letter from the builder as totally inadequate and that he felt that 11 weeks would have been an adequate time to prepare plans and call for tenders. Under cross-examination, however, he did concede that if the architect and the builder worked together as a team and were a team which had worked together in like manner before, then the plans would have been sufficient to enable the deadline as to date to be met provided that the client was made abundantly aware of the cost consequences of such an arrangement. In other words, Mr Haughey was saying that where the architect and builder knew one another and their method of working, it would have been possible with the plans and specifications such as they were for the work to be carried out provided they were supplemented by oral instructions from the architect and provided that the architect adequately supervised and controlled the work with a reliable builder.

Evidence was also given by a valuer, but at the present time I put that to one side as it is of no assistance in arriving at a conclusion of the matter of primary consideration which is, of course the terms of the contract.

So far as the Defendants are concerned the two primary

witnesses to give evidence were Mr Denniston himself and an architect, Mr Dixon. Turning to Mr Denniston's evidence by and large much of what was said by Dr and Mrs Dean he does not challenge. When originally approached he frankly conceded that he did not see it as a large project and that he indicated that he would charge an hourly rate as it did not seem to him that it was what he regarded as a normal architectural commission; being a small scale job he felt he would be able to give the Deans that assistance which they needed to achieve their ends. However, when he saw the house and the requirements of the Plaintiffs he acknowledged straight away that the commission was more extensive than that which he originally thought, but having committed himself to an hourly charge, and having indicated that he had his own work load to consider which at that time was extensive, there was no warrant for him to change his position from that which he had originally discussed with the Deans. When he went to the property with the Deans he was advised that the lounge would need to be so constructed so as to accommodate a piano, stereo and three settees, and that the fireplace would need to be remodelled, while in the entry hall there would need to be a new door and possibly a double door. There were suggestions of the entry porch being tiled with a timber ceiling; the family room was to accommodate television and dining facilities; heating was discussed, while Mrs Dean expressed a desire to have timber beams and textured walls.

Generally the alterations and renovations could be described as extensive and that was realised by Mr Denniston.

He accepted that Dr and Mrs Dean were under a constraint of time and that that was a matter of primary importance to them. He was conscious of the fact that whatever else may be involved, the work had to be so organised as to be completed, or substantially completed, so as to enable the Deans to get into occupation before Christmas when the possession date was the 25th September, 1981. He therefore claimed that he undertook on their behalf to prepare plans sufficient to uplift the permit and allow a capable building contractor to proceed with the work as soon as the house was available and he maintains that that was made plain by him to Dr and Mrs Dean on the 14th July, 1981.

On the 23rd July of that year there was a further discussion with Mrs Dean when Mr Denniston said the four bedroom concept was gone into as being a real possibility, and a suggestion that the McSkimming wall hung water closets were desirable. However, Mr Denniston made it plain in his evidence that he at that time was not anxious to do anything which might delay the obtaining of the permit and any question of any interference with the drainage or alteration thereto which might result from the use of the McSkimming water closets was left to one side at that time so as not to raise any unnecessary complications. At that meeting on the 23rd July, 1981 Mr Denniston says that he discussed with Mrs Dean the necessity of engaging a contractor who could meet the programme and that at that time he mentioned Mr Sutherland and Mr Ken Baker. His view was at that time that he required a builder with an administrative back up who could do a good job. He stated that there was no great

reaction from Mrs Dean except general agreement and that he pointed out that it was difficult to get builders from Tauranga at that time because of the pre-election building boom. In support of his view, at page 91 of the notes of evidence Mr Denniston stated that he was of the view that he had to have a builder committed to do the work before possession date arrived and that it was not possible to go through the normal process which would have been followed after tenders had been called; there was simply insufficient time to consider letting out a contract by tender. At the same time he pointed out to Mrs Dean that she would not have the certainty of cost, but that at least Mr Sutherland was honest and reliable. He repeated that for work of this type it would have been difficult to have got from a builder a quotation as they are notoriously reluctant to give quotations in relation to such work because of the difficulties which might be experienced once the building had been opened up.

Mr Denniston in his evidence-in-chief asserted quite definitely that he had explained these matters to Mrs Dean on the 23rd July, 1981 and that she had accepted his recommendations in this direction. By the 10th September, 1981 when the meeting took place to discuss the plans, Mr Denniston had already obtained Mr Sutherland's agreement to do the work and on that date he claims he received the authority of the Deans to formally advise Mr Sutherland that he would be engaged in doing the work. In consequence of the authority so given to him by the Plaintiffs, Mr Denniston informed Mr Sutherland the following day that he was to commence work as soon as possible after possession

date. As at the date of the meeting of the 10th September, 1981 Mr Denniston deposed to the fact that he had already acquainted Mrs Dean with Mr Sutherland's hourly rate charge.

On the 25th September, 1981 the architect visited the site with Mr Sutherland and all that was required at that time was the issue of the permit. Once that was issued there was nothing to stop the commencement of work which actually commenced on the 5th October. Up to this time Mr Denniston says there was no discussion as to cost at all and it was not until 7th October, 1981, when the Deans met Mr Sutherland, that any question of cost was raised. On that day when Mrs Dean called at Mr Denniston's office he says she asked for a rough idea of cost and he stated that his reply was that he did not have any idea and had not addressed himself to that problem and was not prepared to guess. When they were all at the building site he acknowledges that Mrs Dean did ask the builder if he could give any idea of the cost and the builder replied that he had just finished a large alteration job at Mt Maunganui and that that one cost over $40,000. Mr Denniston said there was no further comment and he took little notice of Mr Sutherland's reply because it related to another job altogether. He further refuted any suggestion that he knew of the raising of any mortgage until somewhere near the end of the job.

In relation to the question of costs Mr Denniston stated that from the way Mrs Dean and her husband approached this particular job it seemed that cost was not a consideration at all and he instanced that in relation to the doors Dr Dean did not want metal spikes between the rails and

stiles of the doors and the joiner was asked whether they could be made without those spikes; this was arranged with the result that the doors became a special order. Further, there was a change in that all doors became panelled doors; then a decision was made that all the walls right throughout the house would be textured with two coats of acrylic paint to deal with dirt and marks. Mr Denniston stated that this was Mrs Dean's idea; for his part he would not have had such walls in the bedrooms as the bedding is inclined to catch on protrusions from the texture which is applied to the walls and can prove to be somewhat of a nuisance. New panelled doors were ordered by the Deans, as were new architraves and door jambs as the latter had been painted and the Plaintiffs wished to see the natural timber grain. In relation to the architraves, the builder had over ordered this particular item and this fact was pointed out to Mrs Dean. A suggestion was made that it could be used to replace the old skirtings, but that there was no obligation so to do. Without demur Mr Denniston says that Mrs Dean agreed and that there was no mention of cost except on a leadlight window and so an estimate was obtained. The toilets were changed to cantilever from the wall which necessitated a change in drainage; while the plumber sounded a warning on this particular aspect, Mrs Dean gave instructions for him to proceed which meant that the drains had to some degree to be relocated and parts of the old drainage system had to be repaired. All of these items, it is plain from the evidence, were matters which were raised after the work commenced.

On the 11th November, 1981 as a result of Mrs Dean stating that it would be somewhat of a bind to take a vaccuum cleaner upstairs for cleaning, a suggestion was made by Mr Denniston that an internal vaccuum unit could be installed. Once again without demurring in any way this was authorised by Mrs Dean. All the light fittings were selected after work began, with Mr Denniston's assistance. While there was some criticism from Mrs Dean as to Mr Denniston's selection of them in relation to cost, Mr Denniston pointed out that the prices were attached to all of the items bought and they could be checked by Mrs Dean and that, in any event, he arranged a discount of 20% for them.

To meet the deadline overtime had to be worked and just before the Deans moved in Mr Denniston stated that he had never seen so many tradesmen working on a job of that size. He accepted entirely that the Deans expressed some shock and amazement upon receiving the third certificate in January, 1982 and that as a result of the meeting which took place in consequence work was stopped save for the completion of the affixing of shingles to the outside of the house.

Mr Denniston was submitted to a rigorous cross-examination on the essential elements by Mr Gittos, but he remained unshakable and repeated that the agreement was that he would be doing far less than full drawings, but sufficient for the Plaintiffs to obtain a permit and sufficient for him, by close liaison with a reputable builder, to produce a standard of result required by the Deans and within the time scale dictated by them. He

repeated that he made his charges accordingly and that the way the commission was arranged it would have resulted in over charging had he resorted to charging a percentage fee in accordance with Appendix 'A'. He maintained that he had to have a builder on the site ready to start as soon as the permit was available and that for all those reasons it was impossible to call tenders which, in his view, would have required a minimum of 15½ weeks and at the most he had but 12 weeks.

Mr Denniston was adamant and firm that he obtained the Plaintiff's approval to engage Mr Sutherland on the 10th September, 1981 following the earlier discussions which had occurred on 23rd July of that year. He absolutely refuted any suggestion that he had any discussion with the builder as to an approximate cost and maintained that Mrs Dean was confusing that particular issue with the discussion she had on the site with the builder herself on the 7th October, 1981.

When questioned as to whether the standard form of agreement recommended by the Architects Institute should not have been used, Mr Denniston replied that it was not appropriate for the service he was offering and accepted the criticism that there was nothing in writing. In retrospect he felt that it would have been much wiser had that been done, but it was a fact that there was no record anywhere of the arrangement or the discussions which had been reduced to a written form.

At page 118 of the notes of evidence it was suggested to Mr Denniston that while he himself may have had an understanding of the limitations of his brief, he did not

communicate his understanding of those limitations in a manner which was intelligent to lay people. In reply Mr Denniston stated that Dr and Mrs Dean were two very intelligent people who knew precisely what was going on and that what was being proposed by way of a building operation was "an open ended affair". He maintained the position which he had contended for in examination in chief and stated that he had not been asked for an estimate of cost and rejected any suggestion that in the absence of a specific query made by the Deans he was under any obligation to give one. I gained the impression from his approach to the problem that it was for the Deans themselves to disclose their financial situation and it was not for him, in all the circumstances, dealing with another professional man, to pry when there was no good reason for him to raise that particular issue.

On the question of cost Mr Denniston did not shillyshally at all and stated that that was no concern of his except where the cost of specific items was raised by his clients. He conceded that at no stage had he envisaged any particular figure and that if he had been asked for a price he would not have attempted to price it himself because at that time prices were changing almost daily and it was impossible for an architect to keep up with the fluctuations which occurred; in those circumstances he would have sought the assistance of a quantity surveyor and in this case would have sought the assistance of a Mr Crowther.

Finally on this aspect of the case I wish to refer

to the evidence of Mr Dixon. While he generally accepted Mr Haughey's evidence and the import of his evidence, Mr Dixon was inclined to view Mr Denniston's duties and performance from a slightly different point of view from that of Mr Haughey. He approached his task of assessing Mr Denniston's performance on the basis of whether in all the circumstances Mr Denniston had acted in the best interests of his client. Having regard to the constraints Mr Denniston was under, such as time, he considered that Mr Denniston had discharged his duties as one would have expected of a competent architect. However, Mr Dixon was of the view that 11 to 12 weeks was quite insufficient to enable plans to be prepared and for tenders to be called; to that extent on a factual matter he did disagree with Mr Haughey. Mr Dixon sat through all the evidence and heard all of it; he stated that having regard to all of the evidence which he had heard he had no hesitation in saying that Mr Denniston had no reasonable alternative but to undertake and execute the commission the way he actually did. He pointed out that in relation to any building contract there are normally three essential elements: cost, quality and quantity. He stated that one or two of those could be varied, but not all three. Thus, if quality and quantity are fixed, inevitably the cost will vary. He referred to the fact that the true constraint in this particular contract was time, but the quality was of a good type so that the variation had to be cost. On the evidence which he had heard, Mr Dixon was of the view that cost was not put in issue at any time by the Plaintiffs up until January of 1982. He was firmly of the view that, having

regard to the availability of builders in Tauranga at the crucial time, the only practical way to carry out this contract was to employ a builder in the manner in which Mr Sutherland was employed so that the architect could have some respect for the quality of the work and be able to certify the resulting cost.

There was one particular peice of evidence from Mr Dixon which really summed up his careful appreciation of the situation in that he said that no evidence had been produced to show that the manner in which the work had been done had resulted in financial disadvantage to the Plaintiffs and there was no evidence that a different contract arrangement would have produced a cost result in a different amount. To some degree that aspect has been to the forefront of the minds of the Plaintiffs in that they have felt that the expense has not been justified as it is not reflected in an increase in value to the extent that they would have expected having regard to the extent of the expenditure. The basis for this belief on the part of the Plaintiffs is certain of the valuation evidence which shows that the increase in value as a result of the renovations is somewhat less than the amount expended. But that is precisely the evidence of Mr Haughey in that he acknowledged that if $50,000 were spent on renovating a property it would not produce a $50,000 increase in value.

Having reviewed the evidence in the manner in which I have, it is now necessary to consider whether the Plaintiffs have established a contract with Mr Denniston in the terms pleaded in the amended statement of claim. It must

be remembered that the onus of proof is upon the Plaintiffs and if they fail in that onus then inevitably their claim will also fail.

I have come to the conclusion that the Plaintiffs have not discharged the onus which is upon their shoulders and have not established a contract with Mr Denniston in the terms pleaded in the amended statement of claim. Firstly it is quite apparent that, from Mr Denniston's evidence, from the very outset when the parties first met he quoted a rate for his fee which was an hourly rate under Appendix 'B' which, from his point of view, was not a rate which he would have charged had he been providing a full service and in respect of which the charges as set forth in Appendix 'A' would have been applicable. In other words, if he had contracted with the Plaintiffs to supply sketch plans, working drawings, full specifications so that tenders could be called, and to supervise the work, then he would have been, I am satisfied, applying his mind to a charge under Appendix 'A'. This was never his understanding of the situation and I am satisfied that he was firmly of the view that his engagement was in respect of the limited service which he was offering. The question is: did the Plaintiffs understand that? Despite their evidence to the contrary I am satisfied that they did so understand that. I accept that initially they had it in their minds that tenders would be called for but that, in view of the constraint of time imposed by them upon Mr Denniston, it was pointed out by him to the Plaintiffs at the very outset that it would not be possible to carry out this contract on any basis other than engaging a

nominated builder at an hourly rate, and that it would be necessary to have him committed to the job so that he could commence as soon as the Plaintiffs had obtained possession of the property. I draw attention again to the evidence of Mrs Dean at pages 42 and 43 where on two separate occasions she refers to the fact that Mr Denniston mentioned Mr Sutherland's name right through the project and on the basis that Mr Denniston always seemed to assume that Mr Sutherland was the builder who was going to do the work. That precisely coincides with Mr Denniston's evidence and I am satisfied from what I have heard that that is precisely the arrangement which was made between the parties.

In any event it is now history that in fact the work was done on an hourly charge up basis by a nominated builder and that Mr Sutherland in fact did the work. However, I reject any suggestion whatever that it was not until after the plans were delivered on the 10th September, 1981 that the Plaintiffs were informed that there was insufficient time to call tenders and that the work would have to be done on an hourly rate basis. In other words, on this particular aspect I reject the Plaintiffs' evidence and accept that of Mr Denniston. It is more consonant with his evidence as to the manner in which the plans were to be prepared and as to his method of charging than is the Plaintiffs' version. But there are a number of other matters that could be pointed to which support the finding which I have come to.

On 10th September, 1981 there was a discussion in relation to the plans which had been prepared by Mr Denniston and certain alterations and variations were made thereto. I accept Mr Denniston's evidence that at that meeting he received the confirmed authority from the Deans to employ Mr Sutherland and that Mr Sutherland was instructed the following day so as to enable work to commence as soon as possible after possession had been obtained. I am perfectly satisfied that having regard to the unavailability of builders in Tauranga at that particular time, Mr Denniston was concerned to ensure that the work was commenced so as to enable the Deans to be in possession of their house before Christmas 1981 and that right from the outset he knew that the only way to achieve that was to have the work done in the manner in which it was done. I am certain that Mr Denniston appreciated that any delay in the calling of tenders, if they were to be called, and any difficulty in obtaining an acceptable tender, would spell disaster for the Plaintiffs and that he was at pains to avoid. But in any event, as at 10th September, 1981 the full plans were not available and it would have been impossible without the plans in relation to the kitchen, laundry and bathroom to obtain any quotations at all, bearing in mind that it might be extremely difficult to obtain any such quotations where certain repairs might be required and which would not be ascertained until such time as the building was opened up.

It is a significant factor that at no time did the Deans disclose precisely what amount of money they had in mind spending. I observe that that placed the architect

in a somewhat difficult position because without any indication from the Plaintiffs as to what their budget was he really was in no position to pry. If cost was to be a factor, and was to be a factor which the architect had to watch with some care, then one wonders why that was not disclosed by the Plaintiffs to the Architect and why, as I will point out shortly, they went on and made various changes and alterations to the work thereby adding to the cost.

While Mrs Dean attributes a statement to Mr Denniston in relation to cost that "Jim thinks it will be about $40,000" I find, having heard the evidence, that she is mistaken on that particular aspect and that she is confusing it with a statement made by the builder on the 7th October, 1981 when she and her husband first met him at the Fraser Street property. I am of the view that with the best will in the world the Plaintiffs have had in their minds throughout, whether from the land agent, Mr Sutherland or the amount of the mortgage that they obtained, that the amount to be expended on the renovations would be about $40,000 and that this unwittingly has coloured their thinking and approach to the whole affair. Even Mrs Dean, being the intelligent person that she is, ought to have realised that with the various changes that were made and the various additions which were being included in the work, the cost was increasing. I simply point to two or three items as an instance: the central vaccuum system; the cantilevered toilets with the subsequent alteration to drainage; the texturing of the walls throughout the house; the application of the acrylic paint.

In addition, to meet the time deadline, as was observed by Mr Denniston, considerable overtime was worked and a considerable number of persons were employed on the work just prior to Christmas. When the light fittings were chosen there was no suggestion from Mrs Dean that price was an aspect which had to be watched and, as all have acknowledged, price did not raise its head until January 1982. I repeat, if cost was to be an aspect which was to be watched by the architect, then it is somewhat extraordinary that the Plaintiffs did not bring that to the architect's attention. In fact the Plaintiffs were somewhat secretive about their financial situation and in the course of Mrs Dean's evidence it became apparent that the Plaintiffs owned a section, which fact was not known to Mr Denniston, but which was sold during the course of the building operations to pay in part for the carpet and in part for the cost of the alterations. Mr Joyce, with some justification, pointed to the fact that the Plaintiffs must have realised that the scheme they were involved in was going to cost more than $40,000 and when one has a look at the photographs which were taken of the property after completion of the work one can only say that the finished product has the hallmark of quality about it and is very attractive. From what had been there before a vast improvement has obviously been effected.

I am satisfied that Mr Denniston never gave any estimate of cost and that he was telling the truth when he said that he never directed his mind to that particular aspect at all as nothing was raised to make it a matter for his consideration.

Therefore, I am of the view, as I have earlier stated, that the Plaintiffs have totally failed to establish a contract on the basis pleaded and I find on the evidence that the contract for which Mr Denniston contends is the one which was agreed to by the parties. That contract was one which was for the preparation of a sketch plan and the appropriate plans to enable a building permit to be obtained and such limited supervision as would enable Mr Denniston to certify for progress payments, at the same time consulting with the builder to supplement the limited specifications which were included on the plans.

I observe again that the way the work was carried out, it would have been quite impossible for anybody to have given any estimate of cost when the work first started. There were no specifications as to the quality or nature of the various fittings and there were, as I have pointed out, instructions given to carry out additional work or work which involved something more sophisticated than had originally been envisaged.

Because of the way the building operations were carried out no records exist as to written instructions in relation to variations to the contract, deletions therefrom or additions thereto. This was a typical charge up type of alteration with the owners giving various instructions as they were entitled to do as the work went on. I am quite sure that even so far as the Plaintiffs were concerned the question of costs did not really enter their minds until January, 1982 and not even at Christmas 1981 when they went into the property. As

at Christmas 1981 $42,500 had been certified for payment by Mr Denniston with still further work to be done and in excess of $8,700 worth of chattels and materials had been supplied by the Plaintiffs, not taking into account the carpet. So even by that date the so called $40,000 figure had been well exceeded.

Having come to the conclusion which I have, it is axiomatic that the Plaintiffs cannot succeed in their claim and accordingly there must be judgment for the Defendants.

I record that it is regrettable that having regard to the standing of the Plaintiffs and the Defendants nothing was reduced to writing right at the outset. If that had occurred this unfortunate situation would never have arisen. It is a never ending source of amazement that parties will enter into business arrangements without putting pen to paper at all and almost invariably in those circumstances disputes arise and inevitably are centred around just precisely what were the terms of the original arrangement. This is one of those cases and it could well have been avoided had the parties but paused and thought for a moment and one or other of them confirmed the arrangements by merely a simple letter.

The Plaintiffs having failed, the Defendants are entitled to costs, but having regard to the nature of the action I allow costs as on an action for $60,000 and certify for five extra days. I allow $100 for discovery and inspection and as the costs will exceed $2,500 I certify for the full costs as on an action for $60,000.

In addition, of course, the Defendants will be entitled to their disbursements and witnesses expenses as fixed by the Registrar.

In relation to Central Bay Building Company's claim, as earlier indicated in this judgment, that may be referred back to me if necessary.

P.D. Lang J.

SOLICITORS:

Sharp, Tudhope & Co., Tauranga for Plaintiffs
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